Case No. BR 6/70

Board of Review:

S. V. Gittins, Q.C., *Chairman*, O. V. Cheung, Q.C., E. J. V. Hutt and Wilfred S. B. Wong, *Members.*

25th May 1970.

Salaries tax—payments under educational trust for benefit of children of taxpayer—income from employment—perquisite—Inland Revenue Ordinance, sections 8 and 19(1)(*a*).

Payments were made to the bank accounts of the appellant's children under a trust established by the parent company of appellant's employer. The children's school fees were paid by the bank and debited to the children's accounts. The sums paid to the children's bank accounts were charged in additional assessments on the appellant's income. On appeal.

Decision: Additional assessments annulled.

A. A. Iles for the Appellant.

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

Cases referred to:—

1. Barclays Bank Ltd. v. Naylor, 39 T.C. 256; (1961) Ch. 7.
2. Heaton v. Bell, (1969) 48 A.T.C. 73; (1969) 2 W.L.R. 735.
3. Tennant v. Smith, (1892) A.C. 150.
4. Abbott v. Philbin, (1960) 39 T.C. 82.

Reasons:

The parties agreed that the overall facts are as set out in **Barclays Bank Ltd. v. Naylor (H.M. Inspector of Taxes)**[1].

The sole issue in the appeal is whether the payments made to the bank accounts of the taxpayer's children, under the cheme set up by the parent company of the company, the immediate employer of the taxpayer, and set out more fully in the reports of the **Naylor's**

[1] 39 T.C. 256; (1961) Ch. 7.

case[1], are a perquisite under section 9(1)(*a*) and therefore chargeable to tax under section 8 as part of the taxpayer's income.

In **Naylor's** case[1], Cross, J. held that the money constituted income of the child and not that of the parent the taxpayer in the present case.

The Board is of the view that this income of the taxpayer's children was clearly a benefit to him in that it was to be applied for the children's school fees or otherwise for their benefit and thereby relieved the taxpayer from certain financial liabilities.

The Board is also of the opinion that on the facts this benefit enured to the taxpayer by virtue of his employment in Hong Kong.

But the question as to whether such a benefit received by the taxpayer is a perquisite chargeable to tax is one which the Board has had considerable difficulty in resolving. There is some consolation in that in the very recent case of **Heaton v. Bell**[2], the House of Lords only decided by a majority of 3 to 2 that the benefit received by the taxpayer in that case was a taxable perquisite. In so doing the House of Lords reversed the judgment of the Court of Appeal.

In **Tennant v. Smith**[3], the House of Lords unanimously held that the benefit received by the taxpayer was not taxable. There it consisted of the privilege of rent free accommodation provided by his employer in which the taxpayer was required to reside as a condition of his employment and which he was not entitled to sublet.

The facts are different from the case before the Board where the benefit was provided by the parent company of the employer through a scheme involving a discretionary trust, and there was no compulsion on the taxpayer to participate.

In Tennant v. Smith[3]:—

(*a*) At p. 162, Lord Macnaghten said : "I do not doubt that the occupation of the bank house rent free, . . . is, on the whole, a considerable gain to the appellant. It is a gain in the popular sense of the word. Whether such a profit or gain comes under the head of 'profit or gains' chargeable for income tax purposes is the question submitted to your Lordships". And at p. 163 : "The real answer is, that the thing which the Crown now seeks to charge is not income, nor is it required to be taken into account as income for the purpose of ascertaining title to relief . . ." And at p. 164 : "But a person is chargeable for income tax . . . not on what saves his pocket, but on what goes into his pocket".

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[1] 39 T.C. 256; (1961) Ch. 7.
[2] (1969) 48 A.T.C. 73; (1969) 2 W.L.R. 735.
[3] (1892) A.C. 150.

(*b*) At p. 164, Lord Field said : ". . . the residence of the appellant . . . which although rent free could not be converted by him into money or money's worth, cannot be held to be either a gain, profit, perquisite, or emolument, within the meaning of the statutes".

(*c*) At p. 165, Lord Hannen said : "Different considerations would apply to the case of an agent who as part of his remuneration has a residence provided for him which he might let. That which could be converted into money might reasonably be regarded as money—but that is not the case before us . . . I am of the opinion that the occupation of this house does not fall within the description of 'salaries, fees, wages, perquisites, profits or emoluments' in the sense in which those words are used in the Act".

Tennant v. Smith[3] was commented on by Lord Radcliffe in **Abbott v. Philbin**[4]—

"The basis of the Crown's claim in *Tennant v. Smith* was really to tax the Bank manager on expenditure which he was saved, not on any money that he got, or could get . . . I think that it has been assumed that this decision (*Tennant v. Smith*) does impose a limitation upon the taxability of benefits in kind which are of a personal nature, in that it is not enough to say that they have a value to which there can be assigned a monetary equivalent. If they are by their nature incapable of being turned into money by the recipient they are not taxable, even though they are in any ordinary sense of the word of value to him".

