INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D42/92

Salaries tax – income of a Roman Catholic Priest paid by a charitable institution – whether taxpayer receiving employment of profit or a non taxable basic living allowance.

Panel: Howard F G Hobson (chairman), Glen C Docherty and Archie William Parnell.

Date of hearing: 27 October 1992.
Date of decision: 3 December 1992.

The taxpayer was a Roman Catholic Priest who was paid by a charitable institution. He submitted that as a Priest he was accountable to the church for all of the remuneration that he received and that because he was required to hand over his earnings to the church he should not be liable to salaries tax.

Held:

An extra statutory concession under which members of religious orders who were subject to a vow of poverty were not assessed to salaries tax did not apply in the present case. The taxpayer had been correctly assessed to tax.

Appeal dismissed.

Cases referred to:

Reade v Brearley [1933] KBD 17 681
Dolan v 'K' [1944] IR 470
Cape Brandy Syndicate v IRC 12 TC 538

Patrick Tam for the Commissioner of Inland Revenue.
Lester G Huang of Messrs P C Woo & Co for the taxpayer.

Decision:

This appeal concerns an objection to salaries tax assessment made on the Taxpayer for the two years of assessment 1985/86 and 1990/91.

The agreed facts are that the Taxpayer was at the material time a Roman Catholic Priest, and a member of the Diocesan Clergy of the Catholic Diocese of Hong

Kong. He completed salaries tax returns in respect of the aforementioned two years which showed his employer to be X Institution and which showed his salary for the years concerned as $191,210 and $363,138. However in a letter accompanying the returns the Taxpayer made the following statements:

> '… I consider that my income from X Institution (a charitable institution) should be considered as an allowance from the Catholic Diocese in order that I can be responsible for my livelihood rather than as salary earned from X Institution which I am by tradition bound to give to the Church. I understand that salaries tax is charged on any income from an employment of profit. However, the income I am allowed to retain is merely to provide for my own basic livelihood that the Church would otherwise provide. I do not therefore consider it an employment of profit but rather as a basic living allowance from the Church.'

His explanation was not accepted and he was assessed accordingly.

When the matter came before this Board the Taxpayer was legally represented and the issues before us had narrowed to the following:

1. The Commissioner failed to take into consideration the position of the Taxpayer as a Roman Catholic Priest canonically incardinated in the Diocese of Hong Kong, and as such accountable to the Roman Catholic Bishop of Hong Kong for all remuneration that he had received, in the circumstances particular to him in that he had entered into an agreement with Bishop Francis C P Hsu, then Bishop of Hong Kong, on 28 August 1969.

2. The Commissioner failed to take into consideration that the position of the Taxpayer is in the same position as that of priests who hand over their earnings to their respective congregations and are therefore not liable to tax; and that the fact that he is on his own, and not in a congregation, does not alter the character of the remuneration received by him in that just [as] a congregation is required to maintain and provide for the upkeep of its members, the Taxpayer is likewise required to support himself in his ministry of religion.

In relation to the aforesaid grounds, the Taxpayer's representative furnished us with, inter alia, a copy of the letter (the 1969 Agreement) dated 28 August 1969 but apparently signed by Bishop Hsu and the Taxpayer in October 1969. The 1969 Agreement first refers to an unwritten customary law whereby members of the diocesan clergy have to hand over to the Ordinary [the Bishop] all remuneration and salaries received on account of '… professional employments and the obligation of the Ordinary to provide the Taxpayer with an adequate and becoming livelihood throughout his life.' Mention is then made of the fact that the Taxpayer has found the standard income of diocesan priest inadequate for his own circumstances. It then goes on to say that though the Taxpayer shall remain 'fully bound by the obligations of your priestly status' he is released from the unwritten customary law and may retain salaries and remunerations received on account of professional

engagements but he is to take out insurance to protect himself and to provide for any future eventuality. The Ordinary is then relieved from any future responsibility for the Taxpayer's livelihood, medical expenses, home leaves, disability and old age pension etc.

The Taxpayer's representative referred to the following passage in a letter of 22 July 1991 (the July letter) from an assessor:

> 'I would like to advise that since you are neither practising a vow of poverty nor observing the tradition of Diocesan Priests of handing over all salaries earned to the Bishop of the Roman Catholic Church remuneration received by you from X Institution should be fully assessable to Hong Kong salaries tax.'

From this passage the Taxpayer's representative drew the inference that the Taxpayer was not liable to salaries tax prior to the 1969 Agreement and submitted that as other incardinated priests were not liable to salaries tax and as the Taxpayer himself continued to be under the control of the Bishop of the Diocese of Hong Kong, the Taxpayer should be treated in the same fashion, the 1969 letter notwithstanding. We think that this submission was an attempt to restate the above quoted proposition in the Taxpayer's letter but amended to reflect the Taxpayer's position after the 1969 Agreement. If we are right then presumably we were being asked to accept that the substitution of the salary retention for the previous allowances from the Bishop was a semantic rather than a real change so far as the Taxpayer was concerned. Of course the feasibility of this submission depends upon whether before the lifting of the unwritten law any salary received by the Taxpayer would have been liable to salaries tax (but see the remarks on Dolan case below).

The Taxpayer's representative then submitted as a second limb that the Taxpayer could be characterized as a religious congregation, as for example where 10 priests received income and pooled it to meet their living expenses and that the sums so drawn by each individual priest were no more than allowances which are not taxable: this proposition did not address the question of whether the received 'income' was itself liable to tax. We have great difficulty in understanding this argument. In as much as it refers to allowances received from pooled income it bears no resemblance to the agreed facts. If however it is intended to mean the Taxpayer should himself be treated as a 'charitable institution' under the exemption contained in section 88 of the Inland Revenue Ordinance it is far too fanciful to merit further examination without some plausible argument or credible supporting authority.

In response the Deputy Commissioner's representative pointed out that section 9(1)(a) of the Inland Revenue Ordinance contains no exception which could possibly embrace the salaries received by the Taxpayer. He then drew our attention to Reade v Brearley [1933] KBD 17 681 and the passage reading, in part, as follows:

> '… but I think, it is clear that at least in a large number of cases the voluntary foregoing of the salary due to a person ought to be regarded by the Court, and would be regarded, simply as being an application of the income and that, in

> such circumstances, the office would not the less be an office of profit and the assessment would, therefore, not the less be made.'

In Dolan v 'K' [1944] IR 470, a nun received a salary and capitation grant from the Board of Education for teaching in the school run by a religious Order to which she belonged. In accordance with her vow of poverty and the constitution of her Order she handed over all the monies received to the Order. The President after referring to passages in other judgements made the following finding:

> 'She is bound while she is a professional nun to hand over her salary for the benefit of the Order. In my view, however, this does not affect her liability to pay income tax on her salary.'

The Deputy Commissioner's representative went on to remind us that '… in a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language which was use.' (Cape Brandy Syndicate v IRC 12 TC 366).

The representative maintained that the Dolan case represents the current position in Hong Kong. However he told us that the IRD as an extra-statutory concession did not raise assessments on members of religious Orders if the members concerned who were subject to a vow of poverty received income from the Order and turned that income back to the same Order. This is in line with the rather exceptional circumstances found in Reade v Brearley. It is this concession which was obliquely referred to in the July letter in the passage quoted above which had misled the Taxpayer's representative.

Bearing in mind the quoted passage from the Cape Brandy judgment, the ruling in Dolan case and that the agreed facts do not meet the criteria for the extra-statutory concession we can find no justification for ruling in favour of the Taxpayer.

Accordingly this appeal is dismissed.