INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D3/93

Salaries tax – deduction of expenses – tuition fees and a subscription and examination fee paid to a professional association – whether deductible for salaries tax purposes.

Panel: William Turnbull (chairman), Richard Lee and Jack Samuel Yuen.

Date of hearing: 4 March 1993.
Date of decision: 20 April 1993.

The taxpayer was employed as an accountant. He claimed to be allowed to deduct from his income assessable to salaries tax certain tuition fees, and a subscription and examination fee paid to a professional association. He submitted that the knowledge which he acquired was necessary for him to perform his duties. He further submitted that his being a student member of a professional association and a member of an institute had allowed him to obtain his present employment at a substantially enhanced salary.

Held:

The Board considered a United Kingdom decision of Humbles v Brooks. The Board approved the principles laid down in the case of Humbles v Brooks and adopted the words of Ungoed-Thomas, J. The Board applied the same to the facts of the case before it.

Appeal dismissed.

Cases referred to:

Humbles v Brooks 40 TC 500
Ricketts v Colquhoun 10 TC 118
Brown v Bullock 40 TC 1
Nolder v Walters 15 TC 380
Simpson v Tate 9 TC 314
Blackwell v Mills 26 TC 468
Griffths v Mockler 35 TC 135
Lomax v Newton 34 TC 558
Edwards v Bairstow 36 TC 207

J R Smith for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a taxpayer against the refusal by the assessor and the Deputy Commissioner to permit the Taxpayer to deduct as an expense from his income assessable to salaries tax certain expenses, namely tuition fees and a subscription and examination fee paid to a professional association. The facts are as follows:

1. The Taxpayer was employed as an accountant.

2. In his 1990/91 salaries tax return the Taxpayer reported his income assessable to salaries tax and claimed as a deduction therefrom total expenses of $8,885; being as to $7,600 tuition fees paid to X Institute for courses on computer and as to $1,285 a subscription and examination fee paid to the relevant professional association, Y Association.

3. The assessor did not accept that the claimed expenses were allowable deductions and disallowed the same when assessing the Taxpayer's income to salaries tax.

4. The Taxpayer objected to the salaries tax assessment and submitted that the expenses should be deducted because they affected the production of the income of the Taxpayer.

5. By his determination dated 9 December 1992 the Deputy Commissioner of Inland Revenue upheld the decision of the assessor and confirmed the assessment against which the Taxpayer had objected.

6. The Taxpayer duly appealed to the Board of Review.

At the hearing of the appeal the Taxpayer appeared in person. He submitted that the determination of the Deputy Commissioner was not reasonable as it was based on information provided by someone who was a manager of his employer and who was not fully acquainted with the affairs of the Taxpayer. He said that the manager who had provided information to the Inland Revenue Department was not in a position to give a fair opinion with regard to the salaries, duties and qualifications of the Taxpayer.

He submitted that he had to have computer knowledge to perform his duties and that computer knowledge took a very significant place in the business of his company. He said that he had to generate management reports from existing data files, had participated in the computerisation of the system and that it was necessary for him to have a good knowledge of computer operations. He said that since he joined the company his salary had risen from $7,000 to $9,700 within two years and this was because of his computer knowledge. He submitted that he had obtained such computer knowledge from attending X Institute. Subsequently he had changed his employment and was now earning a

salary of $13,000. His new employment was dependent upon his being a student member of Y Association and a member of X Institute.

The Taxpayer submitted that in view of the foregoing he considered that the expenses relating to his studies at X Institute and his being a member of Y Association had helped him to obtain his income and therefore he should be entitled to deduct such expenses from his assessable income.

The representative for the Commissioner submitted in reply that the expenses did not qualify for deduction. He referred us to section 12 of the Inland Revenue Ordinance and the case of Humbles v Brooks 40 TC 500. He submitted that the Taxpayer did not have to be a member of a professional body in order to take up his employment and that it was not a condition of his employment that he attend the courses organised by X Institute or to sit the examinations of Y Association. He said that it was necessary that the expenditure be wholly, exclusively and necessarily incurred in the production of the assessable income. He said that the purpose of the expenditure was to enable the Taxpayer to do something different in the future and was not part of the current employment of the Taxpayer. He itemised and analyzed each of the tests which applied to such expenditure. He drew our attention to the fact that if taking the study course was something which the Taxpayer was required to do while carrying out his duties he would have been on duty while sitting the courses and taking the examinations which was not the case.

There are many decided cases on this subject matter and recently quite a number of cases have come before different Boards of Review for decision.

