

the advices were not short. Mr. S told us that there were sometimes communication difficulties in Sabah so that the agents would telephone the taxpayer and ask the taxpayer to telephone. The taxpayer would telephone two or three times per week.

In opening, Mr. Flux who appeared for the taxpayer stated that all of the agents' sales had been on an F.O.B. basis. The accounts, however, showed the amount of \$1,694,775 as freight. Mr. D explained that some of the sales had been on a C.I.F. basis.

Mr. So Chau-chuen, who appeared for the Inland Revenue Department, drew our attention to an employer's return for the taxpayer's driver and questioned why there had been overtime allowance. Mr. D explained that there were regulations concerning the driver's working hours and he was entitled to overtime if he worked beyond those hours or on holidays, Sundays and the afternoons of Saturdays.

We bear in mind that the burden of proof is upon the taxpayer. There were some parts of the evidence which did not entirely satisfy us, notably in relation to the expenses for cables, telex and telephone. However, we were impressed with the witnesses and we accept their evidence and this appeal must therefore succeed. It seems to us that although some part of the business may well have been carried out in Hong Kong, the evidence as a whole, indicated that the majority of it had been carried on abroad. This satisfies the operations test laid down in the Hong Kong and Whampoa Dock case.

In cross-examination it was suggested to Mr. S that the real trader was the agents while the taxpayer was their agent dealing with the monetary side. Mr. S agreed that he was the real trader. In closing, Mr. So Chau-chuen submitted that if this were so then the profits shown in the taxpayer's accounts were "service income". That was not the basis upon which the taxpayer was assessed to tax. It is a matter for the Commissioner whether he would wish to issue a further assessment on that basis. We say nothing further about that.

Case No. D41/86

Board of Review:

William Turnbull, *Chairman*, R. A. Nigel Henley and Wo Man Sing,
Manuel, *Members*.

10 December 1986.

Salaries Tax—Section 9(1)(c) of the Inland Revenue Ordinance—whether the “rent” paid to the Government for the place of residence the amount of 7.5% of the salary or the amount of 7.5% of the salary plus the fixed service charge of \$400 per month.

The Appellant is a Government servant. Under the terms of his employment he was provided with a place of residence and he was required to pay rent. The place of residence provided at the material time comprised an apartment in Trinity Court, Harbour City. Additional facilities include the provision of a central air-conditioning plant, hot water supply, various non-standard kitchen appliances as well as access to recreational facilities such as a swimming pool and tennis courts. A monthly service charge of \$400 was levied from the occupant in addition to the rent payable for the quarter under the Civil Service Regulation 872. The question to be decided by the Board is whether or not the rent paid by the Appellant to the Government was 7.5% of his salary or whether it was 7.5% of his salary plus the amount of \$400 service charge levied compulsorily. The Appellant argued that his employment contract was contained in a number of documents and provision of quarters was governed by the Civil Service Regulation 872. In addition he was bound by Trinity Court provisions regarding service charge.

Held:

That the sum of \$400 paid by the taxpayer to the Government was part of the rent which taxpayer paid to the Government for the place of residence occupied by him. *CIR v. H. J. Walton* Masters 2 HKTC 22 distinguished.

Appeal allowed and case remitted back to the Commissioner to revise the assessment.

Chan Wong Yee-hing for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

The facts of this case so far as they are relevant to the appeal can be summarized very shortly and simply as follows:—

- (1) The Taxpayer was at all material times an employee of the Government.
- (2) Under the terms of his employment the Taxpayer was provided with a place of residence by his employer. He was required to pay rent to his employer for the right to have the place of residence which was provided.
- (3) The employment contract between the Taxpayer and the Government provided *inter alia* as follows:—

“6. (1) The Government will provide for the person engaged (including his family if any) partly furnished Government quarters appropriate to the appropriate grade of the officer or (in lieu thereof) hotel accommodation or such allowance as the Government pay to Government servants of appropriate grade under its Private Tenancy Scheme.

(2) Such heavy furniture and appliance as may be provided by the Government shall be maintained at the expense of the person engaged and he shall be responsible to the Government for breakages damage and loss of such furniture as may be provided and shall make good or pay for such loss.

(3) The Government may require the person engaged to reside in any particular quarters provided.

(4) The person engaged will pay rent for the accommodation provided in accordance with the regulations in force from time to time. The rent for hotel accommodation whether or not it consists of more than one room or for a private tenancy will be the same as that paid for Government quarters."

The foregoing paragraph 6 relating to quarters is quoted from the Appendices to the two signed Employment Contracts which the Taxpayer had with the Government.

