IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 258

Tax Appeal No 12 of 2020

Between

Comptroller of Income Tax

… *Appellant*

And

Forsyth, John Russell

… *Respondent*

JUDGMENT

[Revenue Law] — [Income taxation] — [Appeals]

Comptroller of Income Tax
v
Forsyth, John Russell

[2020] SGHC 258

High Court — Tax Appeal No 12 of 2020
Choo Han Teck J
16 November 2020

25 November 2020 Judgment reserved.

Choo Han Teck J:

1 The respondent was the managing director of Rising Tide Asia Pte Ltd ("the Company") which was a management consultancy company that he had co-founded in 2013. About three years later, on 24 August 2016, he was sacked from his post without warning.

2 The respondent had been made the managing director of the Company under an employment contract dated 23 August 2013 ("the Employment Agreement"). When the respondent's employment was terminated by the Company, the respondent and the company negotiated the terms of settlement of the consequence of his sudden removal, and that resulted in the parties signing a Separation Agreement of 1 September 2016 ("the Separation Agreement"). The respondent was paid a sum of $2,475,000 ("the Severance Payment") under cl 3 of the Separation Agreement, which provides as follows:

> **3. SEVERANCE PAYMENT**
>
> Subject to the Employee fulfilling all of the conditions agreed between the Parties in relation to the Agreement (e.g. including not limited to transition in good faith, communication and fullest confidentiality) and as also outlined in the Employment Agreement under Clauses 13 and 14, the Company will grant the following discretionary ex-gratia payment to the Employee, subject to any withholding and deductions required under applicable law:
>
> | | |
> |---|---|
> | 1st installment | SGD 1'900'000, – gross payable on December 31, 2016 |
> | 2nd installment | SGD 575'000, – gross payable on July 31, 2017 |
>
> All income tax liabilities and other charges incurred by the Employee in respect of his salary (including social insurance or contribution declarations) (whether by way of salary, bonus payments, benefits, or otherwise) shall be borne solely by the Employee.
>
> The severance payments above include any and all entitlements which may have been due to the Employee from the Employment Agreement (as provided for in Clause 9 (Ex-Gratia) and Clause 15 (Termination of Employment)).
>
> [emphasis in original]

3 Within a year, the Company, which was owned by a corporate entity in Switzerland, sold off its Singapore assets and retrenched its employees. The Company was then wound up by a voluntary liquidation in 2018.

4 The Comptroller served a notice of assessment on the sum of $1,350,000, being a part of the $2,475,000 Severance Payment. The Comptroller is of the view that this sum constituted employment income and was therefore taxable. The respondent says that it was part of the compensation paid for his loss of office, akin to a retrenchment benefit that is not subject to tax. There is no dispute that if the entire sum of $2,475,000 was compensation for the respondent's loss of his job, it would not be taxable.

5 The dispute was brought before the Income Tax Board of Review ("the Board") which, by a decision dated 21 May 2020, ruled in the respondent's favour. The Comptroller appeals against that decision before this Court. The issue is the same. Mr Emmanuel Lee, for the Comptroller, argues that the Board was wrong in finding that the sum of $1,350,000 was not taxable.

6 We should begin by ascertaining how the Comptroller came to this sum. To do that, two important clauses from the Employment Agreement must be understood. They are cll 9 and 15. For convenience of reference I shall set these clauses out in full as follows:

> **9. Ex-gratia payment**
>
> In the event where this Agreement is terminated by the Company of employment in accordance with [*Clause 15*] (and for the avoidance of doubt, in no event where termination is for cause), and provided that the [Employee] executes a deed of release in the agreed form as set out in the [Schedule "deed of release"], the Company shall, in addition to any entitlements due to the Employee upon termination hereunder, pay to the employee an ex-gratia payment, depending on the length of employment:
>
> - 6 months' base salary and a pro-rated sum of the annual bonus within the first year of employment
>
> - 6 months' base salary and a pro-rated sum of the annual bonus after the first year of employment
>
> For the avoidance of doubt, the amount of bonus is determined by the Company at its sole discretion (and without obligation), and the Employee shall have no claim whatsoever for any bonus (whether any such bonus is paid or unpaid) in the event of termination."
>
> …
>
> **15. Termination of Employment**
>
> Each Party may terminate this Agreement in writing by giving notice to the other Party as of the end of each month within:

> - 7 calendar days during the probation period of 3 months
>
> - within 3 months after your probation period
>
> The Company shall be entitled at its sole discretion:
>
> *(a) to give you payment in lieu of any notice of termination; or*
>
> *(b) to require you not to attend work during any period of such notice.*
>
> In the event that you are required not to work all or part of any period of notice, you will not be entitled to receive any damages or compensation in respect of any bonus or other benefit which would otherwise be due to you for the period which would have represented the period of notice had you been required to work it.
>
> The termination of your employment shall be without prejudice to any right that the Company may have in respect of any breach by you of any of the provisions of this Letter that may have occurred prior to such termination.
>
> [emphasis in original]

