Case No. D48/06

Salaries tax – whether or not the nature of the sum of money is income from the employment – whether or not the nature of the sum of money is a compensation [Decision in Chinese].

Panel: Anthony Ho Yiu Wah (chairman), Clement Chan Kam Wing and Edward Cheung Wing Yui.

Date of hearing: 10 March 2006.
Date of decision: 29 September 2006.

In 1997, the employment of the taxpayer was transferred to Company D. In 2004, the taxpayer and Company B reached an agreement that once the taxpayer submitted the resign letter to Company D and began to work in Company B, Company B would give a sum of money to the taxpayer. Later the taxpayer submitted the resign letter and began to work in Company B. The taxpayer objected that the said sum of money received from Company B should not be subjected to salaries tax, because the said sum of money was not income from the employment and had nothing to do with Company B. Moreover the said sum of money was a compensation given to the taxpayer to compensate his loss for his leave from Company D and the said sum of money was received from Company B before the commencement of the employment in Company B.

Held:

1. The Board considers that the nature of the said sum of money was to induce the taxpayer to accept the offer of the employment of Company B. Besides, the time for the payment of the said sum of money and terms were all stated in the employment contract and was a part of the terms of the employment of the taxpayer by Company B.

2. After the change of the job, the new employment terms would replace the old employment terms. There did not exist any question of compensation. The new employer might be smaller in the size of business, so the risk on the change of the job would be higher. The offer of a sum of money was therefore required to attract the people to change their job. As a result the nature of the said money was not compensation, but was a term and a consideration for employment, which should be subjected to salaries tax (D36/92, IRBRD, vol 7, 366 considered).

3. The Board considers that the taxpayer received the said sum of money under the terms as provided in the employment contract. According to the terms, once the taxpayer commenced his employment, the taxpayer did not need to repay the said sum of money and the said sum of money would then become the income of the taxpayer which should be subjected to taxation (D83/00, IRBRD, vol 15, 726, Clayton v Gothorp 47 TC 168 considered).

Appeal dismissed.

Cases referred to:

D19/92, IRBRD, vol 7, 156
D36/92, IRBRD, vol 7, 366
D3/94, IRBRD, vol 9, 69
D4/05, IRBRD, vol 20, 256
D83/00, IRBRD, vol 15, 726
Clayton v Gothorp 47 TC 168

Samuel Lai S L and Yuen Wai Man of Messrs W M Yuen & Co, Certified Public Accountants, for the taxpayer.

Chan Siu Ying and Lau Yuen Yi for the Commissioner of Inland Revenue.

案件编号 D48/06

薪俸税 – 款项性质是否受雇入息 – 款项性质是否赔偿

委员会：何耀华（主席）、陈锦荣及张永锐

聆讯日期：2006年3月10日
裁决日期：2006年9月29日

上诉人于1997年转职到D公司。于2004年上诉人与B公司订下协议，一旦上诉人递交辞职信给D公司和转职到B公司，B公司会给与上诉人一笔款项。上诉人之后递交了辞职信和转职到B公司。上诉人反对该笔从B公司所取得的款项不应被徵收薪俸税，因为该笔款项并非受雇入息，与服务B公司无关。再者该款项是赔偿上诉人离开D公司的损失及该款项是上诉人在受雇于B公司前获得。

裁决：

1. **委员会认为该笔款项的性质肯定是为了吸引上诉人接受 B 公司聘用。而且该笔款项的支付时间及其他规定，均列载于雇佣合约内，是 B 公司聘用上诉人的聘用条件的一部份。**

2. **任何人士转换新工作都是以新的雇主的雇用条件取代旧的雇主的雇用条件，不存在赔偿损失这课题。可能新雇主规模较小，因此风险大，因此须要提供一笔特别款项吸引有关雇员转工。那么，有关款项的性质便不是赔偿，而是聘用条件及聘用代价之一部份，须要课缴薪俸税** (参考 D36/92, IRBRD vol 7, 156)。

