INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D13/89

Salaries tax – removal allowance – whether income arising from any office or employment – sections 8(1) and 9(1) of Inland Revenue Ordinance.

Panel: Henry Littion QC (chairman), Joseph S Brooker and Geoffrey Hui.

Date of hearing: 26 April 1989.
Date of decision: 13 May 1989.

The taxpayer was a Hong Kong Government employee who was provided with quarters. The taxpayer was required by his employer to move from the quarters provided to him and was paid a removal allowance to cover the removal expenses and other outgoings incurred by him. The taxpayer agreed that the removal expenses incurred by him were not capable of being deducted as an expense from his income for salaries tax purpose. Instead he argued that the removal allowance was not connected with the services which he performed as part of his employment and accordingly did not arise from his employment.

Held:

The removal allowance was taxable income arising from the office or employment of the taxpayer with the Hong Kong Government.

Appeal dismissed.

Cases referred to:

Hochstrasser v Mayes 38 TC 673
CIR v Humphrey [1970] 1 HKTC 451

Tse Yue Keung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Introduction

1. This appeal concerns the liability of the Taxpayer to salaries tax in respect of a sum of $4,575 received by him from his employer by way of 'removal allowance'.

Facts

2. The Taxpayer is employed by the Hong Kong Government as an assessor of the Inland Revenue Department and arrived (with his wife) in Hong Kong to take up his employment in the year 1979. He and his family were first lodged in an hotel and were subsequently allocated quarters by the Government: that is to say, a domestic flat on Hong Kong island on which the Hong Kong Government had a lease with the owner.

3. In March 1985 the Government told the Taxpayer that it had been decided to relinquish the lease on the flat and the Taxpayer and his family were, accordingly, 'directed to move'. This relinquishment of the lease on the flat occupied by the Taxpayer was, apparently, pursuant to a policy decision taken by the Government under what was called the 'De-leasing Programme 1985/86', which was wholly unconnected with the duties of the individual occupants of the quarters.

4. Under the relevant Civil Service Regulations the Taxpayer was, in the circumstances, entitled to claim from the Government a removal allowance to cover removal expenses and other outgoings (such as, for example, the cost of modifications to curtains, carpets etc). Certain expenses did not have to be vouched; others had to be supported by receipts.

5. In the course of removal from his flat on Hong Kong island, the Taxpayer incurred expenditure which, in fact, probably exceeded that which he subsequently claimed. The total expenditure, for which the Taxpayer claimed, was the sum of $4,575.

Salaries Tax Return

6. In the salaries tax return form which the Taxpayer completed for 1985/86, the Taxpayer filled in the 'box' headed 'Any other reward, allowance, perquisites etc' as follows:

Removal Allowance	$ 4,575
Local Education Allowance	$13,350

In the 'box' for 'Outgoings and Expenses' the Taxpayer then claimed the sum of $4,575 by way of 'removal expenses'.

The Hearing

7. At the hearing before us, the Taxpayer abandoned the claim of $4,575 as an allowable deduction. Upon the facts, this concession was plainly correct. The appeal

therefore boiled down to one point: did the sum of $4,575 constitute 'income arising from any office or employment of profit' in terms of section 8 of the Inland Revenue Ordinance so as to bring the income within the charge to salaries tax?

Section 8(1) of the Inland Revenue Ordinance

8. At first blush, it would seem oppressive to bring the removal allowance in this case within the charge to salaries tax. The Taxpayer did not choose to remove from his quarters; he was required by the Government to do so pursuant to the Government's De-leasing Programme. He had undoubtedly incurred expenses in the course of removal, and the intention of the Civil Service Regulations was plainly to recompense him for such expenses. And yet, by bringing the sum in question within the charge to salaries tax, the Taxpayer had to pay back part of that sum to his employer by way of tax. However, we are not here concerned with the abstract justice of the matter; we are concerned with the proper construction of the provisions of the Inland Revenue Ordinance as they apply to the circumstances of this case.

