Case No. D18/94

Salaries tax – whether motor car expenses deductible for salaries tax purposes.

Panel: William Turnbull (chairman), Eugene Ho and Winston Lo Yau Lai.

Dates of hearing: 28 July 1993 and 4 March 1994.
Date of decision: 17 June 1994

The taxpayer incurred expenses in relation to his motor car. He claimed that he was required to visit building sites in the course of his employment and that the use by himself of his motor car for this purpose should be an allowable deduction for salaries tax purposes. The employer of the taxpayer paid to the taxpayer a mileage allowance in respect of the use by the taxpayer of his motor car.

Held:

As a matter of fact it was necessary for the taxpayer to use his private car in relation to his employer's business. The question to be decided by the Board was whether or not the mileage allowance paid by the employer covered all of the relevant expenses incurred by the taxpayer. The mileage allowance was a contractual agreement between the taxpayer and his employer and fully covered the cost of the taxpayer using his motor car. Furthermore the taxpayer was not allowed to claim any depreciation allowance in respect of the motor car.

Appeal dismissed.

Cases referred to:

D89/89, IRBRD, vol 6, 328
Ricketts v Colquhoun 10 TC 118
Marsden v CIR 42 TC 329
White v Higginbottom 57 TC 283
Perrons v Spackman 55 TC 403

Chiu Kwok Kit for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a salaries taxpayer against the refusal by the Commissioner to allow the taxpayer to deduct certain expenses and allowances which the taxpayer claimed were deductible in relation to his motor car. The appeal first came before the Board on 28 July 1993. It was adjourned to allow the Taxpayer to arrange to call a witness to support his case because the truth of what he was claiming was being challenged by the Commissioner. The appeal was then scheduled for hearing on 17 December 1993. The matter was further adjourned until 4 March 1994 at the request of one of the parties. The appeal was heard by this Board on 4 and 7 March 1994. The facts of the appeal are as follows:

1. The Taxpayer was employed as a professional by a government subvented organisation (the employer).

2. The duties of the Taxpayer included visiting buildings, sites, and persons in various parts of Hong Kong. In view of the seniority of the Taxpayer within the organisation of the employer, the Taxpayer was authorised to use his private car when travelling on the business of the employer. Because the employer was a government subvented organisation it followed government procedures relating to the use of private motor vehicles on the employer's business and also in relation to the quantum of the mileage allowance payable.

3. When the Taxpayer was first employed by the employer in 1984 he did not own his own private car and was obliged to use public transport to perform his duties. He found that this hindered him in the performance of his duties and after working for one year he purchased his own car. In March 1985 he made application to the employer for permission to use his motor car for his official duties and to be paid a mileage allowance with effect from 1 April 1985. Approval was granted to this application by the employer and it was certified that 'it is essential for this officer to use the above-mentioned vehicle on official duties.'

4. Following the approval of the application by the employer, the Taxpayer used his car for official duties and was paid a mileage allowance.

5. In order to receive the mileage allowance it was necessary for the Taxpayer to maintain a detailed account of the journeys which he made in his car when attending to the business of his employer. He was required periodically to submit a mileage allowance claim on a form provided by the employer which stated the date, the journey, the distance, parking and tunnel fees, ferry fares, and the purpose of the journey.

6. In respect of the year of assessment 1989/90 the mileage allowance payable to the Taxpayer was $2.51 per mile. This was based on the allowance which the Hong Kong Government granted to public servants who used private cars in the course of their official duties. The employer when adopting this mileage allowance rate followed the policy that as a subvented government body the employer would follow the civil services rates but would not be concerned with how the government calculated its civil service rate.

7. The civil service rate of mileage allowance was calculated to take into account a number of costs, both fixed and running including depreciation, interest, licence fees, insurance, petrol oil and greasing, cost of tyres, and maintenance expenses. The mileage allowance was a notional amount calculated in relation to an average car of a specified size.

8. In his salaries tax return for the year of assessment 1989/90 the Taxpayer declared the amount of his salary and wages including back pay of a total of $392,880. The Taxpayer did not disclose the amount of the mileage allowance which he had received from his employer namely $4,854.34. In the employer's tax return filed in respect of the Taxpayer the employer likewise disclosed the total sum of $392,880 and did not disclose the mileage allowance. There is an agreement between the Commissioner and the employer under which it is not necessary for the employer or its employees to disclose details of mileage allowances paid and the same are considered not to be taxable.

9. In his salaries tax return the Taxpayer claimed a deduction of $1,800 in respect of an annual subscription to a professional institute. Though this amount was not originally allowed by the assessor as a deduction, the Deputy Commissioner has subsequently agreed that the same is an allowance deduction and the same is not in dispute before this Board.

