

# 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 for services. 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.

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## 終止僱傭關係時的 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剩而被裁的僱員所收取的合約終止款項帶來影響

稅務上訴委員會最近在數宗案件中曾考慮終止僱傭關係時所支付的款項的稅務事宜，此舉也許是因應當前的經濟氣候而作吧。在 *D 3/97 12 IRBRD 115*, (1998) HKRC § 80-510 及 *D 84/97 12 IRBRD 487*, (1998) HKRC § 80-544 兩案中，上訴委員會分別從終止僱傭付款總額中，劃分出毋須課稅的金額，分別是喪失職位賠償 (*D 3/97* 一案) 及代通知金和長期服務金 (*D 84/97* 一案)。至於經上述扣除後的兩筆餘額，上訴委員會裁定每筆須作為納稅人以往向僱主提供服務所得的酬金而予以課稅。

兩案中以 *D 3/97* 較為有趣。當中上訴委員會經衡量後並沒有依據僱傭雙方如何稱呼有關款項（「喪失職位賠償」），而從該筆款項的真正性質作裁決。在這方面，上訴委員會裁定，原本有關終止納稅人受僱的合約條款（即三個月通知或代通知金），是於終止合約起計約二十四年前訂立，當時納稅人只是公司內的低級僱員，但隨著納稅人在公司架構內的地位和情況有所改變，原本的條款已不再有效。上訴委員會作出了以下頗具猜測性但亦頗為切實的裁決，即受爭議款項（總額相當於二十四個月的基本薪金）的百分之七十五乃屬於喪失僱傭賠償。儘管僱傭雙方均視受爭議款項為一項妥協（包括僱員就合約被終止而可對僱主作出的任何申索而言），但上訴委員會仍然把該筆款項攤分為須課稅及毋須課稅兩部分。

值得注意的是，若果代通知金是根據明訂合約條款而付出的話，英國的處理方法與香港的一貫做法不同。在香港，該些款項曾獲豁免繳納薪俸稅（例見 *D 84/97* 一案）。相反地，英國的稅務當局認為，當某筆款項是根據僱傭合約條款而支付時，該筆款項應予以課稅，原因是合約沒有被違反。可是，在一個經常出現的情形下，即合約只規定違約時給予算定損害賠償的話，香港當局已表明應給予稅務豁免。

上述的英國做法，得到了司法界的支持。在 *EMI Group Electronics Ltd v Coldicott*

[1997] STC 1372 一案，高等法院裁定，合約性的代通知金乃是「來自」僱傭關係的薪酬，因此須繳納等同薪俸稅的英國稅項。法官 Neuberger J 裁定，儘管僱傭合約內有關合約終止時的付款的條款並不構成應課稅性的足夠或必需條件，但該條款畢竟是相關，在於它示意著有關款項乃得自僱傭關係，亦是吸引僱員訂立僱傭合約的一套福利的一部分。但 *EMI Group Electronics* 一案似乎與較早前由英國上議院審理的兩宗案例（即 *Delaney v Staples* [1992] 1 AC 687 與 *Mairs v Haughey* [1994] 1 AC 303）有所出入，而有關方面亦已就判決提出上訴。而從法院已經頒發容許「越級」上訴至上議院的證書的事實，我們大概可知道案件的重要性了。

在香港，稅務上訴委員會在一宗案件中可以說是較 *EMI Group Electronics* 一案去得更遠。在 *D 24/97 12 IRBRD 195*, (1998) HKRC § 80-519 一案，上訴委員會裁定，合約內有關因員工過剩而被裁的條款，該僱員必須被當作曾吸引簽訂僱傭合約。在這基礎上，上訴委員會裁定，縱使就款項的申索已被妥協，但一筆根據上述條款而付出的款項須作為來自僱傭關係而予以課稅。上訴委員會駁回了納稅人提出有關款項乃為喪失針對僱主的權益而支付的聲稱，所持原因是僱主有權根據合約而終止僱傭關係。

對於遭解僱或因員工過剩而被裁，並根據合約權利收取終止款項的僱員來說，上述各宗案例並不帶來好的消息。縱使稅務局的整體做法似乎仍然容許這些款項（包括代通知金）豁免繳納薪俸稅，但類似 *D 24/97* 的各宗案例，可能促使當局重新考慮其評稅方式。在這方面，我們便不得不密切留意 *EMI Group Electronics* 一案的上訴結果了。

賀雅德

於香港大學教授稅務法，  
並為麥堅時律師行的顧問

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