

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

September 1982 by which time all of the borrowed gold had been returned. The issue is whether the 'borrowed gold' formed part of the trading stock of the Appellant's business. The Appellant claimed that the borrowed gold did not form part of the trading stock as he did not purchase it from the third parties. The Revenue contended that the Appellant enjoyed ownership of the gold and used it in the course of his business.

Held:

To constitute trading stock it is not essential that the taxpayer should have purchased the gold in question. He became the owner of the 'borrowed gold' in return for his promise to return the equivalent quantity to the third parties upon demand and he introduced the borrowed gold into his business.

Appeal dismissed.

Luk Nai-man for the Commissioner of Inland Revenue.
Kenneth Chau of Kenneth Chau & Co. for the Appellant.

Reasons:

This is an appeal by Mr. C (the Taxpayer) trading as L M J and Goldsmith (the Business) against the additional profits tax assessments for the years of assessment 1978/79, 1979/80 and 1980/81. Prior to 1 January 1978 the Business was a partnership business and the Taxpayer as precedent partner also appeals against the additional profits tax assessment for the year of assessment 1976/77 raised on the partnership.

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

The Business was that of "jewellers and goldsmiths". It commenced on 21 March 1969 as a partnership between the Taxpayer and Mr. K. As from 1 January 1978, the Taxpayer was the sole proprietor. Business ceased on 30 September 1982.

As the Business had a small capital base, the Taxpayer borrowed certain quantities of gold from third parties who are his close relatives ("the borrowed gold"). We had before us a sample of the receipt issued. This simply recorded the receipt from the third party a certain quantity of gold on a certain date and was signed by the Taxpayer. We were informed by the Taxpayer's representative at the hearing that the borrowed gold was kept in a safe box at the shop where the firm's stock of gold was also kept. The Taxpayer was free to dispose of the borrowed gold in the course of his business and he did dispose of various quantities. The third parties could demand the gold back at any time. Upon demand, the Taxpayer would deliver back the equivalent quantities and a cancellation chop with a date would be put on the receipt. The Taxpayer ceased business on 30 September 1982. By that time all the borrowed gold had been returned to the third parties.

The issue before us at present is whether “the borrowed gold” formed part of the trading stock of the Taxpayer’s Business and the partnership business prior to 1 January 1978. The representatives of the Taxpayer and the Revenue agreed before us that if, our answer was “no” (not part of trading stock), then the additional assessments should be annulled but if our answer is yes (part of trading stock), then they will seek to agree on how such trading stock should be valued and in default of agreement the matter would be referred back to the Board for determination.

The Taxpayer’s representative submitted that “the borrowed gold” did not form part of the trading stock, as the Taxpayer did not purchase from the third parties and the third parties were not his creditors.

The Revenue’s representative submitted that purchase is not essential. The Taxpayer enjoyed ownership of the gold and used it in the course of his business and that is sufficient.

In our view, to constitute trading stock, it is not essential that the Taxpayer should have purchased the gold in question. Take the case of a trader who inherited a large quantity of gold and sells it in the course of his business as a goldsmith and jeweller. If the Taxpayer’s argument that purchase is essential is correct in principle, it would mean that this hypothetical trader did not have and did not dispose of any stock. As a matter of commonsense that cannot be right.

In our view, “the borrowed gold” constituted part of the trading stock of the Taxpayer’s business and the partnership business prior to 1 January 1978 because the following two elements were present on the facts.

First, the Taxpayer was the owner of “the borrowed gold”. Under the arrangement between him and the third parties, the Taxpayer became the owner of the “borrowed gold” in return for his promise to return the equivalent quantity to the third parties upon demand. Under this arrangement, the Taxpayer became the owner of “the borrowed gold” and could sell the same to his customers.

Secondly, “the borrowed gold” was introduced by the Taxpayer into this business. It formed part of the total quantities of gold which the Taxpayer offered for sale and sold to the public in the course of his business as a goldsmith and jeweller.

The question of how “the borrowed gold” as trading stock should be valued is an entirely separate question. By agreement between representatives between the Taxpayer and the Revenue, we do not have to deal with it at present.