

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D9/01

Salaries tax – recognized retirement scheme – section 9(1)(ab)(i) of the Inland Revenue Ordinance (‘IRO’).

Panel: Ronny Wong Fook Hum SC (chairman), Gerard Chung Wai Hung and Richard S Simmons.

Date of hearing: 19 March 2001.

Date of decision: 11 April 2001.

The taxpayer was employed by a university in Hong Kong as lecturer. She was a member of a recognized occupational retirement scheme.

From about 1994, the taxpayer complained that she suffered personal injuries in the course of her employment with the university. In January 1997, the taxpayer elected to leave the scheme and to encash all her benefits under the scheme. No reference was made to her physical condition when she made the decision. As a result, she was paid a sum of \$567,019.32 representing the university’s contribution.

The Commissioner took the view that the sum was income received by her as it was not paid by reason other than termination of service, death, incapacity or retirement.

The taxpayer contended that she was incapacitated when she received the sum.

Held:

The taxpayer could not show that the sum was paid to her by reason of termination of service, death, incapacity or retirement.

Appeal dismissed.

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Wong Ki Fong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. By a letter dated 4 July 1986, a university in Hong Kong (‘ the University’) offered the Taxpayer employment as lecturer with effect from 1 September 1986.

2. On 1 January 1988, the University established a staff terminal benefits scheme (‘ Scheme I’). On 9 November 1995, Scheme I was registered under the Occupational Retirement Schemes Ordinance. Scheme I is a defined benefit scheme. Members of the Scheme and the University are both required to make contributions into the Scheme. The Taxpayer was a member of Scheme I.

3. From about 1994, the Taxpayer complained that she suffered personal injuries in the course of her employment with the University as a result of her being exposed to formaldehyde during her work. According to her claim against the University in the employees’ compensation case no XXX of 1996 dated 16 October 1996, firm diagnosis of her injuries occurred between January and August 1995. She was relieved from all departmental duties in about October 1996. Her request to become engaged in activities of the Gemmological Association was refused by the University on 6 November 1996. In the final quarter of 1996, the Taxpayer had extensive correspondence with the Labour Department, the Consulate General of the United States and the Environmental Protection Department in relation to her alleged disability.

4. By a circular dated 3 December 1996, the acting registrar of the University notified members of Scheme I of an irrevocable choice given to them of either retaining membership in Scheme I or leaving Scheme I on 1 February 1997. In the event of a member opting to leave Scheme I, the member was given a choice:

- (a) In respect of future service from 1 February 1997, either opting for a taxable gratuity of 15% of salary or becoming a member of a new scheme called [the University] staff provident fund (‘ Scheme II’).
- (b) In respect of the benefits under Scheme I, either transferring the entire benefit under Scheme I to Scheme II or encashing the benefit under Scheme I less certain deductions.

The circular made it clear that to the extent that a member took as cash from Scheme I any amount due to the University’ s contribution, that part would be subject to Hong Kong salaries tax on receipt unless the member was 60 or over.

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5. By an election form dated 22 January 1997, the Taxpayer elected to leave Scheme I on 1 February 1997 and to encash all her benefits under that Scheme. The Taxpayer did not make any reference to her physical condition when making this election.

6. By a payment advice dated 24 February 1997, the University notified the Taxpayer the payment details arising from encashment of her benefits upon her leaving Scheme I. The Taxpayer was paid a net sum of \$1,105,637.12 which included a sum of \$567,019.32 (‘the Sum’) representing the University’s contributions pursuant to the terms of Scheme I.

7. By a circular dated 16 December 1996, the University invited applications for ‘academic retitling of assistant professor to associate professor’. The Taxpayer applied accordingly but her application was rejected by the University on 27 March 1997. In February 1997, the Taxpayer was posted to research fellow grade with consequential loss in salary, including loss of housing and other benefits. The Taxpayer complained to the Equal Opportunities Commission in relation to alleged maltreatment by the University.

8. By a letter dated 27 June 1997, the University offered to settle all claims of the Taxpayer on terms which included, inter alia, acceptance of a six month notice of resignation from the Taxpayer and an ex-gratia payment of \$2,183,400 as compensation for loss of office and/or in full and final settlement of all claims against the University. The Taxpayer accepted the terms so offered. By notice dated 30 June 1997, she gave formal notice of resignation to the University and confirmed that ‘my last day of employment will be 31 December 1997’.

9. The issue before us relates to the taxability of the Sum which the Taxpayer received on 27 February 1997. The Taxpayer was late in submitting her notice of appeal. The Revenue (rightly in our view) did not raise any objection to her application for extension of time. We extend time in favour of the Taxpayer.

10. By her determination dated 29 May 2000, the Commissioner took the view that:

‘ (2) Section 9(1)(ab)(i) of the Inland Revenue Ordinance provides that income from any office or employment includes so much of any amount received by an employee under a recognised occupational retirement scheme by reason other than termination of service, death, incapacity or retirement of the employee as represents the employer’s contributions under the scheme in respect of the employee.’

(3) Scheme I is a recognized occupational retirement scheme. The sum was paid under Scheme I upon the election of the Taxpayer. The Taxpayer was still employed by the University as from the cut-off date of 1 February 1997. The University’s invalidating procedures had never been invoked in relation

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to the Taxpayer. The Sum was computed according to the rules of Scheme I as if the Taxpayer had terminated her employment on 1 February 1997 for reasons other than death or incapacity/permanent disability. Whilst the underlying reason of the Taxpayer in choosing encashment under Scheme I might be a concern of her health, the objective fact is that the Sum was not paid by the University under Scheme I as a result of her health condition. The Sum was paid under Scheme I by reason other than termination of service, death, incapacity or retirement. The Sum comprised only the University's contribution under Scheme I. Hence, the Sum falls squarely under section 9(1)(ab)(i) of the Inland Revenue Ordinance and should be taxed as an income from employment.'

11. According to the belated grounds of appeal submitted by the Taxpayer on 3 March 2001, the Taxpayer contended that she 'was incapacitated at the time of [her] early withdrawal of [her] retirement money in late February 1997'. She requested the Board to help her to find the most tax efficient way to deal with her situation.

12. At the hearing before us, the Taxpayer's attention was drawn to those parts of the Commissioner's determination referred to in paragraph 10 above. The Taxpayer was invited to identify the error of the Commissioner. Apart from reciting her medical history and her alleged incapacity, the Taxpayer made no attempt to meet the Commissioner's point that the Sum was paid by reason of the Taxpayer's availing herself the options opened to her on re-structuring of Scheme I and not by reason of termination of service, death, incapacity or retirement of the Taxpayer. It appears to us that the Taxpayer paid scant attention to the reasons furnished by the Commissioner.

13. We are of the view that the reasoning of the Commissioner is unassailable. The Taxpayer's employment with the University subsisted well after 27 February 1997. The Taxpayer's alleged incapacity did not lead to the payment of the Sum.

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

15. We are minded to conclude that this appeal is frivolous. We invite the Taxpayer to make representations to us in writing within 21 days of this decision as to why we should not invoke section 68(9) of the IRO and order her to pay part of the costs of this appeal.

(Remark: No cost order was made subsequent to the issuance of this decision.)