

We agree with the Board of Review in case B/R 9/78 that the payment made to employer A was not incurred in the production of earning any emoluments from employer A. However that begs the question. The question to be decided and the argument put forward by the Taxpayer was that the payment made to employer A was wholly, exclusively and necessarily incurred to enable him to take up employment with and earn taxable emoluments from employer B. With due respect to the Commissioner and possibly to the Board of Review in case B/R 9/78, we decide on the facts of this case in favour of the Taxpayer. The Taxpayer could not lawfully have obtained employment with employer B if he did not terminate his contractual obligations with employer A. He could not lawfully have earned his emoluments from employer B without paying a sum equal to one month's wages to employer A.

The distinction between this appeal and the previous decision B/R 9/78 would appear to lie in the fact that in B/R 9/78 the Taxpayer first terminated his contract with employer A and then, as a separate matter, obtained employment with employer B where as in this case he obtained the offer of employment with employer B and could only accept that offer by terminating his employment with employer A.

For the reasons given and on the facts of this case we find in favour of the Taxpayer and order that the taxable emoluments for the year in question be reduced by the amount which the Taxpayer paid to employer A to terminate his service contract with employer A and that the assessment appealed against be reduced accordingly.

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### Case No. D9/87

*Board of Review:*

Charles A. Ching, *Chairman*, Edmund T. C. Lau and Jorgen B. Schonfeldt, *Members*.

**18 June 1987.**

Salaries Tax—Section 9(1) of the Inland Revenue Ordinance—whether a government servant should be assessed on the allowances he received under Government's Home Purchase Scheme.

The Appellant, a government employee, took advantage of the Home Purchase Scheme to purchase a flat and under the terms of the Scheme, the government paid a sum directly to the mortgagee of the Appellant's flat. The Appellant was assessed to Salaries Tax on that sum which he disputed, claiming, *inter alia*, that the sum was not paid as a result of his office or employment and that he was directed to purchase the flat.

*Held:*

The sum was an allowance or a perquisite from an office or employment under Section 9(1) of the Inland Revenue Ordinance. It was the Appellant's own free choice whether or not to join the Scheme.

Appeal dismissed.

WAN TSANG Yuk-ling for the Commissioner of Inland Revenue.  
Appellant in person.

*Reasons:*

There was no dispute on the facts in this case. The taxpayer is a government servant. In February 1984, he took advantage of the government's Home Purchase Scheme to buy himself a flat. So far as is relevant to this appeal the terms of that Scheme required that the taxpayer would forfeit all other housing benefits, that he would live in the flat himself, that any mortgage would have to be approved and that the allowance would be paid directly to the mortgagee. By the year ending 31 March 1984, the government had paid a total of \$18,000 to the mortgagee of the taxpayer's flat. The taxpayer was assessed to salaries tax on that sum and he now appeals to us.

The taxpayer's first argument was that the sum was not paid to him as a result of his office or employment and therefore was not chargeable under salaries tax. We reject that argument. The sum was clearly an allowance or a perquisite from an office or employment under section 9(1) of the Inland Revenue Ordinance, Cap. 112.

The taxpayer asserted that he had been directed to purchase the flat. This also we reject. It was his own free choice whether or not to join the Scheme. He then argued that since he was required to live in the flat the real position was that he was being provided with rent free accommodation or that there was in effect a lease-back arrangement between himself and the government. We see no merit in this. The requirement that he was to live in the flat was merely a condition which he accepted upon joining the Scheme.

As an alternative, the taxpayer argued that \$11,685 out of the \$18,000 represented interest payments to the mortgagee paid by the government for its own benefit. We find quite simply that it was paid for the taxpayer's benefit.

The final alternative argument advanced by the taxpayer was that the payment of interest was an expense wholly and necessarily incurred in the production of that part of his income under the Scheme. We find that the whole of the payment was an allowance or perquisite of the taxpayer's office or employment and we see no reason to differentiate any part of it which may have been used in the payment of interest.

We therefore dismiss this appeal which should never have been brought.

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**Case No. D14/87**

*Board of Review:*

William Turnbull, *Chairman*, Andrew J. Halkyard and Lester C. H. Kwok, *Members*.

**23 June 1987.**

Profits Tax—Whether profit arising from the purchase and resale of the flat in which the Appellant was living constituted a trading transaction.

In 1979 the Appellant purchased and resold at a profit the flat in which he was then living as a tenant and the profit arising was assessed to profits tax as being a trading profit. By a sale and purchase agreement dated 19 November 1979 the Appellant agreed to purchase the property and by a sale and purchase agreement dated 20 November 1979 the Appellant agreed to sell the property to a third party making a net profit of \$201,850.00. The Appellant being a civil servant was at that time hoping to join the Home Purchase Scheme and argued that it was the delay in the implementation of the scheme which ultimately changed his original intention of not reselling the property.

*Held:*

On the facts, at the time the Appellant committed himself to purchase the property on 19 November 1979 he did so with the intention of selling the same at a profit to a third party. Such a transaction is in the nature of trade and any profit arising therefrom is taxable.

Appeal dismissed.

J. G. A. Grady for the Commissioner of Inland Revenue.  
Appellant in person.