Case No. BR20/76

Board of Review:

L. J. D'Almada Remedios, *Chairman*, Charles A. Ching, G. E. Fowle & R. S. Huthart, *Members.*

7th February 1977.

Salaries tax – Inland Revenue Ordinance, sections 8(1) and (1A) (Charge of Salaries tax) and 9 (Definition of income from employment) – taxpayer's source of income arising outside Hong Kong from services rendered inside – taxpayer provided with rent-free accommodation – assessment of rental value for purposes of salaries tax – meaning of "income".

The appellant, who was employed by a firm in the Bahamas to represent the firm in South East Asia, earned a salary of $180,000 for the year 1st April 1974 – 31st March 1975 and was provided with rent-free quarters.

As the appellant's source of income did not arise in Hong Kong nor was it derived in Hong Kong, the assessor took into account the number of days the appellant had worked in Hong Kong (being 338 days in that year) and assessed him to salaries tax with reference to section 8(1A) of the Inland Revenue Ordinance. For the year of assessment 1st April 1974 – 31st March 1975, the amount of salary to be included in assessable income was therefore

$$\$166,684 \quad (\$180,000 \quad x \quad \frac{338}{365} \quad)$$

The main issue in the appeal however was in regard to the rental value of the free accommodation provided to the appellant, such rental value being a benefit to be taken into account for assessment purposes as constituting "income from employment" by virtue of section 9 of the Ordinance.

The Commissioner's valuation of the quarters was based on the appellant's total employment income for that year (i.e. percentage of the sum $180,000) whereas the appellant contended that it should have been expressed as a percentage of the sum $166,684 being the amount of salary attributable to his services in Hong Kong. The appellant also argued that section 9(1) of the Ordinance should be read in "pari materia" with section 8(1) so that the words "income from employment" meant income from employment chargeable to tax.

[Note: This decision is at variance with that given in Case No. BR 25/69. The Commissioner of Inland Revenue has accepted this later decision as that to be followed in any future case.]

Decision: Appeal allowed. Rental value to be ascertained having regard to section 8(1A). Case remitted to the Commissioner to revise assessments.

B.J. Fludder for the appellant.
Chan Kam-cheong for the Commissioner of Inland Revenue.

Cases referred to:-

1. Prince v. Phillips, 39 T.C. 477.
2. Mapp v. Oram, 45 T.C. 651.

Reasons:

The Appellant was employed by a firm in Nassau, Bahamas to represent the interest of the firm's international organization generally in the South East Asia Region during the period from March 1974 to December 1975. His salary during the year ended the 31st of March 1975 and the period between 1st April 1975 to 31st December 1975 was $180,000 and $135,000 respectively. In Hong Kong the rent-free quarters provided to him were as follows:

1/4/74 to 30/4/74:	One room in a hotel
1/5/74 to 14/1/76:	One flat

During the period 1st April 1974 to 31st December 1795 the Appellant spent most of his time in Hong Kong and part of his time outside Hong Kong; in addition he also took leave of 42 days. In tabulated form the particulars are:

	1/4/74 to 31/3/75	*1/4/75 to 31/12/75*
No. of days working in H.K…….....	338	199
No. of days working outside H.K. ……..	27	34
Total working days …….	365	233
No. of days on leave ……	-	42
Total number of days in period ……	365	275
Salary for the period ……	$180,000	$135,000

The main question that arises in this appeal relates to the assessment of the rental value for the purposes of salaries tax.

In raising salaries tax assessment on the Appellant the Assessor took into account such part of the Appellant's salary as is referable to the number of days he worked in Hong

Kong under section 8(1A). This is because it is not disputed that the Appellant's source of income did not arise in nor was it derived from Hong Kong. Strictly speaking, but for section 8(1A), he would not be caught by section 8(1). If the Appellant had not been in the Colony or if his length of stay in Hong Kong had not exceeded 60 days he would not have been liable to salaries tax at all even if free accommodation had been given to him in Hong Kong which was occupied by his wife and family throughout the year. But as he was in the Colony for more than 60 days he is chargeable to tax on his income attributable to the number of days he worked in the Colony. Hence, as he rendered services in the Colony for 338 days in the year ended 31st March 1975, 338 his chargeable income would be $166,684 ($180,000 x $\frac{338}{365}$) less such allowances as are permitted under the Ordinance. Thus far, there is no dispute.

Now, what is his chargeable income where he is given free accommodation during his stay in the Colony? Here is where the dispute lies.