10. The Taxpayer also claimed in his salaries tax return 'essential site transportation expenses' of $42,863.42 made up as follows:

'Details of claim for essential site transportation expenses (1989/90)

	$	$
1. Capital cost of motor car		
- written down value (1988/89)	95,086.90	
- capital on 12 instalment $4,583.33 × 12	- 55,000.00	150,086.90
- Depreciation say 25%		37,521.70
2. Hire purchase interest		
- 12 months $1,031.66 × 12		12,380.00
3. Car petrol cost		8,700.00
4. Car insurance		9,805.60
5. Car registration & licence fee		4,720.00
6. Car Maintenance/Repairs		6,402.30
Total cost per annum		79,529.60

Less	Portion of private use during holidays and from home to office (say 40%)	31,811.84
	Expense of business usage	47,717.76
Less	Mileage allowance reimbursed by (the employer)	4,854.34
	Total claim for deduction due to essential site transportation expenses	42,863.42

Documentary evidence in support of claim enclosed:

1. Copies of detailed mileage reimbursements from (the employer)

2. Documentary evidence substantiating claim for various motor car capital/running costs.'

11. By a salaries tax assessment for the year of assessment 1989/90, the date of which is not know, the assessor raised upon the Taxpayer an assessment on net chargeable income of $392,880 with salaries tax payable thereon of $58,932.

12. By letter dated 21 February 1991 the Taxpayer objected to this salaries tax assessment on the ground that the annual subscription to his professional institute and the essential site transportation expenses had not been deducted.

13. The objection was referred to the Deputy Commissioner of Inland Revenue who by his determination dated 25 March 1993 accepted that the professional institute subscription of $1,800 should be deducted but rejected the claim made by the Taxpayer to deduct essential site transportation expenses amounting to $42,863.42.

14. By notice dated 23 April 1993 the Taxpayer appealed to this Board of Review against the determination issued by the Deputy Commissioner of Inland Revenue.

At the hearing of the appeal the Taxpayer appeared in person and gave evidence and was cross examined. He also called to give evidence the personnel manager from the employer. We accept both the evidence given by the Taxpayer and by the personnel manager. The representative for the Commissioner cross examined them in an attempt to establish that the use by the Taxpayer of his private car on the business of his employer was not necessary. However with due respect to the representative for the Commissioner we find no substance or merit in this part of his case. In his evidence the Taxpayer said that when he first commenced work he did not have a car and it was most inconvenient for him to use other forms of transport. He said that it adversely affected his work. There was produced before the Board a copy of the approved application made by the Taxpayer to use his private car which was dated 8 March 1985 (fact 3 above). This included a signed certificate from the superior of the Taxpayer to effect that the use of the private car of the Taxpayer was essential for his official duties. Unless the Commissioner has reason to

believe in a particular case that an employee and his employer are not telling the truth or are being unreasonable, it appears to this Board to be wrong to attempt to challenge the good judgement of a professional person and an employer which is of a public nature in deciding what is or is not necessary in the performance of official duties by an employee. The best persons to make decisions in this regard must be the employer itself and the employee. In the present case there is nothing to suggest that either the employer or the employee were in any way acting improperly or not telling the truth.

The Taxpayer submitted that he was entitled to have the benefit of depreciation allowances for his motor vehicle and to deduct a proportion of the expenses which he said he had incurred as per the statement of account which he had included with his tax return and which we have set out in fact 10 above.

The Taxpayer further submitted that he had been allowed to deduct such expenses in previous years as had colleagues of his.

The representative for the Commissioner submitted that the expenses were not wholly, exclusively, and necessarily incurred by the Taxpayer within the meaning of section 12(1)(a) of the Inland Revenue Ordinance. He further submitted that the word ‘essential’ appearing in section 12(1)(b) has the same meaning as necessarily.

The representative for the Commissioner drew our attention to the fact that the burden of proof is placed upon the Taxpayer and went on to cite the following cases:

D89/89, IRBRD, vol 6, 328
Ricketts v Colquhoun 10 TC 118
Marsden v CIR 42 TC 329
White v Higginbottom 57 TC 283
Perrons v Spackman 55 TC 403

The representative for the Commissioner then went on to review the facts and referred in particular to the fact that the private car in question was a famous brand which he submitted the Taxpayer had purchased for his private use and for the prestige and convenience of himself. He submitted that the car was not purchased on the employer’s instructions and that its use was not essential for the performance of the duties of the Taxpayer. He said that the expenses claimed were not wholly, exclusively and necessarily incurred in the performance by the Taxpayer of his duties.

The representative for the Commissioner analyzed the expenses claimed and pointed out that a mileage allowance had already been paid to the Taxpayer which was intended to reimburse the Taxpayer with a fair sum for all of the running and fixed expenses of a standard motor car.

The representative for the Commissioner particularly drew attention to the depreciation allowance which had been claimed and pointed out that there are strict rules

under the Inland Revenue Ordinance relating to claims by employees for depreciation of capital assets.

This appeal raises a new and interesting point which does not appear to have come before a Board of Review previously. It is perhaps surprising that such a case would not have occurred previously because it is common knowledge that many employees are entitled to use their private cars and claim mileage allowances from their employers. As apparently this is the first case of its type and as it is likely that this case will be of importance to other taxpayers in the future it is necessary for us to set out our decision and reasoning clearly and at some length.