9. In essence, the Taxpayer's argument is that the sum of $4,575 received by him by way of 'removal allowance' did not 'arise from' his employment and does not therefore come within the charge to profits tax under the Ordinance. In support of his argument the Taxpayer referred us to the well known case of Hochstrasser v Mayes 38 TC 673. The question there was whether a payment received by an employee from his employer to recompense him for loss incurred on the re-sale of a house (sold when the employee was transferred from his place of employment) was chargeable to tax under the Income Tax Acts. The important question there was whether the sum received by the employee came within the scope of 'salaries, fees, wages, perquisites or profits whatsoever' arising from the employment, as those words are understood in the context of schedule E to the Income Tax Acts. Having regard to the scheme of the statutory provisions in the United Kingdom, the Court came to the view that the sum in question was not taxable. The passage in the judgments upon which the Taxpayer in this case particularly relied (in the judgment of Upjohn J, at page 685 and adopted by Viscount Simmonds at page 705) was to this effect:

> '... in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future'.

10. Ultimately, what we are required to do in this case is construe the provisions of the Hong Kong statute, and we have to be careful in applying case-law from overseas such as Hochstrasser v Mayes which deals with a different statutory scheme. 'The authorities' to which Upjohn J referred in his judgment (as quoted above) concern the proper construction of the United Kingdom Acts which are not in identical terms to the Hong Kong statute, though many of the expressions used in the United Kingdom Acts and in the Hong Kong

statute are similar. The charge to salaries tax under section 8(1) of the Inland Revenue Ordinance is in respect of the taxpayer's income arising in or derived from Hong Kong from his employment. If the section stood alone, there would be a strong case for looking closely at the English authorities to see how the words 'income arising from employment' appearing in the United Kingdom statutes have been construed. But section 8(1) of the Ordinance does not stand alone. It is followed by section 9(1) which reads:

> 'Income from any office or employment includes –
>
> (a) any wages, salary, leave-pay, fee, commission, bonus, gratuity, perquisite or allowance, whether derived from the employer or others ...'

These words are very wide, and in construing section 8(1) effect have to be given to them. There is in our view no room for reading into section 9(1) some implied limitation such as 'provided that the income is received by him in the nature of a reward for services past, present or future', or 'provided that the payment is made in reference to the services the employee renders by virtue of his office'; (these are the words of qualification quoted in the judgment of Upjohn J in the Hochstrasser case). To do so is to read into the statute words which are simply not there. Looking a little more closely at section 9(1)(a) one sees for instance the exception in sub-paragraph (iii):

> 'Except –
>
> Any allowance paid by an employer to an employee for the transportation of the personal effects of the employee in connexion with any journey ... etc'.

Looking at these exceptions, and having regard to the sweeping terms of section 9(1), the implication must be that any payment received by the employee from the employer which could fairly come within the scope of the word 'allowance' is swept within the charge to salaries tax by the provisions of section 9(1), unless the allowance falls within one of the exceptions.

11. Obviously, there must be some limit to the expression 'allowance' in section 9(1)(a). A limitation is in fact suggested in the judgment of Mills-Owen J in CIR v Humphrey [1970] 1 HKTC 451 at 487 where the learned judge made a distinction between a 'contribution to his (the employee's) expenses' and reimbursement of the employer's expenses initially incurred by the employee on the employer's behalf. In the latter case, the payment would plainly be outside the charge to salaries tax. Although Mills-Owen J made no express reference to 'allowance' in section 9(1) (a) (and Blair-Kerr J at p 465 in the Humphrey case said that he found section 9(1) of no assistance in reaching his conclusion) it seems to us that a way of limiting the scope of the expression 'allowance' in section 9(1)(a) is to draw the distinction suggested by Mills-Owen J as quoted above. His judgment is to the effect that when the payment is 'contribution to the employee's expenses' it comes within the section 8(1) charge to salaries tax; it must follow that anything by way of contribution to the employee's expenses which could fairly come within the expression

'perquisite', 'allowance' etc would be within the scope of section 9(1)(a); but reimbursement of employer's expenses would be outside both sections.

12. Here, the Taxpayer received the allowance because he was entitled to do so under the terms of his employment. He was entitled to be provided with Government quarters: but upon terms. One of the terms was that in the event of removal, he should receive a removal allowance calculated in accordance with the Civil Service Regulations. Whilst the removal had nothing to do with his services qua employee, the allowance was nevertheless paid with reference to his position as employee and had the effect of enhancing the package of remuneration he received from his employer.

13. In these circumstances, the allowance was plainly income from his office or employment with the Hong Kong Government. The appeal is accordingly dismissed.