Case No. BR 25/69

Board of Review:

S. V. Gittins, Q.C., *Chairman*, O. V. Cheung, Q.C., Albert Kwok and Lam Tat Sam, *Members.*

4th March 1970.

Salaries tax—rental value—whether to be computed on the proportion of salary chargeable during periods of residence in Hong Kong or on the whole annual salary—Inland Revenue Ordinance, sections 8(1), 9(1)(*a*) and (*b*) and 9(2).

The appellant was charged tax on the proportion of his salary for the periods he was resident in Hong Kong and not for the periods he was away from the Colony. His rental value was computed under section 9(2) at 7½% of his salary for the whole year of assessment. On appeal.

Decision: Assessment appealed against confirmed (Chairman exercising his casting vote).

D. A. S. Hart for the Appellant.

H. A. Scott, Senior Assessor, for Commissioner of Inland Revenue.

Case referred to:—Mapp v. Oram, (1969) 3 W.L.R. 557.

Reasons:

The issue on the appeal was the amount of rental value to be added to the taxpayer's salary to constitute his income chargeable to tax. Although he was charged on the proportion of his salary for the periods he was resident in Hong Kong and not for the periods he was away from the Colony, his rental value had been assessed under section 9(2) at 7½% of his salary for each of the whole of 3 years of assessment.

He appealed on the ground that "the Rental Value has been incorrectly calculated on an amount which includes income for services rendered outside Hong Kong which income is not chargeable to tax under section 8" and that since such income was not chargeable to Salaries Tax it should not "be included by virtue of section 9(1)(*a*) in the calculation of the Rental Value".

It was submitted on behalf of the taxpayer—

(*a*) section 8(1) was the charging section;

(*b*) this limited the income chargeable to salaries tax to income arising in or derived from the Colony from the source of any office or employment from profit;

(*c*) the taxpayer's source of income was in the U.S.A.;

(*d*) section 9 did not extend the charging section, section 8; and

(*e*) section 9(1)(*a*) can only refer to income chargeable to tax, i.e., the income from services rendered in Hong Kong.

The taxpayer's representative cited the case of **Mapp v. Oram**[1] as authority for the proposition that "income" meant income chargeable to tax.

We are of the view that the case of **Mapp v. Oram**[1] does not decide that the word "income" in every taxing statute means income chargeable to tax. The ratio decidendi in that case was limited to the words "entitled in his own right to an income" in section 212(4) of the Income Tax Act 1952. Lord Upjohn in that case at p. 566 said :—

> "My Lord, 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 Macmillian in *Astor v. Perry* (1935) A.C. 398 and by Lord Wrenbury in the case of *Whitney v. Inland Revenue Commissioners* (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".

It is true that in their speeches the learned Lords of Appeal were unanimous in thinking that the word "income" in an Income Tax Act is apt to mean taxable income and "any income" should reasonably be construed to mean "any income chargeable to tax" (per Lord Hodson, p. 562 G, per Lord Dilhorne, p. 564 F, per Lord Upjohn, p. 566 H, per Pearson, p. 569 A), but their Lordships were equally careful to say that the word "income" might in the context in which it is used, require a different and wider construction.

It seems clear that section 9(1) in defining income from employment is all embracing and paragraph (*a*) thereof is not limited to income arising in or derived from the Colony. It is by virtue of section 8(1) that only that portion of the income under section 9(1)(*a*) which arises in or is derived from the Colony is charged. Section 8(1) therefore limits the chargeable portion of the income defined in section 9(1)(*a*).

We find it difficult to read such limitation into section 9(1)(*b*)—"the rental value of any place of residence provided by the employer". Section 9(2) provides for the computation of the rental value, viz. that it "shall be deemed to be 7½% of the income as

[1] (1969) 3 W.L.R. 557.

described in paragraph (*a*) of subsection (1) derived from the employer for the period during which the place of residence is provided . . .". The taxpayer's income per section 9(1)(*a*) is his whole annual salary, and the period for which the place of residence is provided is the whole year.

The majority opinion of the Board (the Chairman exercising his casting vote under section 65(4)) is that the Determination of the Commissioner is correct and the assessments therein are confirmed. The appeal is therefore dismissed.

DISSENTING DECISION OF MR. ALBERT KWOK

I accept the submissions made on behalf of the taxpayer set out in the third paragraph herein, and agree with his submissions that, following the decision of the House of Lords in **Mapp v. Oram**[1], income means chargeable income, and therefore the rental value for each of the years of assessment should be computed at 7½% on the chargeable income of each year.

I would allow the appeal and remit the case to the Commissioner to review the assessments in accordance with this opinion per section 68(8).

DISSENTING DECISION OF MR. LAM TAT SAM

I have come to the same decision as Mr. Albert Kwok for different reasons.

Section 9(2) lays down the method whereby the rental value under section 9(1)(*b*) is to be calculated. Although the benefit derived by the taxpayer is 12 months exclusive occupation of the residence provided by his employer in each year, since he is only chargeable to salaries tax for the period he is in Hong Kong, he should only be charged for the said benefit for the same proportionate period as his overall income is chargeable for salaries tax.

I would allow the appeal and remit the case to the Commissioner to revise the assessments in accordance with this opinion per section 68(8).

[1] (1969) 3 W.L.R. 557.