Case No. D25/87

Board of Review:

Andrew K. N. Li, *Chairman*, Lawrence H. L. Fung and James Yuen-wo Chu, *Members.*

25 August 1987.

Salaries Tax—section 12(1) of the Inland Revenue Ordinance—whether transportation expenses incurred by the Appellant were deductible from his assessable income.

The Appellant was employed by a travel agent. He spent about two to three hours a day in the office. The rest of the time was spent outside the office—visiting and entertaining customers and potential customers. He made about 20 visits each week in addition to two to three trips to the airport collecting or sending off VIP customers as a matter of courtesy. Apart from the trips to the airport for which the Appellant used his own car, he usually used public transport for taking customers out to entertain them. The Appellant admitted that he was not required by the employer to provide a car for doing his job. The Appellant did not keep any record of his appointments, of his traveling expenses and of the trips or visits for which such expenses were incurred. His estimates of public transportation expenses were based on a rough estimate of the number of trips taken. The Appellant received from his employer a transportation allowance in addition to his commission income. The Appellant claimed that the transportation expenses, both car and public transport, incurred by the Appellant should be deductible from his assessable income. The Revenue followed its practice of allowing a deduction amounting to 10% of the commission income. The Appellant appealed on grounds that the allowable deduction was too low—much less than the transportation allowance he had received from his employer.

Held:

The inclusion of a transportation allowance as income does not necessarily follow that it has to be allowed as a deduction. Section 68(4) of the Inland Revenue Ordinance places the onus on a taxpayer that the assessment is excessive or incorrect. In seeking to discharge this onus the Appellant had to surmount two hurdles. First, he had to prove that the transportation expenses were within section 12(1)(*a*) of the Inland Revenue Ordinance, viz., they were not expenses of a domestic and private nature and were wholly exclusively and necessarily incurred in the production of the assessable income. Second, the Appellant had to prove the quantum of the expenses so incurred. In respect of the car expenses, they did not satisfy the test laid down in section 12(1)(*a*) of the Inland Revenue Ordinance as it was not a condition of his employment that the Appellant maintained a car. Nor was it a practical necessity imposed by the circumstances of his employment and a proportion of the car expenses were incurred for domestic and private use of which the Appellant had failed to produce any materials to establish the proportion. In respect of the public transportation expenses, the expenses were mere rough estimates as the Appellant kept no records and was unable to produce any appointment book.

Appeal dismissed.

Cases referred to:

CIR v. Humphrey 1 HKTC 451
Lomax v. Newton 34 TC 558
Marsden v. CIR 42 TC 326
Perrons v. Spackman [1981] STC 739

D. J. Gaskin for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

This is an appeal by Mr. L ("the Taxpayer") against his salaries tax assessment for 1983/84.

In his salaries tax return, the Taxpayer stated his total income to be $133,759. This included an allowance of $10,070. He claimed as outgoing and expenses the total sum of $17,000 made up as follows:—

Car fuel + maintenance	$8,500
Insurance + licence + miscellaneous	$4,000
Depreciation	$4,500
	$17,000

In the assessment, the assessor allowed only the sum of $1,578 for outgoings and expenses. The issue on this appeal is whether the assessment should have allowed a larger sum.

The Taxpayer's claim

In his letter dated 23 July 1985 to the Revenue, the Taxpayer claimed the sum of $42,200 as car expenses.

At the commencement of the hearing before us, the Taxpayer put before us a Schedule of transportation expenses amounting to $43,302.60 and based his claim on this Schedule which is set out below.

Transportation Expenses

1.	MTR—$14 per day × 5 days per week	= $3,640
2.	Taxi—$22 per day × 5 days per week	= $5,780

3.	Bus & van—$6 per day × 5 days per week		= $1,560
4.	Car expenses		
	Car licence		$3,420
	Insurance		$2,400
	Fuel		$2,400
	*June 83	$400	
	*July 83	$660	
	*Aug. 83	$776	
	*Sept. 83	$750	
	*Oct. 83	$1,000	
	*Nov. 83	$800	
	*Dec. 83	$600	
	Average $712.3 per month		
	About $8,548 a year		$8,548
	*Maintenance & garage		$3,614.60
	Parking fee		$ 450
	Meter fee		$2,000
	Depreciation		$7,000
			$43,302.60

The Taxpayer produced invoices to support the items marked*.

The Law

Section 68(4) of the Inland Revenue Ordinance places the onus on the Taxpayer to prove that the assessment in question is excessive or incorrect.

In seeking to discharge this onus in the present case, the Taxpayer has to surmount two hurdles.

First, the Taxpayer has to prove that the transportation expenses were within section 12(1)(*a*) viz they were not expenses of a domestic and private nature and were wholly exclusively and necessarily incurred in the production of the assessable income. This is a rigid narrow and restricted test. See *Lomax v. Newton* (Vaisey J.) 34 TC 558 at 561–2, *CIR v. Humphrey* HKTC Vol. 1 451 at 467 where Blair-Kerr J. stated that the difference in phraseology between the English statute and the Hong Kong statute is immaterial in this context. Applying this test to transportation expenses, it must be found that it was a term or condition of his employment or a practical necessity imposed by the circumstances of his employment that he did the things (eg. Maintain a car) for which expenses are claimed. See

Perrons v. Spackman (Vienlott J.) (1981) STC 739 at 750. This is a question of fact and degree. See *Marsden v. CIR* (Pennycuick J.) 42 TC 326 at 331–2.

