Case No. BR 17/73

Board of Review :

Chan Ying-hung, *Chairman*, G. E. S. Stevenson, W. T. Grimsdale, & R. Beynon, *Members.*

25th March 1974.

Salaries tax—taxpayer was paid full salary whilst on study leave—whether travelling expenses incurred during period of study leave were deductible expenses under section 12(1)(*b*) of the Inland Revenue Ordinance.

The appellant, who had an appointment with a University in the Colony, applied for and was granted study leave of 5 months to carry out research work in United Kingdom in 1971. In connection with his work he had to travel from his place of residence to London and return for a period of two weeks. He also had to pay for his fare from London to Hong Kong. The appellant's claim that the travelling expenses so incurred should be deducted in ascertaining his net chargeable income for the year of assessment 1972 / 73, was disallowed by the Commissioner on the ground that they were not expenses incurred "wholly exclusively and necessarily" in the production of his assessable income. On appeal.

Decision: Appeal dismissed.

Cases referred to:—

1. C.I.R. v. Humphrey, H.K.T.C. 451.
2. T. H. Blackwell (Inspector of Taxes) v. Mills, (1945) 2 All E.R. 655.
3. Owen v. Polk, 45 T.C. 57.

Reasons :

The Appellant had an appointment with a University in Hong Kong in 1968. In pursuance of the Regulations governing the Grant of Study Leave (Document 151 / 1170), the Appellant applied for 6 months' study leave to carry out research. His application was submitted on the 16th December 1970 and was accompanied by a document prepared by him entitled "Study Leave : Purpose", in which he stated that during the study leave his time would be spent principally in British archives and he intended to be based in Oxford.

The Appellant was notified of the granting of his application by the University's Committee by a letter dated the 31st May 1971, in which it was stated that he had been awarded study leave of 5 months upon the following terms : —

"Period of long leave : July 1 to August 31, 1971
Period of additional leave : September 1 to November 30, 1971
Total period of study leave : July 1 to November 30, 1971
Passages : Nil
Remuneration for additional period : Full salary".

The letter was accompanied by a copy of the Regulations (Document 151 / 1170) referred to above and drew attention to some of the Regulations therein contained. One of the Regulations provided that any person awarded study leave might be called upon to repay the whole or part of the moneys received by him for emoluments and passages if he resigned within three years of returning from study leave.

Although the study leave awarded was shorter by a month than that applied for by the Appellant, he accepted the same and embarked on his study leave accordingly.

It was also in evidence that earlier in the year 1971 the Appellant had taken 3 months' long leave out of a total period of 5 months to which he was entitled under his terms of service. That was why he had a balance of 2 months' long leave available to him which, according to the terms of the award, went to make up in part the period of study leave.

When he went on long leave early in 1971, the Appellant was granted travel entitlement equivalent to a return 1st class air fare to Kansas City, Missouri, U.S.A., in accordance with his terms of service.

There was no dispute as to the material facts, which have been fully stated in the Commissioner's Determination, and neither party called any evidence at the hearing of the appeal. Additional facts relied on by the Appellant were that part of the archives relevant to his study was kept in London and as he resided and worked in Oxford he had to have season tickets Oxford / London for a period of two weeks. These facts were accepted by Mr. Benjamin Shih, Chief Assessor who appeared for the Commissioner.

As to the Regulations mentioned above, the Committee recommended to the University's Council in February, 1971, that the Regulations be amended so that, if in the opinion of the Committee a person awarded study leave made inadequate use of it, he might also be called upon to make a refund of the whole or part of the sums received by him. These proposed Regulations known as Document 193 / 271 were not finally approved by the Council until November / December, 1971 when they were designated Document 98 / 1171.

The only point at issue arising out of the facts hereinbefore stated is whether the following travelling expenses incurred during the period of the study leave and claimed to be allowed by the Appellant in his Salaries Tax Return for the year of assessment 1972 / 73 viz :

Season Tickets Oxford—London	$ 240.00
One way Charter Flight London—Hong Kong	1,400.00

$1,640.00
=======

were deductible expenses under section 12(1)(*b*) of the Inland Revenue Ordinance. The Commissioner determined that they were not, and from this the Appellant has appealed to us.

In his written Determination, the Commissioner pointed out that the Appellant applied for the study leave, which implied that it was voluntary as opposed to obligatory. The Appellant was not necessarily obliged to undertake the study and, in the opinion of the Commissioner, the expenses claimed to be deducted were referable to his personal desire to study and not incurred "wholly, exclusively and necessarily" in the production of his assessable income, as prescribed by section 12(1)(*b*).

In his submissions to us, the Appellant argued that, whilst the application for study leave was voluntary in the same way as it would be if one were seeking any contractual arrangement, once it was granted it placed the Appellant in an entirely different contractual relationship, as a result whereof the University agreed that he should undertake certain activities in return for which he was awarded a remuneration which might have to be repaid in whole or in part by virtue of the Regulations (Document 193/271). The Appellant argued, therefore, that the remuneration paid to any staff member during study leave must not be regarded as pure salary but as advances or conditional payments which might become repayable in certain circumstances. He also submitted that any relevant expenses incurred during the period of study leave were incurred "wholly, exclusively and necessarily" in the production of the assessable income.

For the Commissioner, the Assessor contended that the Appellant was not directed by the University to undertake the study, so that, in this sense, it was not necessary for him to do so and the task was voluntary and not obligatory. He also asked the rhetorical question : "If the Appellant had not incurred the expenses, would he still have received his income?". The answer, he said, must be in the affirmative because, not only did the terms of the award of study leave clearly state that the Appellant was awarded study leave at full salary, but in fact he did receive his salary in full.

