INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D24/92

Salaries tax – whether hotel subsistence allowance subject to salaries tax.

Panel: Robert Wei QC (chairman), Cheung Wai Hing and Raymond A Zala.

Date of hearing: 28 July 1992.
Date of decision: 3 September 1992.

The taxpayer was an employee of the Hong Kong government who was posted overseas and subsequently returned to Hong Kong. On the taxpayer's return to Hong Kong he was provided with hotel subsistence allowance for 30 nights. The subsistence allowance was intended to alleviate the inconvenience of the taxpayer having to incur additional expenses while living in a hotel. The taxpayer submitted that the subsistence allowance should not be subject to salaries tax.

Held:

The allowance was a reimbursement of non-deductible expenses and was therefore assessable to salaries tax.

Appeal allowed in part.

Cases referred to:

CIR v Humphrey [1970] 1 HKTC 451
D13/89, IRBRD, vol 4, 242
Owen v Pook 45 TC 571

Mabel Mei for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by a taxpayer against the salaries tax assessment raised on him for the year of assessment 1989/90 as revised by the Deputy Commissioner in his determination dated 8 April 1992. It concerns a question of taxability of hotel subsistence allowance.

2. At all relevant times the Taxpayer was employed by the Hong Kong Government (the employer). He was posted overseas by the employer in 1983. In 1989 he returned to duty in Hong Kong.

3. Pursuant to Civil Service Regulation 1531(1)(b), the Taxpayer was provided with hotel accommodation together with hotel subsistence allowance for 30 nights from 10 May 1989 to 8 June 1989.

4. The hotel subsistence allowance totalling $6,150, which was claimed by the Taxpayer and paid to him, was made up as follows:

(a)	2 adults (Taxpayer and wife) for 30 nights at $85 a night each	$5,100
(b)	Child under 4 for 30 nights at $35 a night	1,050
		$6,150

The question for the Board is whether the hotel subsistence allowance is assessable to salaries tax.

5. It was agreed that the Civil Service Regulations formed part of the Taxpayer's terms of service. Relevant provisions of the Regulations were as follows:

> '1531(1) Subject to the approval of the Secretary for the Civil Service, a local officer posted overseas may be provided for himself and his family –
>
> (b) hotel accommodation with hotel subsistence allowance under CSR 846 up to 30 nights on his return to duty from the final tour of his posting overseas.
>
> 846(1) An officer who is eligible for hotel accommodation under CSR 840(1) … may be granted hotel subsistence allowance at the rates set out in Annex 5.1.
>
> 840(1) … no local officer is eligible for hotel accommodation except under the provision of CSR 1531.'

6. Although no evidence was adduced to show what were the rates of hotel subsistence allowance set out in Annex 5.1, it was not in dispute that the rates used to calculate the allowance as referred to in 4 above were the prescribed rates. We therefore find that the allowance was quantified in accordance with the Civil Service Regulations.

7. The hotel accommodation was not provided free of charge but at a rent amounting to 5% of the Taxpayer's salary for the duration of the hotel accommodation. He also paid 5% of the room service charges.

8. The hotel accommodation and the hotel subsistence allowance were provided to the Taxpayer as a package in the sense that had he not used the accommodation, the allowance would not have been paid to him.

9. The Taxpayer put forward 5 grounds of appeal which may be paraphrased as follows:

(1) When he was posted overseas in 1983, he was paid subsistence allowance under CSR 713; the Commissioner of Inland Revenue had accepted his objection that the allowance was not taxable. The Commissioner or the Deputy Commissioner was therefore being inconsistent in his treatment of the hotel subsistence allowance in question.

(2) Subsistence allowance payable under CSR 1004 to officers on study leave to undertake training overseas was not liable to tax; this, he asserted, was stated in a memo from the Civil Service Training Director in 1986 to the Commissioner of the overseas office. He gave the file reference of the memo although no evidence was adduced to prove it.

(3) He was in fact not better off by being paid the hotel subsistence allowance, and it is unfair to make him pay tax on it.

(4) In two letters dated 26 June 1992 and 15 July 1992 respectively, the Quartering Officer stated in effect that the hotel subsistence allowance had been grossed up for tax purposes, and that accordingly it should be taxable. The Taxpayer submitted that the Quartering Officer's statement should not be relied on by the Board.

(5) The hotel subsistence allowance was a reimbursement of accountable expenses and therefore was not taxable.

10. In reply, Miss Mei representing the Deputy Commissioner made submissions which may be summed up as follows:

(1) The hotel subsistence allowance was part of the Taxpayer's income arising in or derived from Hong Kong from his employment with the Hong Kong Government and therefore was assessable to salaries tax under section 8(1)(a) of the Inland Revenue Ordinance (the IRO).

(2) The hotel subsistence allowance was a reimbursement of non-deductible expenses and was part of the Taxpayer's assessable income.