3. **委员会认为上诉人获得该笔款项是按雇佣合约规定进行，依规定上诉人上任后，该笔款项便变为无须偿还的款项，该款项便成为上诉人的入息，须在课税年度内评税** (参考D83/00, IRBRD vol 15, 726; Clayton v Gothorp 47 TC 168)。

上诉驳回。

参考案例：

D19/92, IRBRD, vol 7, 156
D36/92, IRBRD, vol 7, 366
D3/94, IRBRD, vol 9, 69
D4/05, IRBRD, vol 20, 256
D83/00, IRBRD, vol 15, 726
Clayton v Gothorp 47 TC 168

袁慧敏会计师事务所之赖伟庆先生及袁慧敏女士代表出席聆讯
陈筱莹及刘婉仪代表税务局局长出席聆讯。

裁 决 书：

背景

1. A先生(以下称「上诉人」)反对税务局向他作出的2003/04课税年度补加薪俸税评税。上诉人声称他在2003/04课税年度从B公司收取的5,630,148元款项不应课缴薪俸税。

2. 税务局副局长在考虑过上诉人的反对后，于2005年11月17日发出评税决定书，维持评税主任的评税。

3. 上诉人反对税务局副局长的决定，并就此提出上诉。上诉人的上诉理由如下：

(a) 税务局副局长在其评税决定书内所　述的案情事实并不全面，并没有考虑上诉人的税务代表提供的某些重要案情事实；

(b) 有关的款项并非上诉人的受雇入息，不应课缴薪俸税。

4. 在上诉聆讯时，上诉人选择在宣誓后作供，并接受税务局代表的盘问。

案情事实

5. 在回应委员会的查询时，上诉人的税务代表向委员会澄清，与本上诉相关的基本事实，上诉人与税务局局长并没有重大争议，双方主要的分歧是在如何解

读有关的事实，而上诉人认为税务局副局长所发出评税决定书没有充份反映上诉人的观点。

6. 在考虑过双方呈交的文件及聆听过上诉人的证供后，委员会采纳以下事实为本案案情事实。

7. (a) 上诉人在1988年入职C公司，C公司是香港上市公司。

(b) 上诉人在1997年转职到C公司的附属公司，D公司。

8. 上诉人与B公司在2004年1月10日订立雇佣合约，该合约规定如下：

(a) 「为了奖励(上诉人)服务本公司，能安心工作无后顾之忧，解决(上诉人)目前住所在[E银行]之分期余数欠款，其住所地址为[地址F](以下简称「G物业」)，业主登记为(上诉人及配偶)，A/C No.[XXX-XXXXXX-XXX]。(上诉人夫妇)每用上旬大约供分期约66,600元。」

(b) 「雇主有特别安排如下：
2004年2月初(上诉人)一旦与旧雇主交辞职信，本公司便会安排在2月10日-2月15日之间一次性清还上述物业在[E银行]之分期付款余数，但(上诉人)若在2004年3月1日-3月16日之间仍未履行本合约条款到本公司上班，则本公司替(上诉人夫妇)清还之物业分期全数余款则需(上诉人)归还给本公司。」

* (c) 「(上诉人)一旦上任后，则不论任何理由及任何情况，(该款项)，(上诉人)都不用归还。」

(*此条款是在2004年1月20日加入雇佣合约内)

9. 相关事件发生的日期及次序如下：

日期	事项
10-1-2004	上诉人与B公司订立雇佣合约
20-1-2004	雇佣合约加入上文第8(c)段
9-2-2004	上诉人向D公司递交辞职信
9-2-2004	上诉人确认收妥B公司5,630,148.89元支票
29-2-2004	上诉人最后任职D公司的日期
9-3-2004	上诉人由此日起受雇于B公司

