Case No. BR 3/71

Board of Review:

Y. H. Chan, *Chairman*, B. A. Bernacchi, J. L. Bray & Hon. W. T. S. Wang, *Members.*

6th August 1971.

Salaries tax—taxpayer granted special leave without pay—whether ceasing to hold office or employment of profit—Inland Revenue Ordinance, s. 11(6) and (7).

The appellant, a university lecturer, was granted special leave without pay for three years to study in the U.S.A. after which time he intended to return to Hong Kong and resume his post at the University. His period of unpaid leave began on 6th October 1970 and he was assessed for salaries tax for the year of assessment 1970/71 based on his income for the year which ended on 31st March 1970.

He appealed against the assessment claiming that he ceased to hold an office or employment of profit on 6th October 1970. The Board considered, as a preliminary point, whether it had jurisdiction to entertain the appeal in the absence of the appellant or any representative appointed by him. Section 68(2D) and (2E) covers this situation with effect from 23rd June 1972. On appeal.

Decision: 1. The appellant's contract had not been terminated and what he would ultimately return to was an office or employment of profit. The lesser of remuneration did not change the character of the employment.

2. Appeal refused, assessment confirmed.

Cases referred to:—

1. Tam Man & anor. v. Tin Kwai Yin, (1949) 33 H.K.L.R. 296.

2. Re Philpot, (1960) 1 All E.R. 165.

3. Henry v. Galloway, 17 T.C. 470.

4. Oliver v. Chuter, 18 T.C. 570.

5. Reade v. Brearley, 17 T.C. 687.

Reasons:

The facts in this appeal as stated in the Commissioner's written determination are as follows :—

"1. Dr. T., the Taxpayer, was appointed a lecturer at one of the universities in Hong Kong in September 1967.

2. On 29th April 1970, he wrote to the Commissioner of Inland Revenue stating that he would be leaving the Colony on 3rd May. This letter was received by the Assessor on 1st May 1970.

3. The Assessor then contacted the Bursar of the university by telephone, who informed him that the Taxpayer was going to the U.S.A. for about two years. Prior to this, he was granted six months leave. He stated that the Taxpayer might come back after staying in the U.S.A. for two years. Subsequently, in a letter dated 1st August 1970, the Deputy Bursar confirmed the following:—

(*a*) The Taxpayer is still in the employ of the university;

(*b*) His leave dates are—

Long leave with pay:	3rd May 1970 to 5th October 1970.
Special leave without pay :	6th October 1970 to 30th April 1974;

(*c*) It is the intention at present that Dr. T. should *resume duty* with the university at the end of his leave.

4. On 2nd May 1970, the Taxpayer was contacted by the Assessors over the telephone. He confirmed that he would come back to the Colony after three years study and his contract with the university was not considered as terminated.".

An assessment for salaries tax for the year of assessment 1970-71 was issued on 26th May 1970 to the Taxpayer (herein-after called the appellant) based on his income for the year ended 31st March 1970. Details of the assessment are as follows :—

Assessment 1970-71

Section 11(2)—Basis Period : year ended 31st March 1970

Income per Employer's Return ……	$56,279
Less: Personal Allowances ……	18,000
NET CHARGEABLE INCOME : ……..	$38,279
Tax thereon at various rates ……..	$ 4,679

These facts are not disputed by the appellant but he claims that in the circumstances he ceased to hold an "office or employment of profit" as from the 6th October 1970 when he

went on special leave without pay. He craves in aid the provision sub-sections (6) and (7) of section 11 of the Inland Revenue Ordinance (*Cap.* 112) which read as follows :—

> *"Section 11(6):*
>
> Where a person ceases to derive income from a source, his assessable income from that source for the year of assessment in which the cessation occurs shall be the amount of his income from that source accruing to him during the period beginning on the 1st day of April in that year and ending on the date of cessation . . .
>
> *"Section 11(7)*
>
> For the purposes of this section, a person shall be deemed to commence or cease as the case may be, to derive income from a source whenever and as often as he commences or ceases:
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> (*a*) to hold an office or employment of profit or
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> (*b*) to become entitled to a pension".

He contends that under these provisions he should have been taxed on his actual income from the 1st April 1970 to the 6th October 1970 rather than on his full year's income for the preceding year which ended on the 31st March 1970.

The appeal came before us on the 19th April 1971 and was heard in the absence of the appellant. The appellant had previously informed the Clerk to the Board of Review by letter that there was no one to represent him in Hong Kong. He indicated that he was content to rest his appeal on the submissions he made in his letters to the Clerk and to the Commissioner. In view of this letter, we think there would be no point in adjourning the hearing of this Appeal.