The value of free accommodation (known as "rental value") is a benefit which an employee must take into account for the purpose of computing his taxable income because section 9 of the Ordinance provides that his "income from employment" includes "rental value" which is to be measured by taking the appropriate percentage of his income. The Commissioner's computation for the year ended 31st March 1975 is as follows:

Year of Assessment 1974/75

Employment income for y.e. 31/3/75 ……		$180,000
Amount attributable to services in the Colony		
$180,000 x $\frac{338}{365}$ ……...		166,684
Add: Value of Quarters		
3% x $180,000 x $\frac{1}{12}$ ……..…	$ 450	
7½% x $180,000 x $\frac{11}{12}$ …….....	12,375	12,825
		179,509
Less: Allowances – Section 13 Proviso (b) ……..…….		Nil
Net Chargeable Income ……...		$179,509
Total Tax Payable ……		$ 26,926

The Appellant contends that the value of quarters shown by the percentages should be in relation to $166,684 and not $180,000, because section 9(1) must be read in "pari material" with section 8(1) and, accordingly, the words "income from employment" mean income from employment chargeable to tax.

In **Prince v. Phillips**[1]**,** the view was taken that "income" in section 212 of the Income Tax Act 1952 was not a loose expression but meant income in the same general sense as is meant elsewhere in the Act, that is to say, income for income tax purposes. The case of **Mapp. v. Oram**[2] was also concerned with the interpretation of the word "income" in the Income Tax Acts. In that case, Lord Hodson (at page 677) said:-

> "To return to the rival contentions as to the meaning of the wording in s. 212(4), the taxpayer relies wholly on the submission that the "income" means income chargeable to tax. I agree with Ungoed-Thomas J. and with Dankwerts L. J. that the word "income" in the Income Tax Acts is apt to mean taxable income even if it is not always used with that meaning. Lord Macmillan in *Astor v. Perry* (1935) A.C. 398 (the decision was subsequently reversed by s. 411 of the Income Tax Act 1952 but that does not affect the validity of Lord Macmillan's dictum) referred to "any income" in the Income Tax Act 1918 as being reasonably construed to mean any income chargeable with tax. Again, in *Whitney* v. *Commissioners of Inland Revenue* (1926) A.C. 37 it was said by Lord Wrenbury in the case of a non-resident American who received income from the United Kingdom that the word "income" in the Income Tax Acts means "such income as is within the Act taxable under the Act".
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> "Moreover, no violence is done to the language used if the words "an income" in a taxing Act are interpreted as referring to the income which is chargable to tax under the Act, because that is the income which is relevant for the purposes of the Act: *Whitney* v. *Commissioners of Inland Revenue* (1926) A.C. 37, at pages 55-6, *Astor* v. *Perry* (1935) A.C. 398, at page 419" .- per Lord Pearson at page 683.
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> "My Lords, it is a trite remark that "income" has many different meanings in as many different contexts. But in my opinion in an Income Tax Act the approach to the construction of that word is that it is income chargeable to tax under our system of taxation laws. This was so stated by Lord Macmillan in *Astor v. Perry* (1935) A.C. 398, and by Lord Wrenbury in *Whitney* v. *Commissioners of Inland Revenue* (1926) A.C. 37. But this is only an approach: it is not a rule of construction only to be displaced if the context otherwise requires. There are many cases, as my noble and learned friend Lord Hodson has pointed out in his speech, where the word "income" in a taxing Act is used to include income not chargeable to tax". – , per Lord Upjohn at page 681.

We think the Appellant may well be right in his interpretation of section 9(1). This section commences with the words:

"Income from any office or employment includes ..." These words appear to us as being intended to explain and define by way of clarification the meaning of the words "income from office or employment" as used in section 8 which is the charging section and which

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1 39 T.C. 477.
2 45 T.C. 651.

relates to chargeable income. If this is so then the following computation based on the Appellant's contention would be correct:

Year of Assessment 1974/75

Amount attributable to services in the H.K.		
$180,000 x $\frac{338}{365}$ ……...		166,684
Add: Value of Quarters		
3% x $166,684 x $\frac{1}{12}$ ……..…	$ 417	
7½% x $166,684 x $\frac{11}{12}$ ……...	11,459	11,876
		178560
Less: Allowances – Section 13 Proviso (b) ……..…….		Nil
Net Chargeable Income ……...		$178,560
Total Tax Payable ……		$ 26,784

The Commissioner's reason for his determination is, however, an interesting one. He says that since free residence was provided to the Appellant in Hong Kong for the whole year that part of his income which consists of the "rental value" arose in or was derived from the Colony.

