Case No. D11/88

Salaries tax – removal allowance – taxpayer obliged by his contract of employment to change residence – whether moving allowance provided for this purpose was subject to salaries tax – s 9(1)(a) of the Inland Revenue Ordinance.

Salaries tax – removal expenses – taxpayer obliged by his contract of employment to change residence – whether expenses incurred in moving were deductible – s 12(1)(a) of the Inland Revenue Ordinance.

Panel: Charles A Ching QC (chairman), Stephen Lau Man-lung and Lincoln Yung Chu-kuen.

Date of hearing: 9 October 1986.
Date of decision: 25 May 1988.

The taxpayer, a civil servant received a removal allowance from his employer when he was ordered to move into a new residence. He moved reluctantly, but was obliged to do so under his contract of employment.

The Commissioner assessed the allowance to salaries tax. The taxpayer appealed.

Held:

The removal allowance was assessable to salaries tax.

(a) The allowance arose from the taxpayer's employment: it was received under the terms of his contract of employment, and not under a collateral contract.

(b) The fact that the taxpayer was required under his contract of employment to move was irrelevant.

(c) The moving expenses actually incurred by the taxpayer were not deductible: they were not wholly, exclusively and necessarily incurred in the production of the taxpayer's income.

Appeal dismissed.

Cases referred to:

BR 15/77 IRBRD, vol 1, 298
CIR v Humphrey (1970) 1 HKTC 451
Friedson v The Rev F H Glyn-Thomas (1922) 8 TC 302
Hochstrasser v Mayes (1959) 38 TC 673

T J Richmond for the Commissioner of Inland Revenue.
Chan Lee Yin Ping for the taxpayer.

Decision:

The facts in this case were agreed and we therefore heard no evidence. It was also agreed by Mr T J Richmond, who appeared for the Inland Revenue Department, that for the purpose of this appeal Australian tax law was substantially the same as that in Hong Kong.

The Taxpayer was employed by the Hong Kong Government. It was part of his terms of employment that he was to live where directed, the premises beings supplied by his employer. He was posted to a reception centre where he was provided with quarters in which he, his wife and his son lived. He was there for six years. He was then posted to another centre and was required to move there. This he did with reluctance: the environment was not suitable for his wife and son, and his son had to be placed in a new school. However, he had no choice. He did move and his employer paid him a removal allowance in the sum of $4,200. Of that sum, roughly $3,000 was an accountable allowance for which he had to provide receipts. The balance consisted of a non-accountable allowance which he would have received whether or not he had spent it. He made the arrangements for the removal himself and paid the removers directly. He did not have to apply for casual or vacation leave on the day of removal, being treated as if he were at work. There is no dispute as to the non-accountable allowance. The Taxpayer appeals against the inclusion of the accountable allowance in his assessable income for the purposes of salaries tax.

The Taxpayer relied upon the decision in Hochstrasser v Mayes (1959) 38 TC 673. In that case, an employee was offered and accepted a transfer in his place of work. His employer had a policy of assisting its employees in their accommodation and did so when he moved. It was held that the payments made by the employer in that regard were not profits accruing by virtue of an office or employment and were therefore not assessable to tax. The Taxpayer in the present case argues that his position is stronger in that he was required to move by the terms of his employment and in that, even on the day of removal, during which we assume he was not in fact at work, he was regarded as being at work and did not have to apply for casual or vacation leave.

We find that the decision in Hochstrasser v Mayes is not relevant to the present case. The ratio in that case was that, although the taxpayer would not have received the benefits he did receive unless he were an employee, he did not receive them under the terms

of his employment but under a collateral contract. That is not so here. The Taxpayer received the removal allowance under the terms of his contract of employment.

The Taxpayer also agreed that his removal was a part of his duty. He pointed out that by the terms of his employment he was to live where directed. He also pointed out that, since he had not needed to apply for causal or vacation leave on the day of removal, he was regarded as being 'on duty' while he was not in fact at work. Numerous authorities were cited to us by Mr Richmond, the Taxpayer being represented by his wife. In CIR v Humphrey (1970) 1 HKTC 451, the taxpayer was requested by his employer to take his car to work so that it could be used for the purposes of his work, and he was paid a mileage allowance. It was held that that allowance was a part of his assessable income. In Friedson v The Rev F H Glyn-Thomas (1922) 8 TC 302, a curate was removed to another curacy and claimed deductions for his removal expenses. It was held that the deductions could not be permitted since they were not expenses necessarily incurred in the performance of his duties as a curate. In BR 15/77 IRBRD, vol 1, 298 the taxpayer, a government servant in Hong Kong, received an overseas education allowance for his children. It was held that this was part of his assessable income for the purposes of salaries tax, since it was paid under his terms of employment.

We cannot see that the Taxpayer in the present case was in a position any different from any other employee who is required to get himself to work and who is then reimbursed some or all of his travelling expenses. It was his duty to comply with the direction as to where he should live for the purposes of his work, but equally it is the duty of any employee to go to, although perhaps not to live at, his place of work. The fact that he did not have to apply for casual or vacation leave in order to move cannot affect this. For the same reasons we find that the removal expenses were not wholly, necessarily and exclusively incurred to produce his income.

The Taxpayer referred us to Taxation Ruling IT2173 of the Australian Taxation Office Rulings and Guidelines. This shows that, in Australia, where an employer transfers an employee from one locality of employment to another and pays the employee removal expenses, it is the practice not to treat the amount received by the employee as assessable income. This may well be so. However, Mr Richmond's concession went only so far as agreeing that the Australian tax law was substantially the same as in Hong Kong. As we understand it, the Ruling we were shown amounted only to a matter of practice and not of law.

We therefore find that the removal allowance in the present case was, as its name suggests, an allowance from the Taxpayer's employment under section 9 of the Inland Revenue Ordinance and was therefore properly included in his assessable income. For these reasons we dismiss the appeal.