本案的主要争论点

10. **上诉人与税务局局长主要的分歧是上诉人认为该笔从B公司取得的款项具备以下特质，因此不应被徵收薪俸税：**

(a) **有关款项并非受雇入息，与服务B公司无关；**

(b) **该款项是赔偿上诉人离开D公司的损失；及**

(c) **该款项是上诉人在受雇于B公司前获得。**

有关的法例及案例

11. **《税务条例》(香港法例第112章)(以下简称「税例」)有以下规定：**

(a) **第8(1)条**

「除本条例另有规定外，每个人在每个课税年度从以下来源所得而于香港产生或得自香港的入息，均须予以徵收薪俸税 –

(a) **任何有收益的职位或受雇工作……」**

(b) **第9(1)条**

「因任何职位或受雇工作而获得的入息，包括 –

(a) **不论是得自雇主或他人的任何工资、薪金、假期工资、费用、佣金、花红、酬金、额外赏赐或津贴，…...」**

(c) **第68(4)条**

「证明上诉所针对的评税额过多或不正确的举证责任，须由上诉人承担。」

12. (1) **在**D19/92, IRBRD, vol 7, 156**一案中，纳税人当他仍在英国一间财经公司担任一高级职位期间，该英国公司的香港联属公司与他洽谈到香港工作的条件，纳税人不准备转职到香港公司除非香港公司同意给他一笔**50,000**美元(相等于**390,000**港元)的款项，此数目是他估计他与家眷从英国迁移到香港所须的支出。当该纳税人抵达香港后，香港公司立即给予纳税人**390,000**元。**

(2) **税务上诉委员会裁定该笔**390,000**元的款项的性质是：**

(a) 香港雇主补助纳税人因迁移到香港而招致的部份支出；及

(b) 吸引纳税人接纳香港公司的聘用，因为没有此笔款项，纳税人是不会到香港工作。

相关判词原文如下(第162页)：

'*… the lump sum payment was a payment made by the HK employer to recompense the Taxpayer at least in part for the removal expenses which he would incur in coming to Hong Kong, and that such payment was also an inducement without which the Taxpayer would not have come to work in Hong Kong.*'

(3) 在决定了390,000元的性质后，税务上诉委员会认为接着要决定的问题是该笔390,000元的款项是否须根据税例第8条予以徵收薪俸税，就此问题，委员会提出下列论点：

(a) 决定是否须予以徵收薪俸税的起点是税例第8条。按税例第8(1)条规定任何有收益的职位或受雇工作于香港产生或得至香港的入息，均须予以徵收薪俸税。要决定的问题是有关款项是否纳税人因从受雇于其香港雇主所得的入息。

相关判词原文如下(第163页)：

'*The starting point in any salaries tax matter must be section 8 of the Inland Revenue Ordinance. Sub-section (1) states that "salaries tax shall … be charged … on every person in respect of his income … from … any office or employment of profit". These are the words which impose the charge of salaries tax. The question can then be simply stated. We must decide whether or not the lump sum payment was part of the income of the Taxpayer from his employment with the HK employer.*'

(b) 税例第9条的标题是「因受雇工作而获得的入息的定义」。其实，第9(1)条的用字是「因任何职位或受雇工作而获得的入息包括」(income from any office or employment includes)，因此第9条只是列出包括的项目，并非全部项目。

相关判词原文如下(第163页)：

'*The heading to section 9 of the Inland Revenue Ordinance reads "definition of income from employment" but this heading is a little misleading because the opening sub-section (1) states that "income from any office or employment includes". Section 9 is not an exhaustive definition but merely a list of items which are included.*'

(c) **税例第8及9条并没有规限予以徵税的入息须因过往或日后的服务而给予的，税例第8条所指的入息是源自受雇工作。在此个案，获取有关的款项是纳税人受雇香港雇主用条件的一部份，直接由于纳税人受雇于其香港雇主所取得，因此须课缴薪俸税。**

相关判词原文如下(第164页)：

'*There is nothing in sections 8 or 9 of the Inland Revenue Ordinance which limit taxable payments to remuneration for services rendered or to be rendered. Section 8 relates to income from a source namely the employment. This lump sum payment was part and parcel of the employment of the Taxpayer with the HK employer. It arose directly from the employment which the HK employer offered to the Taxpayer and which the Taxpayer accepted. Accordingly it is assessable to salaries tax.*'

