<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>Contractual Payments on Ceasing Employment; 終止僱傭關係時的合約性付款</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Halkyard, AJ</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td>Hong Kong Lawyer, 1999, v. Mar, p. 30-31; 香港律師, 1999, v. Mar, p. 30-31</td>
</tr>
<tr>
<td><strong>Issued Date</strong></td>
<td>1999</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/45508">http://hdl.handle.net/10722/45508</a></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.</td>
</tr>
</tbody>
</table>
Contractual Payments on Ceasing Employment

Andrew Halkyard examines several recent decisions by the Inland Revenue Board of Review that may effect contractual termination payments received by dismissed or redundant employees.

In a reflection of current economic times, several recent decisions of the Board of Review have considered the taxation of payments made upon termination of employment. In D 3/97 12 IRBRD 115, (1998) HKRC §80-510 and D 84/97 12 IRBRD 487, (1998) HKRC §80-544 the Board was prepared to ‘carve out’ of a lump sum termination payment non-taxable amounts representing compensation for loss of office (D 3/97) and payments in lieu of notice and for long service (D 84/97). In each case, the balance was held to be taxable as a gratuity for the taxpayer’s past service to the employer.

Of these two cases, the more interesting is D 3/97. In this case the Board was prepared to disregard the label attributed by the parties to the payment (‘compensation for loss of office’) and determine its substance or real nature. In so doing, the Board determined that the original contractual provision governing termination of the taxpayer’s employment (three months notice or payment in lieu), which was entered into when the taxpayer was a junior employee some 24 years before the termination, was no longer effective given the taxpayer’s change of circumstances within the employer’s organisation. In a fairly speculative, yet pragmatic judgment, the Board decided that 75% of the payment in dispute (which in total amounted to 24 months’ basic salary) was attributable to compensation for loss of employment. Apportionment between taxable and non-taxable components was made by the Board notwithstanding that both the taxpayer and the employer regarded the payment in dispute as a compromise for whatever claim the taxpayer may have against the employer for termination of his employment.

Where payments in lieu of notice are made under an express contractual provision, it is instructive to note that the practice in the United Kingdom is different from the traditional Hong Kong practice. In Hong Kong such payments have been exempt from salaries tax (see eg D 84/97). By way of contrast, the UK Revenue argues that, where a payment is made under the terms of the employment contract, the amount is taxable because there has been no breach of contract. If, however, as would often be the case, the contract is merely providing for liquidated damages in the event of breach, Hong Kong authority indicates that an exemption should be given.

The UK practice described above was supported by the High Court decision in EMI Group Electronics Ltd v Coldicott [1997] STC 1372, which held that a contractual payment in lieu of notice is an emolument ‘from’ employment and therefore taxable under the UK equivalent to salaries tax. Neuberger J concluded that although a provision in an employment contract for a termination payment is neither a sufficient nor a necessary condition for taxability, it is nonetheless relevant and suggests that the payment derives from the employment and is part of the package of benefits to induce an employee to enter into the employment. The EMI Electronics case seems at odds with two previous House of Lords decisions, Delaney v Staples [1992] 1 AC 687 and Mairs v Haughey [1994] 1 AC 303 and an appeal has been lodged. The importance of the case can be judged by the fact that a certificate for a leapfrog appeal to the House of Lords has been granted.

In one decision, the Board of Review in Hong Kong has, arguably, gone even further than the EMI Electronics case. In D 24/97 12 IRBRD 195, (1998) HKRC §80-519, the Board held that a contractual redundancy provision must be taken to have induced the taxpayer to enter into employment. On this basis, the Board concluded that a sum payable under that provision (even though the claim for payment was compromised) was taxable as being from the employment in form. The Board rejected the taxpayer’s claim that the payment was for lost rights against the employer since the employer was entitled to terminate the employment on the basis of the contract.

The sum of all these cases does not bode well for dismissed or redundant employees who receive termination payments in accordance with their contractual entitlements. Although the general practice of the IRD still seems to be that such payments (including those in lieu of notice) are exempt from salaries tax, decisions such as D 24/97 may cause a rethink in assessing practice. In this context, the House of Lords decision in the EMI Electronics appeal will be of no small interest.

Andrew Halkyard teaches Revenue Law at the University of Hong Kong, and is a consultant to Baker & McKenzie.
终止僱佣關係時的合約性付款

賀雅德探討近期數宗由稅務上訴委員會審理的案件，這些案件可對遭解僱或因員工過畧而被裁的僱員所收取的合約終止款項帶來影響。


兩案中以 D 3/97 案為有趣。當中上訴委員會經審覈後並沒提供確確解僱雙方如何稱呼有關款項（喪失職位補償），而僱員須支付款項的合約性及收取款項的合法性是部分不確定。在這方面，上訴委員會裁定，原有僱僱僱員不接受僱員的合約款項（即三個月通知或代通知金），是於終止合約並非二十四前年四個月訂立，當時僱員只是公司內的臨時僱員，但隨後僱員在公司架構內的位置及情況有所改變，僱員的職位已不再是僱員。上訴委員會作出以下結論：僱員是僱員的合約金的僱員。僱員須支付款項的合法性是部分不確定。在這方面，上訴委員會裁定，原有僱僱僱員不接受僱員的合約款項（即三個月通知或代通知金）。

值得注意的是，果若符合僱員在合約中所支付的款項的處理方法與香港的主要合約不同。在香港，這些款項會獲僱員為僱佣金（例 D 84/97 — 1 案）相反。同一種的稅務當局認為，當僱員是根據僱營合約的條款而支付時，僱員款項應予以課稅。原因是合約沒有被違反。若是，於一個經常出現的情形下，即合約已規定僱員支付的款項為僱佣金，香港當局已表明支付僱員為僱佣金。

上述的稅案，得到了司法界的支持。在 EMI Group Electronics Ltd v Coldicott [1997] STC 1372 — 1 案，高等法院裁定，僱員支付的僱僱款項的合約性及僱員收取款項的合法性是部分不確定。在這方面，上訴委員會裁定，僱員須支付款項的金額已被妥協，但一律根據合約條款而支付的款項須作爲僱佣關係而予以課稅。上訴委員會認為，上訴委員會已由納稅人提出有關款項及為僱員支付僱僱金的聲稱，所持原因是僱僱僱員有權根據合約終止僱佣關係。

對於僱佣僱員在合約終止時所得及僱員支付的款項，根據僱僱僱員收取終止僱款項的僱員則上訴兩案並未帶來好的消息。然而，投資者局的整體做法是仍然容許僱僱僱員支付款項（包括代通知金及僱僱僱員支付款項，但範圍 D 24/97 — 1 案的最後案，可能促使當局重新考慮僱僘款項的支付方式。在這方面，我們便不得不密切留意 EMI Group Electronics — 案的上訴結果了。

賀雅德
於香港大學教授稅務法，並為香港律師師會的顧問。

TCL INVESTIGATIONS

Asset Tracing
Matrimonial Surveillance
Insurance Investigations
Commercial Fraud

"The only man who behaves sensibly is my tailor, he takes my measurements every time he sees me. The rest go on with their old measurements and expect me to fit them."

George Bernard Shaw

With over twenty years experience we still take your measurements every time. Effective investigations require a flexible approach and an eye for detail. Please personal service. So call us to discuss your next case.

Philip Alberts
Thomas Wong
John Sloan
Chris Lam

check us out on the web...
www.hk.super.net/-pea

Tel: 2376 0236
Fax: 2314 0576

TRADING CONSULTANTS LIMITED
COMMERCIAL & GENERAL INVESTIGATIONS