The second hurdle is this. Even if the Taxpayer proves that *some* transportation expenses were wholly exclusively and necessarily incurred in the production of the assessable income, the Taxpayer has to prove the quantum of expenses so incurred. This is a question of fact. In considering whether the onus is discharged we would adopt the approach set out in the commentary in the Australian Income Tax Law Practice Volume 1 at 51/428 dealing with their section 51 and in the Australian Board of Review decision at 26 CTBR (NS) Case 69.

The commentary was in these terms:—

51/428 Travelling and entertainment expenses

"The deductibility or otherwise of such expenditure is a question of fact, and the onus of establishing the claim is on taxpayer…. The taxpayer, therefore, is faced with the task of proving that he incurred certain specific expenditure and the extent to which it was incurred in gaining or producing his assessable income. If he fails because he has neglected so to keep his records and vouchers as to show that what he now asserts is correct, he must accept the consequences of his own omission (Stone v. FC of T (1918) 28 CLR 389; 3 CTBR (NS) Case 28)."

"… experience and the many decisions of Boards of Review where claims for entertainment, etc. expenses have foundered under the burden of proof, abundantly show the necessity for a taxpayer to keep contemporaneous records of travelling, entertaining and similar expenses. 'Something more is required of a taxpayer than to give a 'rough computation', or a 'pretty good idea' or a 'rough estimate', when he is claiming a precise amount as outgoings incurred in the earning of his assessable income' (10 CTBR Case 47)…. He must, if called upon, provide with reasonable precision details of expenditure claimed to be deductible (1 CTBR (NS) Cases 47 and 109)."

In the Australian Board of Review decision referred to above, the Board in considering a claim for entertainment expenses said, at page 490:—

"… Boards of Review have stated in very plain terms over many years that something more is required to substantiate a claim for entertainment expenses than a mere estimate of those outlays. For instance, in (1951) 1 CTBR (NS) Case 109; Case 107, 1 TBRD 453 … this Board as then constituted stated at 510 (CTBR) 456 (TBRD): 'In our opinion, it is necessary in order to establish an outgoing or outgoings in a case of this kind, for the taxpayer to provide details of the expenditure incurred, showing with reasonable precision when, where, upon whom the sum or each of the sums concerned was spent, and the person or persons entertained in the process.' "

"We agree with that statement in its entirety. In the case before us, it is clear from the testimony of the taxpayer that he kept no records of the moneys that he took from his pocket for entertainment expenses and that all three components of his total claim are nothing more than estimates. In the absence of precise, definite and complete evidence as to the nature of the

> expenditure concerned, we are unable to determine to what extent, if at all, the taxpayer's outlays were incurred for the purpose of producing assessable income."
>
> "Having in mind the nature of the outlays we can appreciate the difficulty of procuring vouchers, but we consider it incumbent on the taxpayer to maintain a contemporaneous written record in a notework (or similar book possessing a measure of permanence) of the expenditures outlaid by him. In the instant case, the taxpayer had no records to substantiate his claim, not even a diary record. He was not therefore in a position to discharge the statutory onus placed on him."

The facts

The Taxpayer gave evidence before us. On the basis of his evidence and the documents before us, we find the following facts.

The Taxpayer was employed by C Limited ("the Company"). The Company are travel agents dealing with both inbound and out-bound customers. His contract of employment described his duty as follows: "to control the sales of air ticketing and tours and is responsible for all staff for the daily operation works". He was a director and was in charge of the operations under the managing director. Working under him was his secretary, the ticketing manager (under that manager were travel consultants clerks and managers) and the accounts department. He was mainly concerned with the sales side of the Company. In the Taxpayer's own words: "My daily job I have to go out to the commercial houses for the actual selling".

The Company's office was in Tsimshatsui. The Taxpayer spent about 2–3 hours in the office each day. The rest of the time was spent outside the office—visiting and entertaining customers and potential customers. About 30% of the visits he made were in the Tsimshatsui area, 40% in Central, 5% in Sheung Wan, 15% in Wanchai, 5% in Aberdeen and 5% miscellaneous. He would pay about 20 visits per week. In addition to these visits, he made 2–3 trips to the airport, collecting or sending off VIP customers. This was a courtesy, a service to them. If he did not pick them up, they would be asked to take the hotel car or the Company could order a private car for them at the customer's expense.

Apart from the trips to the airport for which the Taxpayer used his own Volvo car, he usually used public transport MTR, taxi, bus and van though he sometimes used his car to take customers out to entertain them.

