

FUCHS, Walter Alfred Heinz
and
Commissioner of Inland Revenue

(Appellant)

(Respondent)

Court of First Instance
(Inland Revenue Appeal No. 1 of 2008)

Hon Burrell J

Date of Hearing : 29 May 2008

Date of Judgment : 26 June 2008

Court of Appeal
(Civil Appeal No. 196 of 2008)

Hon Tang VP, Cheung JA and Chung J

Date of Hearing : 6 March 2009 and 13 October 2009

Date of Judgment : 30 October 2009

Court of Final Appeal
(Final Appeal No. 22 of 2009, Civil)

Mr. Justice Bokhary PJ, Mr. Justice Chan PJ,
Mr. Justice Ribeiro PJ, Mr. Justice Mortimer NPJ and
Lord Walker of Gestingthorpe NPJ

Date of Hearing : 17 - 18 January 2011

Date of Judgment : 1 February 2011

Inland Revenue Ordinance (Cap. 112) - Salaries Tax - whether two sums received upon termination of employment are assessable income - section 8(1)

By a contract of employment, the Appellant was seconded to work in the Hong Kong branch of a German bank for three years. The Appellant's employment was prematurely terminated after two years. The bank paid a sum of \$18,276,667 to the Appellant on termination of his employment. The sum was comprised of three elements:

- (a) \$3,120,000 being a sum equivalent to the Appellant's salary for the remaining term of the employment contract (12 months) ("Sum A");
- (b) \$6,240,000 being "two annual salaries for duration of service with the bank" ("Sum B"); and
- (c) \$8,916,667 being "the average amount of the bonuses paid in the 3 previous years" ("Sum C").

The assessor conceded that Sum A was non-taxable but maintained the assessment in respect of Sums B and C. By a determination, the Deputy Commissioner confirmed the assessment.

The Appellant lodged an appeal against the determination which was transferred by consent to the Court of First Instance (by-passing the Board of Review). The Court of First Instance ruled that Sum C was chargeable to salaries tax but Sum B was not.

The Appellant appealed and the Commissioner cross-appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the Appellant's appeal and allowed the Commissioner's cross-appeal. The Court of Appeal held that both Sums B and C were chargeable to salaries tax.

The Appellant appealed to the Court of Final Appeal.

Held by the Court of Final Appeal, dismissing the appeal, that:

- (1) The statutory wording in United Kingdom legislation differs little in substance from section 8(1) of the Inland Revenue Ordinance. The Hong Kong courts have accordingly found helpful guidance in the English jurisprudence when construing section 8(1).
- (2) Payments made "in return for acting as or being an employee" or "as a reward for past services or as an inducement to enter into employment and provide future services" are income chargeable to tax under section 8(1). A payment is assessable as income from employment where the sum is plainly an entitlement under the contract of employment. Describing a payment as "compensation for loss of office" does not displace liability to tax.

- (3) Where a payment is made in consideration of the employee agreeing to surrender or forgo his pre-existing contractual rights, the payment is not taxable.
- (4) Sums B and C were paid in satisfaction of the rights which had accrued to the Appellant, rather than in consideration of the abrogation of his rights, under the employment contract. Sums B and C accordingly come within the charge to salaries tax contained in section 8(1).

In the Court of First Instance and Court of Appeal

Mr. Barrie Barlow, SC (instructed by Messrs Laracy Gall) for the Appellant/Taxpayer
 Ms. Yvonne Cheng (instructed by the Department of Justice) for the Respondent/Commissioner

In the Court of Final Appeal

Mr. Barrie Barlow, SC (instructed by Messrs Gall) for the Appellant
 Mr. Benjamin Yu, SC and Ms. Yvonne Cheng (instructed by the Department of Justice) for the Respondent

Cases referred to in the judgment of the Court of Final Appeal

Hochstrasser v Mayes [1960] AC 376
 Shilton v Wilmshurst [1991] 1 AC 684
 Mairs v Haughey [1994] 1 AC 303
 EMI Group Electronics v Coldicott [1999] STC 803
 Henley v Murray [1950] 31 TC 351
 Comptroller-General of Inland Revenue v Knight [1973] AC 428
 Williams v Simmonds [1981] 55 TC 17
 Dale v de Soissons [1950] 32 TC 118
 Hunter v Dewhurst [1931] 16 TC 605
 Henry v Foster [1931] 16 TC 605
 CIR v Elliott [2007] HKLRD 297