

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D50/99

Salaries Tax – long service pay – whether long service pay sourced from the employment – concessionary scheme in Employment Ordinance.

Panel: Ronny Wong Fook Hum SC (chairman), Winnie Lun Pong Hing and Lily Yew.

Date of hearing: 2 July 1999.

Date of decision: 19 August 1999.

The taxpayer commenced working with Company A on 1 January 1992. In respect of the year ending on 31 March 1997, the taxpayer received from Company A long service pay for the period between 1 January 1992 and 31 December 1996 in pursuant to agreement between Company A and its workers. The business of Company A was poor and the workers were concerned that they might not obtain their long service pay should Company A's business take a turn for the worse. Payment was therefore advanced. All the workers were thereafter employed on new contracts to commence on 1 January 1997. The issue is whether the sum of long service pay is assessable to salaries tax.

Held:

The Board found that the payment in question was sourced from the employment as required under the wider approach and that it was not a compensation for loss of employment within the narrower approach (D24/97, IRBRD, vol 12, 195 applied). The Board also found that the taxpayer is not within the concessionary scheme in relation to long service payment within the meaning of the Employment Ordinance as she was immediately re-employed by Company A.

Appeal dismissed.

Case referred to:

D24/97, IRBRD, vol 12, 195

Pak Wai Man for the Commissioner of Inland Revenue.
Taxpayer in person.

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Decision:

1. The Taxpayer commenced working with Company A on 1 January 1992.
2. In respect of the year ending on 31 March 1997, she received the following from Company A:
 - a. Salary : \$159,000.
 - b. Bonus : \$12,000.
 - c. Long service pay for the period between 1 January 1992 to 31 December 1996 : \$40,000.
3. Company A informed the Revenue that the long service pay was made pursuant to agreement between Company A and its workers. The business of Company A was poor and the workers were concerned that they might not obtain their long service pay should Company A's business take a turn for the worse. Payment was therefore advanced. All the workers were thereafter employed on new contracts to commence on 1 January 1997.
4. By a written agreement dated 1 January 1997, the Taxpayer was employed by Company A for a period of 2 years with salary at \$13,000 per month.
5. The issue before us is whether the sum of \$40,000 is assessable to salaries tax.
6. The relevant authorities were exhaustively reviewed in *D24/97, IRBRD, vol 12, 195*. Two different approaches have been adopted by the Board.
 - a. The wider approach : 'We should not read into the legislation implied limitation such as "*provided that the income is received by him 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 employment or a reward for services rendered in the past or as an inducement to continue with the service 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 : One has 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.

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7. We have no doubt that the payment in question *was sourced* from the employment as required under the wider approach and that it was not a compensation for loss of employment within the narrower approach.

8. The Revenue operates a concessionary scheme in relation to long service payment within the meaning of the Employment Ordinance. The Taxpayer is not within that scheme as she was immediately re-employed by Company A.

9. For these reasons, we confirm the assessment and dismiss the appeal.

10. There are numerous cases of this nature coming before the Board of Review. The workers concerned argued strenuously that they were led by the Labour Department to believe that all long service or severance pays are not taxable. We would urge the Inland Revenue Department to liaise closely with the Labour Department to ensure that workers are properly appraised.