In answer to the Appellant's argument that the sums received by the Appellant during the study leave period were not pure salary but conditional advances or payments repayable in certain circumstances, the Assessor drew attention to the actual wording of Regulation 4.5 of Document 193/271, which reads as follows : —

> "An applicant who . . . made inadequate use of the study leave may be required by the Council to repay the whole or part of the sum received for passages and emoluments in connection with the study leave".

He submitted that the words "to repay" and "received" would imply that the income had accrued to the Applicant and could not be treated as advances, and any subsequent repayment would be in the nature of a penalty and not deductible from chargeable income.

In the course of his submissions, the Assessor called attention to the case of **C.I.R. v. Humphrey**[1], where the statutory rules in England regulating the deductibility of travelling expenses were compared by the Full Court with those prevailing in Hong Kong. At p. 466 Blair-Kerr J. says : —

> "The main difference between Rule 7 (of Schedule E of the Income Tax Act 1952) and Section 12(1) of the Hong Kong Ordinance is that whereas the former speaks of expenses incurred 'in the performance of the duties of the office or employment' the phrase used in the latter provision is 'in the production of such assessable income' . . . It would appear, however, that the difference in phraseology is immaterial so far as this appeal is concerned".

It is to be observed that at p. 473 after quoting Establishment Regulation 730(1) of the Hong Kong Government that "an officer is not normally eligible to claim reimbursement of any part of expenses incurred in travelling from his home to his place of work" Blair-Kerr J. proceeds to say : —

> "This would appear to repeat in substance what has always been regarded as a fundamental rule in tax law namely that it is the responsibility of every employee to get himself from his home to his place of work. As Dixon C.J. said in LUNNEY v. COMMISSIONER OF TAXATION [(1958 / 59) 32 A.L.J.R. 139] : —
>
> > 'Both in Australia and in England the view has always prevailed that expenses of travelling from home to work or business and back again are not deductible.' ".

We also note that apart from Blair-Kerr J. the other two learned members of the Full Court also dealt with the deductibility of travelling expenses on the basis that the test was whether the taxpayer incurred such expenses whilst he was travelling on duty (see Scholes J's judgment at p. 463 and Mills-Owen J's judgment at p. 487). In short, the entire Full Court appears to have agreed that there is no substantial difference in the meaning of the two phrases "in the performance of the duties of the office or employment" and "in the production of such assessable income". That being the position, we think we can safely rely on principles laid down in decided cases in England, according to which, travelling expenses, to be allowable, must have been incurred in the performance of the duties of the taxpayer's office or employment.

In our opinion, the Appellant's case is somewhat similar to **T. H. Blackwell (Inspector of Taxes) v. Mills**[2] in which the taxpayer was employed as a student assistant in the laboratories of the General Electric Company. It was a condition of his employment that he should attend classes in preparation for the final examination for the degree of Bachelor of Science in the University of London. He attended evening classes at the Chelsea Polytechnic in order to comply with this condition of his employment. He had to pay the cost of traveling to and from the Polytechnic and claimed that the cost incurred should be allowed as a deduction. The Commissioner allowed his claim and the Crown appealed. The

---

[1] H.K.T.C. 451.

[2] (1945) 2 All E.R. 655.

following passages quoted from the Judgment of Macnaghten J. at p. 656 appear to us to apply very aptly to the case before us : —

> ". . . It was a condition of the respondent's employment that he should attend the evening classes. Although counsel for the respondent contended that since the subject-matter of the evening classes was not unconnected with the duties that the respondent had to perform, he should be regarded as performing the duties of his office when he was attending the Chelsea Polytechnic. In my opinion, any such view is inadmissible. The duties of his employment were as a student assistant in the research laboratories of the General Electric Company. It seems to me impossible to say that, when he was listening to the lecturer at the Chelsea Polytechnic, he was performing the duties of a student assistant at the laboratories of the company. I think it is a plain case. The appeal must be allowed".

It is an indisputable fact that, during the whole of his study leave, the Appellant had only one place of work, Oxford. There is no evidence before us that during that period he performed any duty in Hong Kong. In this respect his case can be easily distinguished from cases such as **Owen v. Polk**[3] in which the taxpayer had to perform his duty at two places, so that traveling between them could be said to be done in the line of duty. It is also indisputable that at all material times there was only one office and one employment. Although during the period of the study leave, some of the terms were varied, they were varied under Regulations which formed part of the service agreement between the University and the Appellant. In short the original contract remained in force with variations made in accordance with provisions of the contract. We do not accept the Appellant's argument that the award had the effect of creating any new contractual relationship between the parties concerned. Even assuming a new contractual relationship was created, it did not alter the fact that there was one place only in which the Appellant had to perform his duty and the long established rule still applies that no deduction can be made for expenses incurred by a taxpayer in getting himself to his place of work and back.

We also agree with the Commissioner that the application for study leave was entirely voluntary in the sense that the Appellant undertook the study on his project on his own volition and initiative. As the Appellant frankly admitted, he was not "required" to apply for study leave.

In all these circumstances we hold that the traveling expenses were not wholly, exclusively and necessarily incurred in the production of the assessable income.

For the reasons set out above, the appeal is dismissed and the assessment as determined by the Commissioner is confirmed.

---

[3] 45 T.C. 57.