13. **在D36/92, IRBRD, vol 7, 366一案中，纳税人在1989年第二季当他仍在英国一间上市公司X公司工作期间，香港Y公司与他商讨是否有意到香港工作，其后Y公司在聘用信中同意支付纳税人包括一笔420,000元的「特别花红」(special bonus)。**

纳税人认为此笔420,000元的款项不应予以徵收薪俸税，因为该笔特别花红是资本性款项(capital payment)，是赔偿他因离开X公司而损失的福利。

税务上诉委员会裁定该笔420,000元的款项是吸引纳税人接纳聘用的款项，是额外赏赐(perquisite)，属税例第9(1)(a)条的范畴，因此须予以徵收薪俸税。

相关判词原文如下(第389至390页)：

'*Section 8(1) of the Ordinance imposes salaries tax on "income arising in or derived from Hong Kong" from "any office or employment of profit". Section 9(1) which the Board accepts is not exhaustive, provides that "income from any office or employment includes", and under sub-section (a), "perquisite".*

… the Board had occasion to consider a similar issue in D19/92, at the date of writing of this decision unreported. The distinction between the lump sum paid to the taxpayer in D19/92 and this present appeal is that the obligation to pay that lump sum was not included in the taxpayer's contract. In D19/92 the Board found as a fact that the contractual terms of the taxpayer's employment included an obligation upon his Hong Kong employer to pay that lump sum to him upon his taking up his employment and that, for the reasons stated, the payment could be an "allowance" or a "perquisite" as those words are used in section 9(1)(a) and, accordingly, was taxable under section 8(1). Many of the cases to which the Board's attention were drawn were referred to in that appeal.

A feature common to both cases is that the Taxpayer stated in evidence "without such a payment I would not have accepted their offer" and the Taxpayer stated that without Y Co's agreement to effect the payment of the $420,000 he would not have accepted Y Co's offer ….

The Board finds as a fact that the $420,000 was an inducement paid as a contractual obligation by Y Co to the Taxpayer in consideration of his taking up the position offered to him. Accordingly, it was a "perquisite", as that word is used in section 9(1)(a) of the Ordinance.

The Board also find as a fact that the perquisite was received by the Taxpayer in Hong Kong from his Hong Kong employer and that the source of that payment was the employment of the Taxpayer by Y Co in Hong Kong whereby it is income arising in or derived form Hong Kong from employment and is chargeable to salaries tax.'

14. **在**D3/94, IRBRD, vol 9, 69**一案的雇主同意分**12**期支付该纳税人一笔**162,000**元的款项，纳税人认为该笔**162,000**元的款项不应予以徵收薪俸税，理由如下：**

(a) **有关款项属资本性质**(capital in nature)**；及**

(b) **有关款项赔偿因他离开前雇主而失去：**

(i) **在地区**A**优越的办公室；及**

(ii) **以员工超优惠价购买名牌产品的权利**。

税务上诉委员会裁定：

(a) **吸引接纳聘用的款项是受雇入息**。

相关判词原文如下(第72页第7(1)段)：

'*an inducement was taxable as an emolument from the employment*'

(b) **税务上诉委员会亦驳回纳税人赔偿的论据**。

相关判词原文如下(第73页第8段)：

'*Moving on the ground that the "inducement" sum of $162,000 was a "compensation" for the loss of certain rights and benefits to which the Taxpayer was entitled under the previous employment …, we take the view that it must fail.*'

15. **在**D4/05, IRBRD, vol 20, 256**一案税务上诉委员会不同意纳税人辩称有关款项为赔偿**(compensation)**，委员会解释如下：**

(a) **在确定一笔款项是否赔偿时，雇员一方须证明他曾损失或放弃了某些权益，而雇主一方在法律上有责任就此等损失或放弃了的权益作出赔偿**。

(b) **假若雇主没有要求雇员放弃任何权益，只是单方面给予雇员一笔款项，那笔款项便不是赔偿**。

相关判词原文如下(第17段)：

'*The Taxpayer also tried to argue that the Sum was compensation for loss of employment. This cannot be correct. For a sum to be compensation, it must be shown that there is the loss or surrender or rights on the part of the Taxpayer and a legal liability on the part of Company B to pay compensation for loss of such rights. However, the Taxpayer's employment with Company B was determinable by any party upon giving the appropriate three months' written notice. When the notice period was proposed and accepted and paid to the Taxpayer, there was no breach of contract on the part of Company B and his employment continued. Furthermore, the Taxpayer admitted that the Sum was a unilateral offer from Company E without asking him to surrender any rights. We accept the Revenue's submissions that the Taxpayer had lost no rights and was not entitled to claim any damages from any party for the potential loss of office in Company B when the Sum was proposed or paid to him.*'

