Case No. D3/87 & D4/87

Board of Review:

William Turnbull, *Chairman*, E. J. V. Hutt and WOO Man-shing, Manuel, *Members*.

8 May 1987.

Profits Tax—Section 40(1) of the Inland Revenue Ordinance—whether premises used can qualify as an "industrial building or structure" so that the Appellants are entitled to an industrial building allowance.

The question at issue in both appeals is whether certain premises used by the Appellants can qualify as an "industrial building or structure" so that the Appellants are entitled to an industrial building allowance. The business carried on by the Appellants was that of pest control which comprised the extermination of pests by spraying chemicals onto products and the fumigation of products in a confined area or space such as a container or room. It was common ground between the parties that if the business was a qualifying trade, then the Appellants were entitled to an industrial building allowance regardless of the fact that they might be performed outside of the premises themselves. The question for the Board to determine was therefore whether the business constituted a qualifying trade within the meaning of S. 40(1) of the Inland Revenue Ordinance. The Appellants claimed that the business carried on involved subjecting 'goods or materials to a process', if the word "process" is given its widest meaning.

Held:

The trade of the Appellants was to subject goods or materials to a process and fumigation was clearly a "process". Extermination, is likewise a process to which goods were subjected.

Appeal allowed.

Cases referred to:

C.I.R. v. Tai On Machinery Works Limited 1 HKTC 411
Crusabridge Investments Limited v. Casings International Limited 54 TC 246
Kilmarnock Equitable Co-operative Society Limited v. C.I.R. 42 TC 658
Vibroplant Limited v. Holland 54 TC 658

S. P. Barns for the Commissioner of Inland Revenue.
LAU Kam-cheuk for the Appellants.

Reasons:

The question at issue in this appeal is whether certain premises used by the Taxpayer can qualify as an "industrial building or structure" so that the Taxpayer is entitled to an industrial building allowance.

The business carried on by the Taxpayer was that of pest control which comprised the extermination of pests by spraying chemicals

onto products and the fumigation of products in a confined area or space such as a container or room.

It was common ground between the parties that the premises in question were used by the Appellant for his business. The question for the Board to determine was whether the business constitued a qualifying trade within the meaning of the Inland Revenue Ordinance. It was also common ground that if it was a qualifying trade, then the Taxpayer was entitled to the industrial building allowance regardless of the fact that the work he performed might be performed outside of the premises themselves.

The chemical used in the fumigation process was always methyl bromide. The dosage, duration of application, temperature and method of application would vary in each particular case and were trade secrets of the Taxpayer. Fumigation certificates would be issued by the Taxpayer certifying that products had been fumigated. The example given to the Board of Review was the requirement of manufacturers of bamboo ware to have their products fumigated prior to being shipped from Hong Kong so that the products could comply with the import regulations of overseas countries. The fumigation process would kill or destroy any unwanted living creatures or bacteria which might be in the bamboo.

The example given of the extermination process was the spraying of chemicals on plants and grass including the treatment of grass for the X Club so that insects would not bite the horses using the grass.

The representative for the Taxpayer argued that fumigation and extermination were within the meaning of Section 40(1) of the Inland Revenue Ordinance which defines "industrial building or structure" as meaning (inter alia) a building or structure used for the purposes of a trade which consists of the subjection of goods or materials to any process.

It is clear that the business carried on by the Taxpayer involved subjecting goods and materials to a process if the word "process" is given its widest meaning.

There is no definition of the word "process" appearing in the Inland Revenue Ordinance. The representative for the Commissioner argued that the word "process" should be given a narrower meaning than its widest dictionary meaning and cited to us the cases of Kilmarnock Equitable Co-operative Society Limited v. *CIR* 42 TC 675, Crusabridge Investments Limited v. Casings International Limited 54 TC 246, Vibroplant Limited v. Holland 54 TC 658, and CIR v. Tai On Machinery Works Limited (HKTC 411).

The Kilmarnock case was similar in many respects to the present case. In the Kilmarnock case the Taxpayer sold coal in 28 lb paper packets retail through its grocery branches and in its self-service stores and wholesale to other co-operative societies. The Taxpayer built a coal depot to prepack the coal. The packing procedure was to convey the coal by conveyor belt from wagons through machinery which screened the coal to remove dust and then weighed and packed the coal into 28 lb bags.

The Court of Session had no hesitation in finding that the coal was subject to a process. It was decided that the word "process" should not have the widest possible meaning and that the mere conveyance of goods from one part of a building to another would not constitute subjecting the goods to a process. However the separation of bulk coal into coal suitable for packing in bags was definitely a process.

It was argued in the Kilmarnock case and the representative for the Commissioner argued in the case before us that for a process to qualify for benefits under the Inland Revenue Ordinance it is necessary that the goods must be adapted or changed in some way. This argument was rejected by the Law Lords in the Kilmarnock case and we likewise reject it in this case. Lord Migdale at page 683 stated as follows:—

> "It was cleaned and then packed up in small paper bags which would, because of their convenience, command a ready market. Council for the Crown conceded that what went on could be described as "process" but contended that goods or materials could not be said to have been "subjected to a process" unless that operation resulted in some alteration to the nature of the material itself. All that was done in this building was to pack it into smaller units. Now I am unable to find any warrant in the sub-section for requiring that the nature or size of the material must be altered before one can say that it has been subjected to a process. In my opinion, when the coal was cleaned and then packed into containers of a convenient size it was subjected to a process."

Applying that principle to the present case we find that the trade of the Taxpayer was to subject goods or materials to a process. Before fumigation the bamboo ware was infested or possibly infested with pests or bacteria. The fumigation was clearly a process. The ware was fumigated in containers which were covered with gas tight sheets and then subjected to methyl bromide gas which was applied for some period of time at a specified temperature and with a specified dosage of so many pounds per cubic foot. Like the coal in the Kilmarnock case the bamboo ware remained bamboo ware. However it was more marketable and would probably attract a higher price after fumigation than before. In our opinion fumigation

clearly was a process and the goods were clearly subjected to that process. Extermination is likewise a process to which goods were subjected.

We find that the trade carried on by the Taxpayer of fumigation and extermination was a trade which qualified him to claim industrial building allowance in respect of the premises which he used for that trade. Accordingly we allow this appeal and order that the tax assessment be reduced accordingly.

Case No. D5/87

Board of Review:

William Turnbull, *Chairman*, E. J. V. Hutt and LEE Wing-kit, *Members*.

27 May 1987.

Salaries Tax—Assessability of benefits—section 9(1)(*a*) of the Inland Revenue Ordinance—whether utility and telephone charges paid by employer on behalf of the Appellant assessable.

The Appellant's employer paid utility and telephone charges but none of the contracts for the supply of electricity, gas or telephone were in the name of the employer. The Appellant argued, inter alia, that the payment of utility charges on behalf of the Appellant to the utility companies was a genuine fringe benefit provided by the employer and was not taxable.

Held:

The employer paid these charges direct to the person to whom taxpayer owed the money and thereby discharged the obligation of the taxpayer. The word "perquisite" included in Section 9(1)(*a*) of the Inland Revenue Ordinance is a word which has a very wide meaning; it includes all incidental emoluments.

Appeal dismissed.

Cases referred to:

C.I.R. v. Humphrey 1 HKTC 451
Hartland v. Diggines [1926] AC 289
Hochstrasser v. Mayes 38 TC 673
Nicoll v. Austin 19 TC 531
Tennant v. Smith [1892] AC 150

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