The Taxpayer lived in Kwun Tong. His car was parked near his home at a carpark at a fee of $450 per annum. He drove to work and parked his car near the office at parking meters. The expenses claimed for the car set out in the Schedule are *total* expenses for the car. The Taxpayer agreed that of such expenses "may be some is based on private use". He had just sold his car for $20,500 having bought it in 1981 for $60,000. The claim of $7,000 for depreciation was worked out from these figures.

The Taxpayer accepted in cross-examination that he was not required by the Company to provide a car for doing his job. Further, in response to questions by the Board, he accepted that the Company did not require him to have a car though it would be more convenient for him to have one. The following passage in the evidence is relevant:

"Chairman:	So is it fair to say that they do not require you to have a car. But obviously to have a car would be more convenient.
Taxpayer:	Yes, I find Honda not good enough.
Chairman:	Did they not require you to have a car? But they recognise that if you have a car it would be convenient and hence they gave you a transport allowance?
Taxpayer:	Yes, like my boss he need a launch he would also explain to the German that it is good for business.
Chairman:	So they did not require you to have a car? I just want to make this clear. Did they require you to have one?
Taxpayer:	It is not saying in the contract I need a car. But it says I am responsible for the turnover.
Chairman:	Yes, I see."

The Taxpayer did not keep any appointment book. When asked whether his secretary kept one, his answer was: "No, I don't think so."

The Taxpayer did not produce any record of the traveling expenses or of the trips or visits for which such expenses were incurred.

The Taxpayer gave evidence of how he had estimated the expenses for public transport in the Schedule. His estimate of $14 per day for MTR based on a 2 round trip tickets to the HK side. His estimate of $22 per day for taxis was based on 4 short trips.

It was clear from the Taxpayer's evidence that his estimates of public transportation expenses of MTR, taxi, bus and van were based on his rough estimates of the number of trips taken. When asked by the Board: "So normally you need 5 trips to go out everyday?", his reply was: "No this is just a rough estimate".

As to the figures in the Schedule for car expenses, the item of meter fee is again an estimate. The rest are actual figures. As pointed out above, these are *total* expenses for the car.

Until September 1983, the Taxpayer was reimbursed transportation expenses by the Company according to actual payment subject to a maximum of $1,000 per month. From September 1983, he was paid a fixed amount per month, initially $1,070 increased to $1,200 for October to December 1983 and further increase to $1,800 from January 1984. The Taxpayer accepted that he could not claim the expenses (amounting presumably to a total of $5,000) for the five months from March to September 1983, for which he had been

reimbursed. But presumably he maintains his claim even for these 5 months in so far as the expenses incurred exceeded the sum of $5,000.

Applying law to the facts

It is convenient to separate the car expenses from the public transportation expenses.

Car expenses

As to the car expenses, it is clear that they do not satisfy the test in section 12(1) that they were wholly exclusively and necessarily incurred in the production of the assessable income. It was not a term or condition of his employment that he maintained a car. Nor was it a practical necessity imposed by the circumstances of his employment. It was a matter of convenience, not practical necessity.

Even if we are wrong in the above conclusion, it is clear that a proportion of the car expenses were incurred for domestic and private use and could not be claimed. But the Taxpayer has not produced any materials to establish the proportion spent on domestic and private use and thus has not discharged the onus on him.

As to the sum of $7,000 claimed for depreciation, we hold that the Taxpayer has not discharged the onus of establishing that the car was essential to the production of the assessable income within 12(1)(*b*). In any event, as stated above he has not discharged the onus of establishing the proportion spent on domestic and private use with the result that even if contrary to our conclusion the car was essential, the amount by which any depreciation allowance has to be reduced in accordance with section 12(2) could not be determined.

Public transportation expenses

Turning to the public transportation expenses, these are merely rough estimates. The Taxpayer kept no records and he was unable to produce any appointment book which would have formed a basis for working out the expenses claimed. He did not keep an appointment book and he did not think that his secretary kept one. In these circumstances adopting the approach referred to above, the Taxpayer has failed to discharge the onus on him of proving the public transportation expenses in question.

Generally

The assessor allowed the sum of $1,578 for transportation expenses (both car and public transport). This was based on the Revenue's practice of allowing a deduction amounting to 10% of commission income in cases where income is derived on a commission basis. The Taxpayer submitted that this sum is clearly too low.

Further the Taxpayer pointed out that the Company had given him a flat allowance from September 1983 which had been included as part of his income. He argued that this shows that at least the amount of the allowance was incurred and he should be entitled to deduct at least this amount. Surely the Company would not give him an allowance which was more than he spent, so the argument goes.

It does not follow from the fact that the inclusion of a transportation allowance as income means that it has to be allowed as a deduction. These are two separate questions.

We have already held that the Taxpayer is not entitled to deduct any car expenses. As to public transportation expenses even assuming that the figure of $1,578 for public transportation expenses is too low, and even assuming that the Company was unlikely to have given him a flat allowance amounting to more than what he incurred, it is nevertheless incumbent upon the Taxpayer to discharge the onus on him to establish the quantum incurred in the way described in the commentary in the Australian Income Tax Law & Practice Volume 1 and the Australian Board of Review decision quoted above. And he has failed to do so.

Accordingly, we confirm the assessment in question.