The case of Humbles v Brooks is a very useful United Kingdom decision which in our opinion applies to Hong Kong. Before referring to this case we would point out that the facts of each tax case are different, one from another, and care must always be taken to avoid drawing conclusions or principles from facts. However Ungoed-Thomas, J in Humbles v Brooks set out in some detail the legal principles which apply to cases such as the one now before us.

The facts of Humbles v Brooks related to a headmaster at a primary school who was required to teach various subjects including history. He attended a series of weekend lectures in history at a college for adult education for the purpose of improving his background knowledge. The General Commissioners, the equivalent of our Board of Review, decided that the fees which he had paid for this course were an allowable deduction under the provisions of the relevant United Kingdom Income Tax Act. The Inland Revenue appealed against this decision and, on appeal to the High Court, Ungoed-Thomas, J decided in favour of the Revenue and said that no deduction could be made of the expenses.

Apparently the United Kingdom case was some sort of test case because the allowance or deduction claimed was only Sterling Pounds 9 which even in 1962 was a small sum of money. This is no doubt the reason why the Learned Judge gave a full exposition of the relevant law.

The United Kingdom law is similar to the Hong Kong Inland Revenue Ordinance and for convenience we will cite extensively from the judgement of Ungoed-Thomas, J starting at page 502 where he begins with an analysis of the relevant United Kingdom provisions and then proceeds to consider the relevant law:

This case turns upon the operation of paragraph 7 of the ninth schedule to the Income Tax Act, 1952, which applies to allowances under schedule E. That paragraph reads:

> ' If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.'

The particular words which require consideration in that paragraph are, first, the words 'necessarily obliged'; second, 'wholly, exclusively and necessarily'; third, 'in the performance of the said duties'; and, fourth, I may add the words 'so necessarily incurred' at the end of the paragraph which refer back to 'necessarily obliged' at the commencement of the paragraph. I will take together the words 'necessarily incurred' and 'necessarily obliged', and also the words 'in the performance of the said duties'. I will then come separately to the words 'wholly, exclusively and necessarily'.

First, then, 'necessarily obliged in the performance of the said duties'. To be within those words the taxpayer must be obliged by the very fact that he holds the office, and has to perform its duties. The test is not a personal test but an objective test: see Ricketts v Colquhoun 10 TC 118, per Viscount Cave, LC, at page 133, and per Lord Blanesburgh, at page 135. Lord Blanesburgh says:

> ' The language of the Rule points to the expenses with which it is concerned as being confined to those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties, to expenses imposed upon each holder ex necessitate of his office and to such expenses only. It says: – "If the holder of an office" – the words be it observed are not "if any holder of an office" – "is obliged to incur expenses in the performance of the duties of the Office" – the duties again are not the duties of his office; in other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective.'

Donovan, LJ, in Brown v Bullock 40 TC 1, at page 10, states the test is whether the duties impose the expense.

'In the sense that … the duties cannot be performed without incurring the particular outlay.'

'In the performance of the said duties' means in the course of their performance: see Viscount Cave's speech in Ricketts v Colquhoun. It means 'in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office': see Rowlatt, J's judgment in Nolder v Walters 15 TC 380 at page 387. It does not include qualifying initially to perform the duties of the office, or even keeping qualified to perform them: see Simpson v Tate 9 TC 314 at page 318, per Rowlatt, J. As Danckwerts, J stated in Brown v Bullock 40 TC, at page 6, it does not mean adding to the taxpayer's usefulness in performing his duties. The requirement of the employer that the expenditure shall be incurred does not, of itself, bring the expenses within the Rule, nor does the absence of such a requirement exclude it from the application of the Rule: see the passage which I have already referred to from the judgment of Donovan, LJ, and Blackwell v Mills 26 TC 468, Griffiths v Mockler 35 TC 135, and Brown v Bullock.

Now I come to the words 'wholly, exclusively and necessarily'. These words were considered by Vaisey, J, in Lomax v Newton 34 TC 558, at pages 56l-2. The judgment from which I quote was approved by the Court of Appeal in Brown v Bullock.

> ' Before coming to the particular items, I would observe that the provisions of that Rule'
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> ... that is the Rule with which we are dealing here ...
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> ' Are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the Rule it must be shown that the expenditure incurred was not only necessarily but wholly and exclusively incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements of the Rule, without specifying the detailed facts upon which the finding is based. An expenditure may be "necessary" for the holder of an office without being necessary to him in the performance of the duties of that office; it may be necessary in the performance of those duties without being exclusively referable to those duties; it may perhaps be both necessarily and exclusively, but still not wholly so referable. The words are indeed stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the Rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that when examined they are found to come to nearly nothing at all.'
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> ' These propositions of law are not in dispute between the parties in this case. The difficulty arises over the application of those propositions to the facts of this particular case, and Mr Rees propounded the determining question as: Was going to the adult college part of the respondent's duties? He says, first, that although the respondent is the headmaster, he is required to teach history. That is clear from the case stated and is not disputed by the Crown. Then he goes on to say that the preparation of lectures is as much a part of his duty as the giving of lectures. But perhaps lectures may be a slightly grandiloquent term to use: 'a

talk' might be more appropriate. But, in either case the substance of the submission is precisely the same.