Miss Mei cited CIR v Humphrey [1970] 1 HKTC 451 and D13/89, IRBRD, vol 4, 242 in support of her submissions.

11. (1) Section 8 of the IRO, so far as relevant, reads:

> '8(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –
>
> (a) any office or employment of profit; and
>
> (b) any pension.'

(2) Section 9 of the IRO, so far as relevant, reads:

> '9(1) Income from any office or employment includes –
>
> (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance …'

12. To be assessable to salaries tax, the income in question must be from one of the two sources laid down in section 8(1)(a) and (b). In the present case, we are concerned with source (a) – any office or employment. Section 9(1)(a) provides that income from any office or employment includes a number of specified types of income. Obviously, just because income in a particular instance comes within any of those types, it does not necessarily follow that it is income from a particular office or employment: it must be shown to be so, although in many cases it may be possible to determine both type and source in the same process. In the present case we are concerned with the question whether the hotel subsistence allowance was income from the Taxpayer's employment with the Hong Kong Government.

13. In his letter dated 20 April 1991 to the Commissioner of Inland Revenue, the Taxpayer stated in effect that hotel subsistence allowance was payable to alleviate an officer's inconvenience of having to incur more expenses on items such as food and laundry while living in a hotel. We think that is correct. In our view, the hotel subsistence allowance in question was an allowance or perquisite within the meaning of section 9(1)(a). The Taxpayer received the allowance pursuant to his contractual terms of service (see 3 to 6 above). We have no hesitation in finding that the source of the allowance was his employment with the Hong Kong Government and that the allowance was part of his income from that employment.

14. On the question of reimbursement, we accept Miss Mei's submission that the allowance was reimbursement of non-deductible expenses and therefore assessable to salaries tax. The source of the submission may be traced to Lord Wilberforce's observation

in Owen v Pook, 45 TC 571, which was cited and followed by Blair-Kerr and Mills-Owens, JJ in CIR v Humphrey at 483 and 486 respectively:

> '… if I had not reached this conclusion, I should have difficulty in seeing how the taxpayer could succeed, on the alternative point, in establishing that reimbursement of a non-deductible expense is something other than an emolument.'

The expenses incurred by the Taxpayer in supporting himself and his family while living in the hotel were living expenses which it was his own responsibility to defray. The deduction of expenses is governed by section 12 of the IRO which provides, so far as relevant, as follows:

> '12(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person –
>
> (a) 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 …'

In our view, the Taxpayer's living expenses incurred while living in the hotel were expenses of a domestic or private nature. Further, in any event they were not expenses wholly, exclusively and necessarily incurred in the production of the assessable income. The phrase 'in the production of the assessable income' was compared with the phrase 'in the performance of the duties of the office or employment' appearing in the corresponding United Kingdom statute in CIR v Humphrey, and the difference in phraseology was held by Blair-Kerr J to be immaterial so far as that appeal was concerned (CIR v Humphrey, 467). Nor, in our view, is the different material so far as this appeal is concerned. In our view, the living expenses cannot be said to have been wholly, exclusively and necessarily incurred in the production of the assessable income or in the performance of the duties of his employment. The hotel subsistence allowance, viewed as a reimbursement of the living expenses incurred while living in the hotel, was a contribution to the employee's expenses, and not reimbursement of the employer's expenses initially incurred by the Taxpayer on the employer's behalf (CIR v Humphrey, 487, per Mills-Owens J).

15. To come back to the Taxpayer's grounds of appeal mentioned in 9 above, ground (5), which raises the reimbursement point, has been dealt with in 14 above. As for ground (1), the fact that the Commissioner accepted the Taxpayer's objection that subsistence allowance granted to him in 1983 under CSR 713 was not taxable was not in our view something which should have tied the hands of the Commissioner or the Deputy Commissioner in respect of the hotel subsistence allowance in question. He was entitled to, as he did, apply the law to the facts as he found them irrespective of how he treated the Taxpayer's objection in respect of the 1983 subsistence allowance. As for grounds (2) and (4), the Civil Service Training Director's views on the taxability of subsistence allowance

payable on study leave and the Quartering Officer's views on the taxability of the hotel subsistence allowance in question are both irrelevant to this appeal. The question of taxability is a question for the Board and for the Board only; in deciding that question, the Board is only concerned with what the Ordinance says. It remains to deal with ground (3) which raises the point of unfairness. Taxability turns on what the charging provisions say; considerations of fairness or equity are irrelevant.

16. For all those reasons, the hotel subsistence allowance in question amounting to $6,150 is assessable to salaries tax.

17. It is agreed between the parties that if the hotel subsistence allowance of $6,150 is taxable, the item 'quarters' included in the assessment in question should be revised from $1,286 to $476. We therefore direct that that item be revised accordingly and that this case be remitted to the Commissioner for that purpose.