Case No. BR 29/75

Board of Review :

L. J. D'Almada Remedios, *Chairman*, Roland K. C. Chow, N. J. Gillanders & Wilfred S. B. Wong, *Members.*

11th September 1976.

Salaries Tax—wage dividend—sum payable to employee of company conditional upon declaration of a dividend to shareholders—whether wage dividend received formed part of employee's emoluments—Inland Revenue Ordinance, section 9—proper rate of exchange to be adopted for conversion purposes.

The taxpayer who was employed by an American company was paid a fixed salary and various allowances in U.S. dollars. He was also paid a sum in U.S. dollars known as a "wage dividend" at the end of the year if in that year there had been a declaration of dividend payable to shareholders. In computing the taxpayer's income for the purposes of salaries tax for the years of assessments 1971/72, 1972/73 and 1973/74 payments received by the taxpayer as wage dividends were taken into account, and for currency conversion purposes the mean rate of exchange for twelve months for the basis period for each year of assessment was adopted. The taxpayer objected to the inclusion of the wage dividends as part of his earnings and complained that the rate of exchange that should be adopted should be the rate prevailing at the time of payment of the tax. On appeal.

Decision: Appeal dismissed.

Anthony P. Fahy for the appellant.
Lau Wing-kit for the Commissioner of Inland Revenue.

Reasons :

This reference concerns assessments for salaries tax for the years of assessments 1971/72, 1972/73 and 1973/74.

The Appellant was employed by a Chemical Company in U.S.A. He earned a fixed salary and was entitled to various allowances that went with his employment for which he was paid in U.S. dollars.

The Appellant's main objection to the assessments is the inclusion by the Assessor of "wage dividends" received by the Appellant as part of his emoluments. A "wage divided" is a sum which the Company pays to its employees annually. The amount payable is calculated in proportion to the employee's accumulated salary over a period of five years based on a percentage of the cash dividend declared by the Company to be payable to its shareholders. There is no certainly that a wage dividend will be payable annually. It depends on the profits made by the Company so that if there is a declaration of a dividend payable to shareholders, employees can expect a "wage dividend" which will be paid at the end of the year. The Appellant's argument is that a wage dividend must be looked upon in the same context as a dividend paid to shareholders because the Company makes these annual payments as an incentive to employees on a policy concept to treat employees as if they were part-shareholders. For this reason, the Appellant contends that "wage dividends" should not be treated as part of his earnings for tax purposes.

The Appellant was not a shareholder of the Company. Although the sum he received is termed a "wage dividend" one must look to the substance of the payment, and not to the label that is used to describe it, for the purpose of determining the nature and quality of its receipt. Strictly speaking, a dividend (in the true sense of the word) is only payable to a shareholder of a company. If a company formulates a scheme whereby a "dividend" is also payable to a person who is not a shareholder but by virtue of his being an employee of the company, such payment, even if it can be regarded in law as a "divident", would not escape salaries tax if the payment falls within the extended statutory meaning of "income form any office or employment" in section 9 of the Inland Revenue Ordinance. There is no doubt in our minds that the wage dividend was part of the Appellant's income form employment. We do not see what else it could be. He would not have received it if he had not been an employee; it was part of his income because it was paid to him in return for his acting as or being an employee. The nature of such payment is akin to the Company having said, in effect: "As an employee you would not only get your remuneration and allowances, but you will also get what we call a "wage dividend" at the end of the year if the Company prospers". In essence, therefore, the expression "wage divided" is just another form of window-dressing for what is in substance a bonus which he can expect to receive by virtue of his serving the Company as an employee. It matters not that it is paid irrespective of whether he serves the Company well or indifferently. As the wage dividend forms part of his emoluments, the fact that there may have been taxation at the source in the United States in respect of such wage dividends does not empower us to pull these chestnuts out of the fire and exclude them for the purpose of computing his Hong Kong income for services rendered.

Rates of Exchange : As the Appellant's salary is paid in U.S. dollars an issue has been taken in regard to the proper rate of exchange for conversion into Hong Kong dollars. The Appellant argues that exchange should be at the actual rate at the time he pays the tax. It has not been explained why the rate should be at the time the tax is paid. The Assessor adopted the mean rate of exchange for twelve months for the basis period for each year of assessment. We think on probative reasoning the Assessor is right. A taxpayer is taxed on a percentage of the income he receives so that such percentage is properly referable to the buying power or value of the currency converted to the Hong Kong dollar equivalent of such currency at the time of its receipt. It would, therefore, be realistic to have regard to the value of the currency during the basis period in Hong Kong dollars and for that purpose to take the mean or average rate for the twelve months of that period. It the strength of the U.S. dollars had risen sharply in value in later years surely it would not be right for a taxpayer to pay more by a calculation of a higher rate than is represented by the value of currency at the time of its receipt. Accordingly, this ground of appeal fails.

The assessments to which this appeal relates are, therefore, remitted to the Commissioner to revise the assessments in accordance with our opinion as above expressed.