



GES Tax Newsflash

Payment made for standing by for work on rest days, statutory and public holidays is chargeable to Hong Kong Salaries Tax

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Overview

The Court of Final Appeal (“CFA”) allowed the Commissioner of Inland Revenue’s appeal and held that payment for standing by for work on rest days and statutory holidays was not damages for breach of Employment Ordinance (“EO”), but income arising from the employment and therefore is chargeable to Hong Kong Salaries Tax.

What is the change?

The Case Background

Dr. LEUNG, Ka-Lau (the “Taxpayer”), as the lead plaintiffs, argued that a sum (“Sum”) awarded to him and other doctors in the same position (all employed by the Hospital Authority (“HA”)) were damages for depriving him of his entitlement to statutory holidays and rest days due to on-call systems and were not replaced. In the Court of Appeal (“CA”) judgment, it was held that the Sum should not be chargeable to Salaries Tax. The Commission of Inland Revenue (“CIR”) appealed to the CFA.

The CFA's Analysis

First, the CFA held that the Sum arose out of employment with the following main reasons:

- The Taxpayer was required to be on standby on his holiday and rest days at the request of the HA because he was an employee of the HA, thus the Taxpayer was "acting as or being an employee".
- The Taxpayer provided the HA a service by being on standby on statutory holidays/rest days. That was a past service to the HA.
- The terms of the contract that provided for holidays and rest days, of which the Taxpayer was deprived, might be viewed as an inducement to prospective employees to enter into a contract for services with the HA. Hence it was related to employment.

In addition, the CFA did not agree with the Taxpayer's argument that the Sum was paid for the abrogation of contractual rights because the Taxpayer's employment contract was never terminated and the Taxpayer's right to be paid when he was on standby did not negate or abrogate the contract terms. The CFA considered the principal reason of the entitlement to payment was the Taxpayer's standing by on holidays and rest days, despite that the HA might arguably have violated the EO.

In view of the above, the CFA unanimously allowed the appeal and held that the Sum was arising from the employment and therefore subject to Hong Kong Salaries Tax under section 8(1) of the Inland Revenue Ordinance.

Deloitte's view

Whether a payment is subject to Hong Kong Salaries Tax depends on the true nature and purpose of the payment. Applications of rules and principles in determining taxability could be complicated and contentious, based on relevant facts and circumstances.

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