Case No. BR 12/76

Board of Review:

Chan Ying-hung, *Chairman,* David B. K. Lam, P. D. D'Almada Remedios, & Seaward Woo, *Members.*

28th December 1976.

Salaries tax – taxpayer's wife provided with accommodation in connection with her duties – whether rental value of accommodation should be included in computation of income – whether such rent paid by taxpayer's wife to employer was a deductible expense – Inland Revenue Ordinance, sections 9(1)(c), (2) and 12(1)(a).

The taxpayer's wife, a government officer, was required to live in quarters provided by government at a rental for 2-3 nights a week in connection with her duties. The quarters so provided could be used as a residence by the wife but were not available to the husband. In the assessment for salaries tax the difference between the rental value and the rent paid for the quarters was charged as part of the income of the taxpayer's wife. The taxpayer objected on the ground that the quarters could not be regarded as a place of residence since they were not available to him. It was also contended by the taxpayer that the rent paid by the wife should be deductible as expenses necessary for the production of her income by reason of the fact that her stay in the quarters was compulsory in connection with her duties. On appeal.

Decision: Appeal allowed to the extent that the rental value of the premises should not have been included in the taxpayer's assessment. The claim to a deduction for rent paid disallowed.

Appellant in person.
Dennis Tsui for the Commissioner of Inland Revenue.

Cases referred to:-

1. R. v. Fermanagh, (1897) 2 I.R. 563.
2. C.I.R. v. Humphrey, H.K.T.C. 451.
3. Norman v. Golder, 26 T.C. 293.

Reasons:

The grounds of appeal filed by the taxpayer raise two questions: (1) whether rent paid by the taxpayer's wife to her employer the Hong Kong Government for certain premises

provided by the Government was a deductible expense, and (2) whether rental value of such premises was correctly charged as part of the assessable income of the taxpayer's wife.

The facts as agreed or found by us may be briefly stated as follows. The taxpayer was married to his wife on 14th September 1973. Before her marriage she had been employed by the Hong Kong Government as a nurse in the Tai Lam Chung Centre for Women of the Prisons Department on secondment from the Medical and Health Department. She retired on her marriage but was re-appointed immediately thereafter and has continued to serve as a nurse at the Centre. She is allocated a residential unit at the Centre, which she shares with two other nurses. The accommodation consists of a sitting room and a bedroom without cooking facilities. Each of them has a single bed in the bedroom. There is a nurse doing on-call duty every night. On such occasions the nurse on call has to stay in the unit at night. On an average, the taxpayer's wife stays in the unit once every 3 nights. She is required to do so in order to carry out on-call duties at night. Other than that she is not required to stay in the unit although according to the Commissioner of Prisons it is available to her (but not to her husband) as a residence. The rental value of the unit calculated at the statutory rate of 3% is $908.00 a year and the proportionate amount for the period of 199 days from 14th September 1973 when the taxpayer married his wife to the end of the year of assessment 1973/74 at 31st March 1974 is $495.00. Rent of $494.00 a year is paid by the taxpayer's wife to the Hong Kong Government so that for the period aforesaid the proportionate amount is $269.00. In the assessment for salaries tax for the said year of assessment as determined by the Commissioner, the taxpayer has been charged with the sum of $226.00 being the difference between the proportionate rental value of $495.00 and the proportionate amount of rent paid of $269.00.

On these facts the taxpayer submits that the premises concerned cannot be considered as "a place of residence" within the meaning of sections 9(1)(c) and 9(2) of the Inland Revenue Ordinance *(Cap.* 112). He emphasizes the fact that his wife is required to stay in the unit once every 3 nights when she has to be on-call at the Centre. He relies heavily on the fact that his wife has no choice in taking or refusing the premises and that she cannot abandon them even if she wants to. Further, the quarters are made available to his wife but not to her husband so that in fact she is getting no subsidized accommodation from the Government as they must perforce live somewhere else. Lastly, as she is required to stay in the unit in order to carry out on-call duties at night, the rent paid must be treated as expenses necessary for the production of her income, and should, therefore, be deductible.

The taxpayer also calls attention to a letter dated 5th May 1975 sent by the Assessor to the taxpayer in which the Assessor agreed as a concession to exclude the "value of quarters" from the taxpayer's assessment and acting on that statement the taxpayer did not make any claim for the deduction of the rent paid.

On the point of rental value, Mr. Dennis C. W. Tsui, Acting Chief Assessor who appeared on behalf of the Commissioner, confined his argument to the sole question as to whether the premises concerned constitute "a place of residence". After pointing out that the phrase has not been defined in the Ordinance or by the courts in Hong Kong, he calls

attention to various definitions of the word "residence" in the 4th Edition of *Stroud's Judicial Dictionary* all of which seem to suggest that it is a place where one habitually sleeps. He argues, however, that physical occupation is irrelevant so long as an employer has reserved premises for the use of an employee. He also points out the residential unit in this case is made available to the taxpayer's wife at all times and that she is not required to reside in it when she is not doing on-call duty. In any event, the wife paid rent for it without demur.