As stated above we do not find sympathy with the Commissioner's submission that it was not necessary for the Taxpayer to use his private car in relation to his employer's business. This case is particularly clear in this regard because of the nature of the employer. The employer was a subvented body of a quasi government nature. Before authorising the Taxpayer to use his car on official duties it was necessary for his superior to certify that it was 'essential' for him to use his car. It was then necessary for him to maintain a detailed record of all trips which he made on business for his employer and to file detailed claim forms setting out every trip, the purpose thereof, and the mileage involved. This claim then had to be certified by the employer before it could be paid to the Taxpayer. In such circumstances we have no hesitation in finding as a matter of fact that the use by the Taxpayer of his private car was necessary in the performance of his duties. In the present case we also have the evidence of the Taxpayer that in the first year of his employment he did not have a car of his own and found that this impeded his efficiency.

Having found the fact that it was necessary for the Taxpayer to use his car it is then necessary for us to decide what if anything the Taxpayer can deduct from his taxable emoluments.

There was a contractual agreement between the Taxpayer and the employer that the employer would pay to the Taxpayer a mileage allowance calculated at the rate of \$2.51 per mile. We take the view that so far as both the Taxpayer and the employer were concerned they had come to an agreement that the cost to the Taxpayer and the value to the employer of the Taxpayer using his car on the business of the employer was \$2.51 per mile. In our opinion this is binding both so far as the Taxpayer and the employer are concerned. Accordingly it is not now open to the Taxpayer to say to the Commissioner that he wishes to claim a much higher cost as an expense for using his car. We have no doubt that if the Taxpayer had said to the employer that he required the employer to pay to him something in excess of \$24 per mile the employer would have declined so to do. However that is the sum which the Taxpayer suggests to this Board as being the legitimate deductible expense which he can deduct from his salaries tax for using his own car when travelling a total of 1,934 miles for his employer ($\frac{\$47,717.76}{1,934} = \$24.67$).

On the facts before us we are of the opinion that the only amount which the Taxpayer can deduct as an expense in relation to his motor car is that amount which he

agreed with the employer namely $4,854.34 being 1,934 miles at $2.51 per mile. However to be able to claim a deduction of this amount the Taxpayer would also be obliged to disclose that he had received from his employer a similar amount so that the net effect of claiming such a deduction would be nil.

The Taxpayer has claimed a depreciation allowance in respect of his car. If this were to be allowable it would have to fall within the provisions of section 12(1)(b) which reads as follows:

'Allowance calculated in accordance with part VI in respect of capital expenditure on machinery or plant the use of which is essential to the production of the assessable income.'

It is clear to us that the car in question does not fall within the ambit of this provision. The Taxpayer did not incur capital expenditure on machinery or plant the use of which was essential to the production of his assessable income. What he did was to purchase a motor car for his own personal use. There was no requirement of his employment that he must own a car. According to the evidence given he used his car to drive to and from his place of work each day and no doubt used his car for other personal purposes.

As we have mentioned above it is common practice in such circumstances for employers in Hong Kong to authorise their employees to use their own private cars on business travel. The reason for this is very simple. It would not be economic or sensible for the employer to have a fleet of cars for each of its employees and would not be economic or sensible to maintain a pool of cars available for use with or without drivers by its employees. Indeed evidence to this effect was given by the personnel manager. In such circumstances to assist himself in performing his duties an employee will offer to make use of the car which he owns provided that his employer fully compensates him for its use. That is exactly what happened in the present case. The Taxpayer owned a car and made application to his employer to use the car on the business of the employer. The employer saw the merit and benefit of acceding to this request and agreed to the same. The agreed price for the use of the car was $2.51 per mile which so far as both the Taxpayer and the employer were concerned represented full compensation to the employee for the use of his car.

When we consider the other expenses which the Taxpayer has claimed to deduct we find that they do not come within the wording of the Inland Revenue Ordinance. Section 12(1)(a) is quite clear in this regard and is notoriously restrictive in its scope. It provides:

'All outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income.'

Apart from the capital expenditure with which we have already dealt, the remainder of the claim made by the Taxpayer relates to expenses which do not come within the ambit of wholly, exclusively, and necessarily incurred in the production of the assessable income. As we have said the Taxpayer purchased the car and likewise maintained and operated the car as a private car for his own use and benefit. Because of the terms of his employment and the nature of his duties he was also able to use his car on official business but that does not make the expenses 'wholly, exclusively, and necessary incurred in the production of the assessable income.' Clearly they were not.

For the reasons given we dismiss this appeal and reject the claim made by the Taxpayer. A question might arise as to whether or not the mileage allowance received by the Taxpayer is subject to assessment to salaries tax as being an allowance within the meaning of section 9(l)(a) of the Inland Revenue Ordinance and if so whether the Taxpayer is entitled to claim any deductions in relation thereto. Apparently from what the representative of the Commissioner informed us the Commissioner accepts that in cases such as the present either the allowance is not taxable or if it is that the Taxpayer is entitled to an equal expense to offset the same. As this was not raised or argued before us we do not intend to pursue the point in this decision though we have made reference to it above. The Taxpayer has not been taxed on the allowance and we see no reason to change this.

We dismiss the appeal of the Taxpayer and confirm the determination of the Deputy Commissioner dated 25 March 1993.