7 The amount in issue here and before the Board is the sum of $1,350,000. The Board was perplexed as to how this sum came about and held at [57] of its grounds, "[w]hile we have not been provided with a calculation to show how the lump sum was arrived at, it is at least possible that the lump sum was calculated by adding different components". The mystery was finally cleared when Mr Lee explained how the sum of $1,350,000 was calculated at paragraphs 114 to 120 of the Appellant's Case. It was based on the fact that the respondent had been terminated after the first year of his employment, and that meant that, as provided under cl 9 of the Employment Agreement, he would be entitled to twelve months' base salary ($675,000) as well as the full sum of his annual bonus ($675,000). This added up to the sum of $1,350,000.

8 The Comptroller's case is that since this sum had been paid pursuant to the Company's obligations under cl 9 of the Employment Agreement, it would be deemed taxable income.

9 With respect, I agree with the Board that whether an income is taxable must be determined based on the strict wording of the taxing statute. Thus, for the $1,350,000 to be taxable, it must fall within the ambit of s 10(2)(*a*) of the Income Tax Act (Cap 134, 2014 Rev Ed) ("ITA"), which specifies what gains or profits from employment would be taxable. These are:

> **Charge of income tax**
>
> **10.**—(2) In subsection (1)(*b*), "gains or profits from any employment" means —
>
> > (*a*) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the Comptroller to have been expended for purposes other than those in respect of which no deduction is allowed under section 15) paid or granted in respect of the employment whether in money or otherwise;

This definition, which is exhaustive, does not include redundancy payments or compensation for loss of employment.

10 Counsel agree that an ex gratia payment by way of compensation for loss of employment is not income from employment but compensation for loss — similar to damages received as compensation by an injured person. I agree with the Board that to determine whether the amount was taxable, one has to examine the nature of the payment itself. In my view, the payment of the $2,475,000 was compensation for the loss of his employment. The respondent's employment was not terminated under cl 15 of the Employment Agreement. The respondent was sacked without notice. Although cl 15 permitted the

Company to "give [the respondent] payment in lieu of notice of termination", the Company did not expressly indicate that it was so doing. Nor did the Company explicitly inform the respondent it was relying on cl 15. Significantly, cl 3 of the Separation Agreement merely states that the Severance Payment includes any and all entitlements which "may" have been due to the respondent under cll 9 and 15 of the Employment Agreement. It does not confirm that such entitlements were indeed due. Thus, cl 9 was never triggered. This alone suffices to dispose of the present appeal.

11 Furthermore, although the ex gratia payment under cl 9 of the Employment Agreement was expressed as a sum that was immediately due and payable, the Severance Payment was expressed as a conditional sum which, even if paid, was subject to clawbacks by the Company in the event that the respondent breached his obligations under the Separation Agreement. This reinforces the respondent's argument that the Severance Payment and the ex gratia payment under cl 9 were distinct; the former was intended to substitute and not encompass the latter.

12 There is no evidence that the Company used the respondent's salary and bonus entitlements as part of the formula for calculating the Severance Payment, and even if it did, this does not make the Severance Payment income that is taxable. When the respondent was sacked, the only taxable income would be that which he had earned up to the day he was sacked.

13 The Board held at [57] of its grounds that the Severance Payment could be bifurcated, and that it was likely that the ex gratia payment under cl 9 of the Employment Agreement was a component of the Severance Payment. With respect, the Board may have erred in this regard. The Severance Payment may

be bifurcated in the sense that if the Severance Payment had expressly included payment of income, then that portion would be taxable. But this was not the case here. As stated above, cl 9 was never triggered and thus the ex gratia payment envisaged under that clause could not have formed a part of the Severance Payment. Counsel for the Comptroller are likewise incorrect insofar as they calculated the income and pro-rated bonus for that year on the (mistaken) assumption that the Severance Payment included a discrete taxable sum of $1,350,000.

14 Here, the Severance Payment was to be paid in two instalments only because the Company wanted to withhold an amount to ensure that no misconduct on the respondent's part was discovered prior to the deadline of 31 July 2017.

15 For the reasons above, the appeal is dismissed. I will hear submissions on costs at a later date if parties are unable to agree on costs.

- Sgd -
Choo Han Teck
Judge

Lee Wei Liang Emmanuel Benedict and Lau Sze Leng Serene
(Inland Revenue Authority of Singapore) for appellant;
Lee Wei Han Shaun and Low Zhe Ning (Bird & Bird ATMD LLP)
for respondent.