

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D81/02

Salaries tax – section 9(1) of the Inland Revenue Ordinance ('IRO') – whether expenses incurred in order to place the appellant in a position in which he was able to earn part of the assessable income or expenses incurred in the production of the assessable income – whether or not the bonus constitutes part of the appellant's income.

Panel: Ronny Wong Fook Hum SC (chairman), Robert Law Chi Lim and Leung Hing Fung.

Date of hearing: 5 September 2002.

Date of decision: 11 November 2002.

The appellant was employed by Company A on 1 October 1996. Under his contract of employment, he was obliged to give three months' written notice for termination of his employment or make payment in lieu thereof. By a memorandum dated 30 June 2000, the appellant gave Company A notice of his resignation. On or about 8 July 2000, Company A sent to the appellant a 'Calculation of Full and Final Payment' computed on the assumption that 27 August 2000 was the appellant's last date of employment with Company A. There was a deduction for salary in lieu of notice for the period from 28 August 2000 to 29 September 2000 in the sum of \$49,306.45.

The appellant commenced working for his new employer Company B on 4 September 2000. For the period between 4 September 2000 and 31 March 2001, the appellant earned salary and a further sum of \$23,951 by way of bonus.

The appellant sought to deduct the sum of deduction for salary in lieu of notice on the ground that the Revenue failed to have regard to his 'net income' when assessing his tax liability. The appellant further said that the bonus was paid by Company B to help him to offset the payment of the deduction for salary in lieu of notice. The question is whether this bonus constitutes income from the appellant's employment with Company B.

Held:

1. The Board is bound by the decision in Sin Chun Wah. The principles enshrined in that decision are well established. No question of unfair treatment arises in the application of those principles (Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364 applied).

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2. The Board was of the view that there was no doubt that the appellant did receive the notice payment from Company A. The same is not a deductible expenses as it was not incurred in the production of the assessable income either from Company A or from Company B (D15/88, IRBRD, vol 3, 223 followed).
3. Company B referred this sum as 'bonus' in their employer's return. The Board had no doubt that the same constitutes part of the appellant's income from Company B. It was a sum paid to him with reference to his position as the principal consultant of Company B. The sums falls well within the tax ambit as defined by the IRO.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364
D15/88, IRBRD, vol 3, 223

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

Decision:

Background

1. The Appellant was first employed by Company A on 1 October 1996. Under his contract of employment with Company A, he was obliged to give three months' written notice for termination of his employment or make payment in lieu thereof.
2. By a memorandum dated 30 June 2000, the Appellant gave Company A notice of his resignation. The Appellant indicated that he would discuss with Company A to work out his last day of employment.
3. On or about 8 July 2000, Company A sent to the Appellant a ' Calculation of Full and Final Payment' computed on the basis of the Appellant's then basic salary of \$45,000 per month and on the assumption that 27 August 2000 was the Appellant's last date of employment with Company A. The Appellant was paid \$42,960.21 arrived at as follows:

\$

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Salary for 1-8-2000 – 27-8-2000 (\$45,000 / 31 × 27)	39,193.55
Compensate 17.2 days annual leave (\$45,000 × 12 / 366 × 17.3)	25,524.59
Pro-rata 13 th month payment (\$45,000 / 366 × 240)	29,508.20
Deduction for salary in lieu of notice for 28-8-2000 – 29-9-2000 (\$45,000 / 31 × 4) + (\$45,000 / 30 × 29)	(49,306.45)
Deduction of provident fund for 1-8-2000 – 27-8-2000 (\$45,000 / 31 × 27 × 5%)	(1,959.68)
	<hr/> <u>42,960.21</u>

4. The Appellant commenced working for his new employer Company B on 4 September 2000. According to Company B's employer return dated 31 May 2001, the Appellant's earnings for the period between 4 September 2000 and 31 March 2001 amounted in total of \$414,108 made up of a sum of \$390,157 by way of salary and a further sum of \$23,951 by way of bonus.

5. The issue before us relates to:

- (a) the sum of \$49,306.45 ('the Notice Payment') referred to in paragraph 3 above which Company A deducted as constituting payment in lieu of notice for the period between 28 August 2000 and 29 September 2000;
- (b) the sum of \$23,951 ('the Bonus') referred to in paragraph 4 above. The Appellant says that this sum was paid by Company B to help him to offset the payment of \$49,306.45.

The Notice Payment

6. The Appellant sought to deduct this sum in his return for the year of assessment 2000/01. This was rejected by the Revenue on the basis of the decision in Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364.

7. In Sin Chun Wah, the taxpayer was a government employee. Under civil service regulations he was required to give three months' notice of resignation or a month's salary in lieu of notice. He resigned from the Government and took up employment with the Mass Transit Railway Corporation. Having failed to give three months' notice of resignation he paid a month's salary in lieu of notice and claimed this amount as a deduction from this total income. Nazareth J (as he then was) rejected his claim. His Lordship drew a distinction between expenses incurred in order to place the taxpayer in a position in which he was able to earn part of the assessable income and expenses incurred *in the production of* the assessable income. There is no deduction for the

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former whilst deduction is permissible for the latter. His Lordship held that the sum in question was not incurred *in the production of* the assessable income and hence not deductible.

8. We are bound by the decision in Sin Chun Wah. The principles enshrined in that decision are well established. No question of unfair treatment arises in the application of those principles.

9. The Appellant further says that the Revenue failed to have regard to his 'net income' when assessing his tax liability. This amounts no more to a suggestion that he did not physically receive the sum of \$49,306.45 and should not be assessed thereon. The answer can be found in the decision of this Board in D15/88, IRBRD, vol 3, 223 where the Board (on similar facts) pointed out that:

' We do not, however, see why the mechanics of the payment in lieu of notice should make any difference. The "set-off" would implicitly involve receipt of the month's salary which should therefore be chargeable to tax '.

10. There is therefore no doubt that the Appellant did receive the Notice Payment from Company A. The same is not a deductible expense as it was not incurred in the production of the assessable income either from Company A or from Company B.

The Bonus from Company B

11. The question is whether this sum constitutes income from the Appellant's employment with Company B.

12. Section 9(1) of the IRO defines income to include '*any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others*'.

13. Company B referred this sum as 'bonus' in their employer's return. We have no doubt that the same constitutes part of the Appellant's income from Company B. It was a sum paid to him with reference to his position as the principal consultant of Company B. The sum falls well within the tax ambit as defined by the IRO.

14. For these reasons, we dismiss the Appellant's appeal.