

concerned with the question of validity of a tax reduction scheme. The Crown asked the court to find, without express statutory basis, that no transaction is valid in the income tax computation process that has not been entered into by the taxpayer for a valid business purpose. It relied on the business purpose test as evolved in the courts in the United Kingdom in the Ramsay, Burmah Oil and Furniss v. Dawson cases. The court rejected the test and held that the only law that could possibly apply was Section 137, supra, (which was in fact not relied on by the Crown). "It must be borne in mind that the United Kingdom tax statute, like the Internal Revenue Code of the United States under which the Helvering case was decided, contains no clause similar to our s. 137. Each of the English and American statutes had specific provisions barring dividend stripping, bond washing, land transactions and the like, but no general provision barring artificial transactions appears in the statutes." (Ibid, 6316). "Whatever the source or explanation, measures such as s. 137 are instructions from Parliament to the community on the individual member's liability for taxes, expressed in general terms. This instruction is, like the balance of the Act, introduced as well for the guidance of the courts in applying the scheme of the Act throughout the country." (Ibid, 6321).

Decision

5. It follows therefore that this appeal is allowed and that the Profits Tax Assessments for the years of Assessment 1981/82 and 1982/83 are hereby annulled.

Case No. D56/86

Board of Review:

Andrew K. N. Li, *Chairman*, Roland K. C. Chow and Anthony F. Neoh, *Members*.

21 January 1987.

Salaries Tax—Sections 8(1) and 9(1) of the Inland Revenue Ordinance—whether reimbursement of dental expenses paid by the Hong Kong Government chargeable to salaries tax.

The Appellant is an employee of a firm which was engaged by the Government on various projects. In his contract of employment his immediate employer was obliged to provide the Appellant and his family with medical and dental attention equivalent to that prescribed for Government officers by the current regulations of the Government. By this arrangement the Appellant and his family could either seek treatment at the Government dental clinics or seek private treatment and claim reimbursement. The Appellant and family obtained private treatment and after settling the bill the Appellant claimed reimbursement from the Government and the amount reimbursed was assessed to tax.

Held:

The right of reimbursement was a benefit, a perquisite which could be converted into money or money's worth by the Appellant and it is a taxable benefit.

Appeal dismissed.

Cases referred to:—

Richardson v. Worrall [1985] STC 693
Tennant v. Smith [1982] AC 150

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

Reasons:

This is an appeal by Mr. R (the Taxpayer) against the Additional Salaries Tax Assessment for the year of assessment of 1982/83. The sum of \$3,150 was brought in as additional assessment income. This sum represented reimbursement of dental expenses paid to him by the Hong Kong Government.

The facts as set out in the Commissioner's Determination are not in dispute and can be summarised as follows.

The Taxpayer was an associate engineer employed by ABC Limited. ABC Limited was engaged by the Government on various projects. During the year in question, the Taxpayer worked on one of them, the Tuen Mun Road project.

The Taxpayer's contract of employment obliged ABC Limited to provide the Taxpayer, his wife and children with medical and dental attention equivalent to that prescribed for Government officers by the current regulations of the Government.

Such current regulations provide that civil servants and their families are eligible for treatment in Government dental clinics. Such clinics had a very heavy workload and the waiting period for an appointment was long, some 7 months. So, in May 1981 Government introduced a scheme whereby they can obtain private dental treatment. The Scheme is set out in Civil Service Branch Circular No. 7/81. For this appeal, the important feature to note is that

the civil servant patient (not Government) is responsible for settling the bill with the dentist and that the arrangement between them is a separate contract between them not involving Government. The civil servant then seeks reimbursement from Government.

By virtue of his contract of employment, the Taxpayer was entitled to the same dental attention for himself and his family as that referred to above for a Government officer. By arrangement between ABC Limited and the Government, employees of ABC Limited working on Government projects and their families such as the Taxpayer could either seek treatment at the Government dental clinics where the waiting period is long or seek private treatment under the Scheme.

During the year in question, the Taxpayer and his family obtained private treatment. The Taxpayer settled the bill for \$3,150 and obtained reimbursement from Government. Under his employment contract, ABC Limited was liable to the Taxpayer for this sum. But under its own arrangements with Government, Government paid this sum.

ABC Limited submitted an employee's return. This made no reference to the dental fees. A separate employee's return of allowances was submitted by Government (though strictly ABC Limited is the employer). This referred to private dental fees of \$3,150.

The issue in this appeal is whether the sum of \$3,150 is part of the Taxpayers assessable income.

The Taxpayer who appeared in person before us submitted that it is not. He submitted that had he gone to a Government clinic, the treatment he would have obtained would not be chargeable to tax. By opting for private treatment, he was helping to alleviate the pressure on Government clinics. Why should he be penalised? He was going to a "substitute" Government dentist. He was charged a fee which was reimbursed by Government. He did not receive a dental allowance. It is unjust if he is taxed.

Our starting point must be the relevant provisions in the Inland Revenue Ordinance.

Section 8(1) provides:

"Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources—

(a) any office or employment of profit;"

Section 9(1) provides:

“Income from any office or employment includes—

- (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others”

In our view, what the Taxpayer had was a right of reimbursement from his employer of the dental fees incurred and paid by the Taxpayer. In law it was a chose in action. That right entitled him to receive the amount of the fees and by the exercise of this right he did receive such amount. In our view such a right of reimbursement was a benefit, a perquisite which could be converted into money or money's worth by the Taxpayer. That being so, it is taxable. See *Tennant v. Smith* (1892) AC 150 and the recent and helpful judgment of Scott J. in *Richardson v. Worrall* (1985) Simon's Tax Cases 693.

The Taxpayer submitted that the tax consequence of going to a Government clinic should not be different from private treatment. Assuming that the benefit of the former is not taxable (and that is a question not before us), we note that different transactions although leading to the same result can have different tax consequences. It would however be more satisfactory if Government can draw attention to the result of this ruling so that civil servants (and others such as the Taxpayer entitled to the same treatment) can make a choice, taking the tax consequence into account.

Accordingly, we dismiss the appeal.

Case No. D58/86

Board of Review:

Andrew K. N. Li, *Chairman*, Wilfred C. W. Lee and David C. S. Wu, *Members*.

27 January 1987.

Profits Tax—whether ‘borrowed gold’ constituting trading stock.

The Appellant's business was that of ‘Jewellers and goldsmith’. It commenced on 21 March 1969 as a partnership and from 1 January 1978 the Appellant was the sole proprietor. As the business had a small capital base the Appellant borrowed certain quantities of gold from third parties who were his close relatives. The borrowed gold was kept along with the firm's stock of gold. The Appellant was free to dispose of the borrowed gold and he did dispose of various quantities. However, the third parties could demand the gold back at any time. The Appellant ceased business on 30