Mr. Kelly who appeared on behalf of the Revenue waived any objection to the absence of the appellant at such hearing. According to him, section 68(2) of the Ordinance which provides that :—

> "every appellant shall attend at the meeting of the Board at which the appeal is heard in person or by an authorised representative"

is not a mandatory requirement and non-compliance therewith may be waived by the Commissioner.

It is well settled that if the requirement is one which goes to the jurisdiction of this Board, then compliance with it cannot be waived, but in general "regulations concerning the procedure and practice of civil courts may . . . when not going to the jurisdiction, be waived by those for whose protection they were intended" (12th *Maxwell on Interpretation of*

Statutues p. 377 and **Tam Man & another v. Tin Kwai Yin**[1] at p. 302). Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent to a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction" (12th *Maxwell* p. 375). In our view what gives jurisdiction to this Board is section 66(1) which prescribes that an appeal shall be commenced by a notice to the Clerk to the Board setting out in full the grounds of appeal. This is followed by section 68(1) which provides that, as soon as may be after the receipt of a notice of appeal, the Clerk to the Board shall fix a time and place for the hearing of the appeal. We not only have the power but the duty to hear an appeal filed in pursuance of those two sections, and although the appellant is required to attend in person or by an authorised representative, his failure to do so should not affect our jurisdiction to hear and determine the appeal. In our opinion, such a requirement is merely directory and not mandatory. It is not a condition precedent the non-compliance with which would invalidate this appeal.

In the case of **Re Philpot**[2] the Court had to construe section 21(5) of the Criminal Justice Act which prescribes that :—

> "A copy of any report or representation in writing made to the court by the Prison Commissioner for the purpose of the last foregoing subsection *shall be given* by the Court to the offender or his counsel or solicitor.".

Lord Parker, C.J., says in his judgement (ibid p. 166) :—

> "The sole question, and the short question is whether the words *'shall be given'* in section 21(5) are merely directed to the procedure which should be followed, or whether they are imperative and make it a condition precedent to a sentence of preventive detention that the copy should be given. For my part, I am quite satisfied that those words are directed only to the procedure to be followed. They are, as it seems to me, in direct contrast to the words used in section 23(1) which provides for a notice being served of the intention to prove previous convictions. There the words used are . . . no account shall be taken of any previous conviction or sentence unless notice has been given to the offender".

We can see no distinction between the case before us where the statute requires that every appellant shall attend and the case quoted above where the requirement is that a copy of a report . . . shall be given.

Taking another line of approach, we observe that section 68(3) expressly provides that the Assessor or some other person authorised by the Commissioner "shall attend" at the hearing of every appeal. If the provision constitutes a condition precedent, it must follow that the non-attendance of the Assessor or some one representing the Commissioner would preclude this Board from hearing an appeal, with the logical consequence that an appeal

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[1] (1949) 33 H.K.L.R. 296.
[2] (1960) 1 All E.R. 165.

could be in theory, frustrated by the Assessor, or the Commissioner's representative, deliberately staying away from the hearing. We do not think such a result could have been contemplated by the legislature.

Holding as we do that it is competent for us to hear the appeal in the absence of the appellant, (particularly when the respondent waives any objection), we now proceed to deal with the merits of the appellant's case.

In the first place there can be no dispute that in the normal course of events, the taxpayer is liable to be taxed for the year of assessment 1970/71 on his income for the basic period ending the 31st March 1970. If, however, he ceases to derive income from a source at any time during the year of assessment, then his income from that source shall be the amount of his actual income from the beginning of the year of assessment—in this case the 1st April 1970—to the date of cessation (see section 11(6) of the Ordinance). Section 11(7) provides that a person shall be deemed to cease to derive income from a source whenever he "ceases to hold any office or employment of profit".

The point at issue is, therefore, whether the appellant ceased to hold an office or employment of profit on the 6th October 1970 when he went on special leave without pay.

It is not in dispute that the appellant ceased to receive any further remuneration from his employers from the 6th October 1970 onwards, but it is also not in dispute that his employment with the university continued and that when he went on leave the intention was always that the appellant would resume duty at the end of his special leave.

On these facts, the Commissioner held that there was no cessation within the meaning of section 11(6) and that although the appellant's salary from the university ceased temporarily with effect from the 6th October 1970, he is, nevertheless, still in the employ of the university. Mr. Kelly relied heavily on the case of **Henry v. Galloway**[3] in which Finlay, J. says :—

> "Now 'office of profit' is not a thing particularly easy to define; everybody, I think, has a good idea of what it means, but certainly it is not easy of exact definition . . . It is, of course, and must be, an office and, no doubt, it must be an office to which remuneration is in some way or other attached. You cannot have an office of profit unless you have got the remuneration attached to it. That does not, of course, mean that in any particular year there must necessarily be any remuneration. It is, I should think, clear beyond any controversy . . . that if you take the case of a holder of an office remunerated by share of profits and by reason of the fact that in difficult times there are no profits so that there is no remuneration, it is not questioned, I think, and could not be questioned, that that would, none the less, be an office of profit and would continue to be an office of profit even though for one year, or for more than one year, no remuneration accrued.".