(4) The employment of the Taxpayer was also governed by the Civil Service Regulations and Civil Service Regulation No. 872 which appears in Chapter 5 of Civil Service Regulations relating to quarters. Sub-paragraph 6 of Regulation 872 reads as follows:—

"Rent of quarters includes a hire charge for furniture and domestic appliances. An officer of G grade and above who draws no item of furniture from Government may receive an allowance of \$80 a month, and if he draws no item of domestic appliances by a further allowance of \$20 a month. Payment will be made in accordance with CSR 866."

(5) The place of residence of Government quarters provided by the Government to the Taxpayer at the material times comprised an apartment in T-H Court. In relation to this accommodation the relevant contractual provisions are contained in a document headed "T-H Court" and were as follows:—

"2. The 'adequately housed' rule will be waived in respect of applications for these quarters under this circular. Accordingly, the provisions of CSR 812(4) will not apply on this occasion.

3. Retaining officers are advised that should category change to 'family' during their occupancy of these quarters, they will not be eligible to retain when they next proceed on leave.

4. The T-H Court quarters include the provision of a central air-conditioning plant, hot water supply, various non-standard kitchen appliances, as well as access to recreational facilities such as a swimming pool and tennis courts.

5. Successful applicants will be levied a monthly service charge of \$300 for the one-bedroom quarters and \$400 for the two-bedroom quarters (payable pro-rata for periods of less than a month) and this will be deducted from the officer's salary. This charge is subject to periodic review, and is additional to the rent payable for the quarter under the terms of CSR 872.

6. Access to the central air-conditioning plant is obtained through an air-handling unit which is operated by room controls in each quarter. The electricity consumption arising from operation of the air-handling unit is metered to the officer's own account, as are gas, water and other electricity consumption.

7. As air-conditioning is provided in these quarters, air-conditioning allowance under CSR 700-702 will not be payable to otherwise eligible officers. For officers already in receipt of this allowance, the period of residence in T-H Court will not count as part of the 5-year period before they may re-apply for the allowance. They will thus have to complete the balance of the 5-year period after they leave T-H Court before they may re-apply for this allowance."

(6) At the hearing of the appeal the Taxpayer submitted salary payment vouchers which showed the total amount deducted from his salary including the HK\$400 per month under the heading of "Rent" and also a statement in the form of a letter from the Quartering Officer of the Hong Kong Government addressed to the Taxpayer dated 1 October 1985 in which the Quartering Officer made the following statement:—

"The rent which government pays for leasing the T-H Court quarters includes an element for air-conditioning, hot water supply and kitchen equipment. Obviously some of these charges had to be passed on to occupants and after consultations with various departments, including Finance Branch, the original charges were set.

The rates of service charges were determined on the basis of the notional cost for the supply of chilled water (for the air-conditioning system), hot water, and certain non-standard provisions (i.e. kitchen and laundry equipment). The rate set for the 2-bedroom flats was \$400, the breakdown of which was \$210 for air-conditioning, \$70 for hot water supply, and \$120 for non-standard items."

(7) At the hearing the Commissioner's representative submitted Employer's Tax Return forms which stated that the rent paid by the employee to the employer was limited to 7.5% of the employee's salary.

Those are the relevant facts of this appeal.

The question to be decided by this Board of Review is whether or not the rent paid by the Taxpayer to the Government for the place of residence provided was 7.5% of his salary as provided by regulation 872(1) or whether it was 7.5% of his salary as provided by regulation 872(1) plus the amount of HK\$400 per month as provided by paragraph 5 of the T-H Court provisions.

First we will deal with a preliminary point relating to the evidence before us. It was submitted respectively by the Commissioner's representative and the Taxpayer that the salary payment vouchers (fact 6 above) on the one hand and the Employer's Tax Return forms (fact 7 above) on the other were not binding and did not prove what was or was not the rent. We agree with both submissions. The fact that the employer has made two conflicting statements in two documents issued is of no great assistance to either party to the appeal nor to the Board itself.

On the other hand the statement by the Quartering Officer (fact 6 above) is both relevant and material. This statement was issued in

reply to a request made by the Taxpayer for information regarding this payment of HK\$400 and the Quartering Officer clearly states that the rent which Government pays for the quarters includes a sum, part of which is passed on to the employee in the form of a payment entitled "service charges". Though we are not concerned with what rent the Government was paying, this letter clearly suggests that the expression "service charges" was used by Government to pass on to its employees part of the rent which it was paying in addition to recovering part thereof in the form of deducting 7.5% of salary.