16. 在D83/00, IRBRD, vol 15, 726一案税务上诉委员会根据Clayton v Gothorp 47 TC 168一案裁定当雇主放弃追讨有关贷款的一刻，有关款项便由贷款转为入息。

相关判词原文如下(第734页)：

'The sum was a loan till the point of waiver and the act of waiver converted the same into income. Such waiver was in consideration of the services rendered by the Taxpayer in those 1,410 days. We therefore agree with the Revenue that the sum of $811,981 was income of the Taxpayer.'

双方的论据和案情分析

17. 上诉人在作供时详细交代了他离开D公司及加入B公司主要原因是被B公司东主的诚意打动。但因为B公司是一间规模较小的新公司，前景不如D公司稳健，而且上诉人离开D公司，薪金及花红等损失，可高至六百多万港元。上诉人向B公司H先生提出他的顾虑。在得悉上诉人的顾虑后，B公司提出给予上诉人一笔款项，以便他一次过清还G物业的贷款余额，使上诉人无后顾之忧。上诉人因此认为该笔款项是赔偿他离开D公司的损失。

18. 在回应税务局代表的盘问时，上诉人声称他离开D公司的主要原因是D公司东主的第二代参与经营决策，使到他和东主之间的关系，不及以前密切。但上诉人承认B公司给予他的有关款项，是他加入B公司所考虑的一项因素。

19. 在聆听了上诉人的证供后，我们同意上诉人在作出离开D公司加入B公司的决定前，一定考虑过多项因素。但如果B公司没有给予上诉人该笔五百多万元的款项的话，上诉人肯定是不会接受B公司的招聘的。因此该笔款项的性质肯定是为了吸引上诉人接受B公司聘用。而且该笔款项的支付时间及其他规定，均列载于雇佣合约内，是B公司聘用上诉人的聘用条件的一部份。

20. 上诉人辩称该款项是B公司赔偿他离开D公司的一切损失。但其实上诉人的所谓损失是不能再从D公司收取薪金、花红等。任何人士转换新工作都是以新的雇主的雇用条件取代旧的雇主的雇用条件，不存在赔偿损失这课题。可能新雇主规模较小，因此风险大，因此须要提供一笔特别款项吸引有关雇员转工。那么，有关款项的性质便不是赔偿，而是聘用条件及聘用代价之一部份。

在D36/92一案的纳税人亦提出有关款项是赔偿的论点，但被上诉委员会驳回。

21. 上诉人又辩称有关款项是他在受雇于B公司之前获得，因此不应予以徵收新俸税。我们认为上诉人上述论点不成立，原因如下：

(a) 上诉人是在与B公司订立雇佣合约后才获得该笔款项，而B公司支付该笔款项亦是按雇佣合约规定进行。

(b) 雇佣合约规定，「一旦(上诉人)上任后则不论任何理由及任何情况」，上诉人不用归还该款项。B公司于2004年2月9日支付该笔款项，上诉人于2004年3月9日上任，因此在2月9日至3月9日期间该笔款项可被视为预支款项。但在2004年3月9日，上诉人上任后，该笔款项便变为无须偿还的款项，就正如D83/00及Clayton v Gothorp的裁决，在2004年3月9日此日，该款项便成为上诉人的入息，须在2003/04课税年度内评税。

案情总结及裁决

22. 在考虑过整宗案情及双方陈词后，我们认为上诉人从B公司收取的有关款项是B公司聘用上诉人的聘用条件及聘用代价的一部份，须要课缴薪俸税，我们因此驳回上诉并维持税务局的评税。