Irrespective of whether the Appellant's construction of section 9(1) is correct – and we are inclined to think it is – it would seem to us that on probative reasoning the Appellant's objection must be upheld whichever way one looks at the case.

For the purpose of this appeal, section 9(1) says nothing more than this: The Appellant's "income" is his salary plus rental value. As an example, let us take the year ended 31st March 1975. The case for the Revenue is that the Appellant's fixed salary is $180,000; the rental value is $12,825. If the word "income" in section 9(1) does not mean chargeable income or is wide enough to cover non-taxable income then the Appellant's income for that year is $192,825 ($180,000 + $12,825). Having determined that his "income" is $192,825, then his chargeable income under section 8(1A) is:

$$\$192,825 \times \frac{338}{365} = \$178,560,$$

which produces the same figure if the computation is worked out on the basis of the contention advanced by the Appellant.

It is important to bear in mind that the Appellant's income does not consist of separate and independent parts that can, by dichotomy, be treated as two separate incomes. The Appellant has but one income under one contract. It is common ground that the income he receives under his contract is from a source outside Hong Kong. This is why his chargeability to tax arises under section 8(1A) and not under section 8(1). Because the

Revenue recognizes and accepts that his "income" did not arise in nor was derived from the Colony, he is only taxed on the proportion which his income bears to the number of days he has rendered services in the Colony. If that is what has been done in regard to his cash emolument so the same must also apply to the rental value because his "income" is the combination of the two. He does not have a separate contract for rental value. A mode of approach would be this: as the consideration he receives is under one contract for services which he rendered, you look to the facts to determine whether his "income" from the contract arises in or is derived from the Colony. If the answer is in the negative, then section 8(1) does not apply but he may be caught under section 8(1A) depending on how many days he has served in the Colony. Section 9(1) does no more than to state, by way of statutory amplification, what his income includes to enable one to compute his "income", for tax purposes, in monetary figures. Section 9(1) is not a charging section nor is it intended to formulate some sort of a test to be applied in determining whether income arises in or is derived from the Colony. The Appellant's income is not derived from Hong Kong merely because his employers pay his rent in Hong Kong. Free quarters is nothing more than a fringe benefit which you value for salaries tax purposes. Having made a valuation in terms of the Ordinance you tack it on to his salary and compute his tax liability under section 8(1A) in the same way as if he had not been given free accommodation.

It is unfortunate in this case that the Appellant is no longer in Hong Kong. He was represented by his tax representative and as a result of some questions asked by us, replies were given by the Appellant to his tax representatives by telex. Such a situation is not entirely satisfactory. However, the Commissioner's representative conceded that the Appellant's employers were not under a legal obligation to provide the Appellant with free accommodation for one year irrespective of how long the Appellant was required to be in Hong Kong. It was conceded, for instance, that if the Appellant had rendered services in the Colony for 3 months after which he was posted elsewhere or if he decided to serve his employers in some other region in South East Asia (which is a decision we are told that the Appellant could himself make), his employers would not be legally bound to continue maintaining a flat for him in Hong Kong. In fairness to the Commissioner's representative we should add that he was, however, not prepared to concede that the Appellant's employers had no obligation to continue providing him with free accommodation in Hong Kong if his absence from the Colony was for short periods to perform services abroad but intending to return to Hong Kong. In this connection it may well be that as a matter of convenience it may not have been practical for the Appellant's employers to give up the flat. We are told, however, quite positively by the Appellant's representative, but without direct evidence, that free accommodation was provided for one year because that was the Appellant's estimated length of stay in Hong Kong.

It is our view that if, which appears reasonable and as conceded by the Commissioner's representative, the Appellant's employers were not under a contractual obligation to grant the Appellant free accommodation for one year or any specified length of time in Hong Kong, then the Appellant did not, by his employment, earn a right to free quarters for the whole year. Accordingly, there can in any event be no justification in assessing rental value without regard to section 8(1A).

For the reasons given, the appeal on this point is allowed so that rental value is to be ascertained by having regard to section 8(1A). This case is, therefore, remitted to the Commissioner to revise the assessments for 1974/75 and 1975/76 accordingly.

The assessments appealed against were also on the ground that the Appellant applied for and was refused Personal Assessment. This ground of appeal appears to be misconceived. We are told by the Commissioner's representative that it was necessary to defer the question of Personal Assessment until the issue on the Rental Value had been resolved for which reason no decision has yet been made on the application for Personal Assessment. This ground of appeal is, therefore, premature.