[3] 17 T.C. 470.

The appellant on the other hand maintains that under section 11(7) a person is deemed to cease to derive income from a source whenever he ceases to hold an office or employment of profit. According to him employment *per se* is irrelevant; what counts is "employment of profit". Since he is on "no pay leave", he contends that it must follow he has ceased to hold any office or employment of profit and should be taxed under section 11(6) and not section 11(2) for the year of assessment 1970/71. Dealing with the case of **Henry v. Galloway**[3] he says in his notice of appeal:—

> "In the case cited, the reason for saying it is an 'office of profit' by the judge, even when there is no remuneration due to difficult times, is because the office is potentially of profit; that is, in better times there will be remuneration. But, in my case of no pay leave, it is a certainty that there will be no remuneration for a period of some 3½ years, irrespective of good or bad times. It is clear, therefore, that I have ceased to hold an employment of profit since the judge said 'You cannot have an office of profit unless you have got the remuneration attached to it'.".

The case of **Henry v. Galloway**[3] is one in which the director of a company decided not to accept his salary unless and until the company had earned more than enough to pay certain debenture interest and it was contemplated that he would receive no remuneration for a considerable time having regard to trading conditions. In these circumstances Finlay, J. held that it was "impossible to say that the mere cesser of the remuneration in the manner described in this case caused the office to cease to be an office of profit".

Whilst conceding that the facts are not identical to the present case, Mr. Kelly submits that the decision gives clear guidance that the test is to ascertain the nature of the office or employment objectively, not merely at any given point of time. He adopts as part of his submission a passage in the judgment in **Henry v. Galloway**[3] in which Finlay, J. says:—

> "It is the nature, the quality of the office, which is being defined.".

Mr. Kelly also referred to **Oliver v. Chuter**[4]. There a director of a company renounced his claim to director's fees because of unfavourable trading conditions and the Court held this circumstance did not prevent the office from being an office of profit. On appeal, Lord Hanworth, M.R. laid down the test by posing a question and answering it himself in the following terms :—

> "But does the fact that, without any consideration moving to him, he (the taxpayer) gave up the money to which he was entitled really alter the nature and quality of the office. It seems to me quite plain that it does not.".

Here it can be said that the appellant's leave itself is a consideration for the "no pay". But in our view the fact that there is consideration is only relevant if it implies a New Agreement

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[3] 17 T.C. 470.
[4] 18 T.C. 570.

and, therefore, a new "office". The agreed facts here do not admit of any such "New Agreement" and the appellant was, at all times, employed under his original agreement with the university, which itself deals with his subsequent no pay study leave.

Reade v. Brearley[5] (a leading case that went in the taxpayer's favour) is a very special case dealing with the tax liability of the headmaster of a Roman Catholic school who was a member of a Congregation known as the Fathers of the Oratory in Birmingham. The court came to the conclusion that he was not the holder of an office of profit although the accounts of the school contained entries for the payment to him of an annual salary of £800, the reason being that they were book entries only, and no money was ever paid to the headmaster, who, under the rules governing the Congregation, was not allowed to receive any emolument. The case is referred to in 17 *Halsbury's Laws of England* (2nd Edition) at p. 213, foot note (*d*), where the learned authors sum up the position thus: "where exceptionally, although the holder of an office is entitled to a salary under a contract there was *ab initio*, no intention that remuneration should ever be paid, and none is paid, the office or employment is not one of profit". That is certainly not the case here.

Indeed the situation with which we are dealing is quite the contrary, as the contract of employment forming the subject matter of this appeal is, *ab initio*, an employment of profit. One of the terms of employment is that the employee should be entitled to 3½ years study leave, the first 6 months of such leave being with pay and thereafter without pay. The period of leave is unquestionably a very long one but we do not think it should make any difference to our considerations. What is important is that the appellant himself confirms that his contract with the university has not been terminated and there can be no doubt that on his ultimate return to the university at the end of his leave, it will be an office or employment of profit that he will be returning to under that Original Agreement. If the contract provides that for a certain time the appellant should get leave rather than pay, the character of his employment nevertheless remains the same.

In our opinion, nothing has happened which has altered the nature and quality of such employment. As Finlay, J. puts it in **Henry v. Galloway** (*supra* at p. 476), "it is impossible to say that the mere cesser of the remuneration in the manner described in this case caused the office to cease to be an office of profit".

For these reasons, the appeal is dismissed and the assessment is confirmed.

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[5] 17 T.C. 687.