The representative of the Commissioner submitted that this appeal should be decided on the authority of the recent Walton Masters Decision (Commissioner of Inland Revenue v. H. J. Walton Masters Hong Kong Tax Cases Vol. 2 Page 22). In that case Mr. Justice Miles Jackson-Lipkin found in favour of the Commissioner and overruled a decision of the Board of Review. The judgement of Mr. Justice Miles Jackson-Lipkin is short and to the point. He ruled that the Inland Revenue Ordinance Section 9(1)(c) refers not to the rent paid by the employer to the land-lord but the rent paid by the employee to the employer for the place of residence. He said that it was not relevant to consider the relationship between the landlord and the tenant. Accordingly in the present case it is only material for this Board of Review to consider the contractual and factual relationship between the Taxpayer and the Hong Kong Government and ascertain what amount of "rent" was paid by the Taxpayer to the Hong Kong Government for the place of residence provided. With this part of the submission by the representative of the Commissioner we agree. The Walton Masters decision is binding on this Tribunal and accordingly it is not open to this Board to consider the relationship between the Government and its landlord. We are only concerned with the relationship between the Government and the Taxpayer. Indeed there is little or no evidence before us as to the Government's relationship with the landlord.

It was common ground between the parties to this appeal and this Board of Review confirms that the labels given by individuals to payments does not govern the nature of the payments. Calling a payment rent does not mean that it is rent. Likewise, calling a payment a service charge does not mean that it is not rent. The true nature of the payment must be considered.

In the present case the Commissioner's representative argued that the decision of Mr. Justice Miles Jackson-Lipkin was binding factually as well as legally. With this contention we cannot agree.

The contract of the Taxpayer was materially different from that of Mr. Walton Masters. In the Case of Mr. Walton Masters the additional payment being considered was a hotel service charge. In the present case we are talking about the rent required by the employer to be paid by the employee for the occupation of a place of residence provided by the employer.

The representative for the Commissioner argued that the total rent paid by the Taxpayer was 7.5% of his salary as specified by CSR 872(1). It was argued that any other payment including the HK\$400 per month was not rent and was a service charge identical to the hotel service charge paid in the Walton Masters case.

The Taxpayer argued that his employment contract was contained in a number of documents namely his two separate employment contracts with their respective appendices (fact 3 above), Civil Service Regulation No. 872 (fact 4 above), and the T-H Court provisions (fact 5 above). With this submission of the Taxpayer we are in agreement and we find as a fact that on a true construction of the documents before us the sum of HK\$400 per month paid by the Taxpayer to the Government was part of the rent which the Taxpayer paid to the Government for the place of residence occupied by him. It was as much a payment of rent as the deduction of 7.5% of his salary and we can find no distinction between the two.

The provisions relating to T-H Court were clearly contractual in nature and were part of the employment contract between the Taxpayer and the Government. The wording of the provisions makes this quite clear. In particular paragraph 2 of the provisions states that CSR 814(4) will not apply. Likewise reference is made to air-conditioning allowances payable under the Civil Service Regulations. The provisions relating to T-H Court must be contractual in nature otherwise they would be meaningless. Obviously it was the intention of the parties, namely, the Taxpayer and the Government, that if the Taxpayer elected to live in T-H Court, his employment contract would be governed and modified by the provisions issued in relation to T-H Court.

The T-H Court provisions clearly state "this charge is subject to periodic review, and is additional to the rent payable for the quarter under the terms of CSR 872." This sentence clearly equates the HK\$400 with the 7.5% of salary and we can see no distinction between the HK\$400 as rent and the 7.5% of salary as rent. The HK\$400 is described as an additional charge to cover the provision of central air-conditioning plant, hot water supply, various non-

standard kitchen appliances, as well as access to recreational facilities such as a swimming pool and tennis courts.

It is obvious that the facilities available at T-H Court are superior to facilities available in standard Government quarters. Government wishes to be fair between different employees and has found that it is necessary in relation to T-H Court to charge the employee a sum greater than 7.5% of his salary. The \$400 covers the use of the kitchen which was an integral part of the place of residence provided by the employer. It is impossible to call this charge for the use of a kitchen with non-standard appliances anything other than rent or to differentiate between the 7.5% of salary and this additional payment. Likewise the facilities enjoyed by the employee as part of his place of residence included recreational facilities such as a swimming pool and tennis court. Clearly these were facilities which went with and were part of the place of residence. The fact that they may have been communal facilities enjoyed by other occupants of T-H Court is not material. Many tenants of many apartment blocks have the use of communal facilities. Such communal facilities are not provided free of charge but are included in the monthly rent paid for the use of an apartment. In the present case the Taxpayer paid 7.5% of his salary plus \$400 per month to occupy an apartment at T-H Court and enjoyed the facilities which went with it. We can give no other interpretation to the contractual relationship between the Government and the Taxpayer. The central air-conditioning and hot water supply were just two of the facilities provided by the Hong Kong Government to its employee and which were covered by the rent paid.

For the foregoing reasons we distinguish the facts of this case from the facts of the Walton Masters case and allow the Taxpayer's appeal. The assessments appealed against are remitted back to the Commissioner so that the Commissioner may revise the same by including the monthly sums of HK\$400 paid by the Taxpayer as part of the rent paid by the Taxpayer to his employer.