The speeches delivered in **Heaton v. Bell**[2], do not detract from these statements of the law. Lord Morris said [(1969) 2 W.L.R. at p. 754] :—

"Tax is chargeable on the "full amount" of the respondent's emoluments. The expression 'emoluments' includes all salaries, fees, wages, perquisites and profits. The tax being a tax upon income or (as Lord Macnaghten said in *Tennant v. Smith*) on what 'comes in' the word 'amount' denotes that in order to be taxable a perquisite must either be a cash or money payment or must be money's worth or of money value in the sense that it can be turned to pecuniary account. This conception in regard to the nature of a taxable perquisite was, in my view, revealed in earlier Acts. Thus, under the Income Tax Act, 1918, in reference to the sums to be charged to tax under Schedule E are the words 'the annual amount thereof'. In the Income Tax Act 1842, in reference to perquisite to be assessed there occurs the word 'payable'. This denotes that the mere fact that a benefit in kind accrues does not mean that there is a perquisite which is taxable".

Lord Upjohn said (ibid at p. 761) :—

"My Lords, I think the officious bystander uninstructed in the law would say that for an employee to have the use of a brand new car licensed and insured for himself and his family

[2] (1969) 48 A.T.C. 73; (1969) 2 W.L.R. 735.
[3] (1892) A.C. 150.
[4] (1960) 39 T.C. 82 at p. 124.

and not at all for the purposes of the employer at a rate in the neighbourhood of £2 to £3 a week would be a valuable perquisite if the employee liked to avail himself of it. But that is not the test; the word 'emolument' (of which the word 'perquisite' is only an example) in the Income Tax Acts means an incoming in the sense of a money incoming; a benefit such as the right or indeed obligation (for in the case I am about to mention no difference was made between the two) to live in a house free was not an incoming merely because it relieved the taxpayer from the obligation he would in commonsense otherwise be under of providing a roof over his head. All this was decided in your Lordships' House in *Tennant v. Smith* where it was pointed out, however, that profits or perquisites in kind readily convertible into money might be taxable as though they had been money received. This principle has been repeatedly approved . . .".

Lord Diplock said (ibid at p. 763) :—

"For my part, if it were permissible to confine myself to a consideration of the relevant words in the current Statutes (namely the Income Tax Act 1952, and the Finance Act 1956), by which income tax under Schedule E is currently charged, I should have little hesitation in deciding that the free use of a car for his own purposes provided to an employee by an employer by reason of his employment was perquisite from that employment and that the full amount of that perquisite on which tax is chargeable was the amount of money which the employee would have had to pay upon the open market for a right to use a car on similar terms as to its user. I have no doubt that the man in the street would call the benefit of the use of the car, if not a 'perquisite' at any rate a 'perk'.

But it is I fear too late to read the relevant words of the current legislation in what I should regard as being their current acceptation. In *Tennant v. Smith* the House of Lords placed a judicial gloss upon the word "perquisite' appearing in the corresponding sections of the Income Tax Act 1842 by confining it to actual money payments and to benefits in kind variously described by Lord Halsbury L.C. at p. 156 as 'capable of being turned into money', by Lord Watson, at p. 159 as 'that which can be turned to pecuniary account' by Lord Macnaghten, at p. 163, as 'payments convertible into money' and Lord Hannen, at p. 165, as 'that which could be converted into money'. Lord Halsbury and Lord Watson expressly found their conclusion upon the presence in the definition of 'perquisite' in the statute they were construing of the adjective 'payable' qualifying the 'perquisite' to be assessed under that Act. But Lord Macnaghten and Lord Hannen did not base their gloss upon the meaning of 'perquisite' on this narrow ground. In the Income Tax Act 1918, the relevant sections were redrafted and in the process the word "payable' disappeared, but this professed to be a consolidation Act and the presumption is that the change in wording was not intended to give to the new enactment a meaning different from that of the enactment which it replaced. Further changes in drafting and arrangement which were made by subsequent legislation, including the Income Tax Act 1952 and the Finance Act 1956 which are applicable to the present appeal, have not, in my view, affected the meaning which the word 'perquisite' bore in the Income Tax Act 1918. I think that it must be accepted that 'perquisite' in each of these subsequent statutes still means what it meant in the Income Tax Act 1842. The judicial gloss placed on the expression 'perquisite' in *Tennant v. Smith* has been consistently accepted by the courts in subsequent cases and in particular by your Lordships' House in *Abbott v. Philbin*".

This interpretation of the word “perquisite”, so consistently followed since 1892 must have been well known to the framers of our Ordinance, and one must assume that the Legislature intended it to bear the meaning which had been given to it for over half a century.

In the case before the Board the benefit to the taxpayer could not be turned into money for use on his own account, and for this reason, on the authorities cited above, the Board holds that the additional assessments are not perquisites which are taxable as part of the taxpayer’s income.

The appeal is allowed and the assessments discharged.

The Board has noted that the taxpayer’s employer has not sought to deduct as an expense for profits tax, the amounts sought to be charged in this case.