Case No. BR 20/71

Board of Review:

S. V. Gittins, Q.C., *Chairman*, P. B. Tata, D. A. L. Wright and W. T. Grimsdale, *Members.*

31st August 1972.

Salaries tax—income from an office or employment of profit—commissions received by taxpayer from companies other than his employer—whether commissions derived from taxpayer's employment—onus of proof on Commissioner to show income chargeable to Salaries Tax—Inland Revenue Ordinance, section 8(1) and section 9(1)(*a*).

Two foreign companies S. Ltd. and I. Ltd. paid commissions to the appellant in respect of business transacted through or introduced by him. Commissions were paid to the appellant in respect of goods supplied to the company of which he was the managing director as well as on purchases by other buyers introduced by him. The appellant contended that these sums did not relate to his office or employment as managing director and were not chargeable to tax under section 8 of the Ordinance. The Assessor sought particulars of deposits made to the appellant's bank account and certain sums were found to have been received from the 2 foreign companies. These sums were included by the Assessor in his assessable income. Other deposits the origin of which could not be traced, were also brought into the appellant's assessable income. On appeal.

Decision: Appeal allowed.

H. Litton, Q.C., for the taxpayer.

H. J. Somerville, Crown Counsel, for the Commissioner of Inland Revenue.

Case referred to:—Hochstrasser v. Mayes, (1960) A.C. 376.

Reasons:

By section 68(4) "the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant". By section 59(2)(*b*), "Where a person has furnished a return . . . the assessor may either—(*b*) if he does not accept the return, estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly; . . .".

However, Viscount Simonds in **Hochstrasser v. Mayes**[1] at p. 389 said : —

[1] (1960) A.C. 376.

> "It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it.".

The taxpayer is charged with Salaries Tax under section 8(1) in respect of income arising in or derived from the Colony from an office or employment of profit. By section 9(1)(*a*) income from any office or employment is defined as including commission etc., whether derived from the employer or others.

With respect to the commissions or rebates paid to the taxpayer by the two foreign companies it was contended on his behalf that such income did not relate to the taxpayer's office of employment as Managing Director of W.K.M. Co. Ltd. (hereinafter referred to as W.K.) and was not chargeable to tax under section 8 of the Ordinance.

Counsel for the Commissioner conceded that the commissions relating to sales by S. Ltd. to buyers other than W.K. paid to the taxpayer, could not be attributable to the taxpayer's office or employment and should be excluded from charge to Salaries Tax. However, the Board was invited to infer that the commissions on purchases by W.K. were paid to the taxpayer by S. Ltd. because of his office in W.K. It was urged that the I. Ltd. payments made a stronger case for charge because annexure E. referred to the payments as "rebates".

The effect of the concession by the Commissioner's representative is that for income to be chargeable under section 8, it must be derived from an employment as an employee even though the income is derived from some person other than the employer. Applying the principle laid down in the **Hochstrasser** case[1] the Board feels that there is a primary onus on the Crown to prove that Salaries Tax is chargeable and consequently to establish that the unconceded commissions from S. Ltd. were paid to the taxpayer because of his employment with W.K. The Board's conclusion is that the facts that W.K. made purchases from S. Ltd. and the taxpayer received commissions on those purchases are not in themselves sufficient to establish that these commissions were derived from the taxpayer's employment with W.K. S. Ltd. treated the conceded commissions paid to the taxpayer on sales to other buyers in the same way, and we do not consider that the commissions are distinguishable in the absence of further evidence as to the nature and details of the transactions or course of dealing between the taxpayer and S. Ltd. which resulted in payment of the commissions now sought to be chargeable with Salaries Tax.

We consider that a prima facie case has not been established that the commissions on the W.K. purchases were derived from the taxpayer's employment with W.K.

As for the I. Ltd. payments, they are referred to as "rebates" in Annexure "E" and rebates connote return payments of part of the purchase price to the purchaser. Counsel for the taxpayer pointed out that : —

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[1] (1960) A.C. 376.

(*a*) although Annexure "E" was written by a firm of auditors on behalf of the Company with which I. Ltd. merged, they did not state they were the auditors of I. Ltd. or of the merged company;

(*b*) it was unlikely that this type of foreign corporation would employ Hong Kong auditors;

(*c*) there was no suggestion that W.K. regarded the payments to the taxpayer as being made on its behalf;

(*d*) letters from the company into which I. Ltd. had merged to the C.I.R. dated 16/2/71 and 20/2/71 show that the payments had been made to the taxpayer personally;

(*e*) the assessor had not sought to distinguish between the payments received from I. Ltd. and S. Ltd.

We consider that the arguments on behalf of the taxpayer are well founded and that the I. Ltd. payments should be regarded, like the S. Ltd. payments, as commissions. On this basis we find that the Revenue has not discharged its primary onus that these payments were derived from the taxpayer's employment with W.K. and consequently subject to charge under section 8.

With regard to the unidentified deposits counsel for the taxpayer has denounced the assessments as having been arbitrarily made without prior investigation, high handed, oppressive, without statutory authority and were an abuse of power.

Although not so stated expressly, the assessments were clearly estimated assessments under section 59(2)(*b*). The taxpayer had furnished returns, and since the assessments were not made on those returns it must follow that the assessor did not accept the returns.

On his assumption that the I Ltd. commissions were chargeable to Salaries Tax, information received by the assessor from I Ltd. in February 1971 indicated that over HK$250,000 had been paid to the taxpayer. These payments had not been disclosed by the taxpayer and investigation into his bank statements revealed nearly HK$400,000 bank deposits which were unidentified. Then the taxpayer was given the opportunity of challenging the inclusion of these deposits in the computation. It is obvious that 14 days is inadequate in the circumstances of this case "to make any representations which you consider necessary" and that the obtaining of information from bankers has been a lengthy task and is still not completed. But it is not known that the assessor would have refused to grant any longer period, or to render assistance in getting information, if, before the expiry of the 14 days, he had been requested to extend the time for representations and to assist in obtaining information from the banks concerning the deposits.

Although the assessor's actions reflect a degree of pressure on the taxpayer in this case, we do not consider that his assessments are unwarranted or invalid, subject to the subsequent concessions made on behalf of the Commissioner.

Whereas an estimate of income by the process adopted by the assessor in this case might be sufficient to place the onus on the taxpayer to disprove an assessment of profits tax under Part IV, in the opinion of the Board this is insufficient for the purposes of Salaries Tax under Part III because of the limitation of assessments to those on income from the sources set out in s. 8(1). The Board feels there is a primary onus on the Revenue to show that such estimated income is derived from some office or employment of profit of this taxpayer and there is no evidence to this end. We think that the point made by the taxpayer's tax representatives, that the unidentified deposits did not derive from an office or employment, has not been overcome by the Revenue so as to shift the onus on the taxpayer. There is evidence that the taxpayer had received the unidentified deposits, but there is no evidence that he had received them in circumstances which render him liable to Salaries Tax in respect of them.

The taxpayer's appeals regarding : —

(*a*) assessments to Salaries Tax in respect of commissions or rebates paid to the taxpayer by I. Ltd. and S. Ltd.

(*b*) assessments to Salaries Tax for "Unidentified Deposits" other than the disallowed sum of $15,535 attributed to entertainment etc;

are therefore allowed.

The case is remitted to the Commissioner for him to revise the assessments in accordance with the opinion of the Board expressed herein.