In our opinion, the so-called residential unit allocated to the taxpayer's wife at her place of work at Tai Lam Chung which she has to share with two other nurses and to which her husband is excluded must be regarded as a place taken for the purpose of performing her duties in accordance with her contract of service. Although the full details of the contract are not known to us, one can readily infer from the primary facts that the contract provides for her paying rent for the use of the unit in connection with her employment and that she is required to stay there when she is doing on-call duty at night. We do not think that such a place can be described as anything remotely resembling "the dwelling and home where a man is supposed usually to live in and sleep" which is one of the definitions quoted from *Stroud's Judicial Dictionary*. It has been taken from **R. v. Fermanagh Justices**[1] in which Gibson J. says:-

> "The words 'residence' and 'place of abode' are flexible, and must be construed according to the object and intent of the particular legislation where they may be found. Primarily, they mean the dwelling and home where a man is supposed usually to live and sleep; they may also include a man's business abode, the place where he is to be found daily".

In the *Oxford English Dictionary* the word "residence" is denned as "the place where one resides; one's dwelling place; the abode of a person" and the word "reside" is defined as "to dwell permanently or for a considerable time to have one's settled or usual abode, to live in or at a particular place". We can find nothing in the Ordinance or in its object and intent which be-hooves us to ascribe to the word "residence" any special or extended meaning other than its primary and ordinary meaning of a dwelling or home where one usually lives and sleeps. Taking into consideration all the relevant facts before us, we have no doubt in our mind that in the special circumstances of this case the unit allocated to the taxpayer's wife is not a place of residence within the meaning of sections 9(1)(c) and 9(2) of the Ordinance. Consequently no rental value should be included in the taxpayer's assessment.

As to whether the rent should have been allowed as a deduction, the only point relied on by Mr. Tsui is that under section 12(1)(a) the rents paid by the taxpayer, being outgoings and expenses of a domestic or private nature, are not deductible from the taxpayer's income. In the course of his submission to us, he makes it clear that he does not contend that such outgoings and expenses were not "wholly, exclusively and necessarily incurred in the production of the assessable income". He also raises no objection to the absence of any formal claim for their deduction. This narrows the dispute considerably. We have already

---

[1] (1897) 2 I.R. 563.

decided that the unit in question is not a residence according to the ordinary concept of the word, and, to be consistent, we must hold that the rents paid for the use of the same are not outgoings and expenses of a domestic nature.

What remains to be considered is whether they are of a "private nature". We have no direct Hong Kong authority on this point. The words "private nature" were added in 1969 by section 11 of the Inland Revenue (Amendment) Ordinance (No. 26 of 1969). There are certain *obiter dicta* in **CIR. v. Humphrey**[2] at pp.462 and 472), a case decided by the Full Court, which suggest that the word "private" has the same meaning as "personal" inasmuch as the phrase "private or personal nature" occurs more than once in the judgments of two members of the Full Court, Scholes J. and Blair-Kerr J. It is true that the case concerns an assessment for the year of assessment 1968/69 before the amendment in 1969 and hence any pronouncement of the Full Court on the meaning of the word "private" must be regarded as obiter. Nevertheless, any dictum of the Full Court, albeit obiter, commands our highest respect and we have no hesitation in holding that the word "private" is interchangeable with the word "personal".

A case in point is **Norman v. Golder**[3] which deals with the deducibility of expenses. The following excerpt from the judgment of Lord Greene M.R. at p.299 has a direct bearing on this appeal:-

> "The rules about deductions are to be found in Rule 3 of the Rules applicable to Cases I and II of Schedule D in respect of which deduction is prohibited in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation. It is quite impossible to argue that doctor's bills represent money wholly and exclusiveily laid out for the purposes of the trade, profession, employment or vocation of the patient. True it is that if you do not get yourself well and so incur expenses to doctors you cannot carry on your trade or profession, and if you do not carry on your trade or profession you will not earn an income, and if you do not earn an income the Revenue will not get any tax. The same thing applies to the food you eat and the clothes that you wear. But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being. Paragraph *(b)* of the Rule equally would exclude doctor's bills, because they are, in my opinion, expenses of maintenance of the party, his family, or a sum expended for a domestic or private purpose, distinct from the purpose of the trade or profession".

We realize that doctors' bills are a far cry from the rent paid in this case but the principle involved is the same. It seems clear to us from Lord Greene's judgment that expenses incurred in part for the personal advantage and benefit of a taxpayer as a living human being would not be deductible because then they would not be wholly and exclusively incurred for the purpose of producing his assessable income. The same test

---

[2] H.K.T.C. 451.
[3] 26 T.C. 293.

should apply, *a fortiori*, to whether an expense is of a private nature. If "private" means "personal", as we think it does, then the crucial question to be asked in this case is: does the taxpayer (or to be precise, his wife) get any personal benefit from the rent paid? Although our sympathies are with the taxpayer, we must regretfully hold that the answer to this question is "Yes", as his wife unquestionably has the use of the unit allocated to her for the purpose of rest and relaxation whilst she is doing on-call duty and the premises are available to her on off-duty days. The wording of section 12(1)(a) is such that expenses incurred "wholly, exclusively and necessarily" by an employee for the purpose of earning his income are nevertheless undeductible if they happen to be also of a private or personal nature, which, unfortunately for the taxpayer, is the position here. This being our view, the claim to deduction of the sum of $269.00 for rent paid must be disallowed. We should like to place on record that this view is not shared by one of us, Mr. David B. K. Lam, who is of the opinion that since it was not in issue, that the rent paid was incurred necessarily for the production of the assessable income, it must be deductible. He cannot visualize an item of expenditure that is "private" or "domestic" and yet wholly, exclusively and necessarily incurred in the production of such income.

The result is that the appeal is partially allowed, and the assessment as determined by the Commissioner is reduced by $226.00 being rental value of quarters charged.