Mr Orr contended that he was not employed to prepare lectures but to deliver them. This, to my mind, is an unreal distinction for present purposes. I cannot recognise that a person who is employed to deliver lectures or to teach is not, when preparing the lectures or the talks which he gives, doing what he is employed to do – that he is not acting in the course of the performance of his duties. Preparing lectures is, to my mind, a necessary part of his duties. That leaves the question, was the respondent in this case, when listening to the lecture at the adult college, preparing his own lecture; and here I come to the important passages which I have quoted from paragraphs 2(c) and 3 of the case stated.

First, he attended the course to improve his background knowledge of the subject which he had studied to GCE '0' level only; second, he gleaned useful information from the lectures at the course; third, he felt the course was essential to keep himself up to date; and, fourth, to provide him with material which he reproduced in the history lessons.

There is, in my view, a distinction between qualifying to teach and getting background material – and even getting information and material which he reproduced in his own lecture – on the one hand, and preparing his own lecture for delivery on the other hand. The statement, in the passages in the case stated, that the lectures at the college provided the respondent with material which he reproduced gets nearest to the performance of his duties within the section, but even if this element could be treated in isolation, it goes no further than providing material – just as any background information would provide material – and is not, of itself, part of the preparation of his own lecture. It is, to my mind, qualifying for lecturing, or putting himself in a position to prepare a lecture. It is not the preparation of a lecture. In this sense, the distinction is between preparation for lecturing on the one hand and the preparation of a lecture on the other hand.

In my judgment, the respondent, when he was attending a course and listening to a lecture, was not preparing his own lecture, and he was therefore not acting in the performance of his duties within the meaning of paragraph 7 of the ninth schedule. But, further, even if getting information and material could be regarded as part of the preparation of his own lecture, yet the expense incurred by the respondent in attending this course is not, in my opinion, an expense which passes the objective test propounded by Lord Blanesburgh and Donovan, LJ, in the passages which I have quoted. It is not an expense, in the words of Lord Blanesburgh.'

' Which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties.'

> ‘ Again, even if, to the extent that the respondent was getting material from the course, he attended to prepare his own lecture, yet he was (as appears from the case stated) also in general keeping himself up to date and getting background information, and apparently trying to make good his lack of qualification in a subject which he had read up to GCE ‘0’ level only.
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> Therefore, in accordance with the principles established by the authorities which I have quoted, the payment for the course was not wholly, exclusively and necessarily incurred in the preparation of his own lectures or in the performance of his duties.
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> Mr Rees, however, submitted that the finding of the Commissioners was a finding of fact and that there was evidence to justify the finding. Here the primary facts have been found by the Commissioners, the most material being those which I have quoted. The difficulty in this case is in deciding whether those facts bring the case within the words of the section. What I consider to be the error of the Commissioners is, in the words of Lord Radcliffe in Edwards v Bairstow 36 TC 207 at page 229, a ‘misconception of the law’. I therefore cannot accede to this submission.
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> The allowance claimed in this case is only Sterling Pounds *9,* but I am told that it is meant to be a test case. I do not know precisely what general proposition it is supposed to test. I merely emphasise that I decide this case, as I am bound to do, upon its own peculiar facts, including particularly those which I have quoted from paragraphs 2 and 3 of the case stated.’

We adopt the words of Ungoed-Thomas, J in deciding this appeal before us. When we apply the legal principles which he enunciated it is clear that the Taxpayer in the case before us is not entitled to deduct either his tuition fees nor the subscription and examination fee which he paid. He did not attend the courses at X Institute and he did not take the examination or become a member of Y Association in the performance of his duties. What he wanted to do was to better himself and improve himself. The expenses of so doing cannot be deducted against his taxable income under section 12(1A) of our Inland Revenue Ordinance. Such expenses are not wholly, exclusively and necessarily incurred in the production of the assessable income.

We understand that as a concession the Commissioner in some instances allows a professional person to deduct the expenses of being a member of a professional body. We do not know whether such a concession would be extended by the Commissioner to a taxpayer such as the one now appearing before us. However that is immaterial. As Boards of Review have frequently said we are governed by the Inland Revenue Ordinance and have no powers to grant or confirm concessions which may or may not be granted by the Commissioner to an individual taxpayer.

To avoid any misunderstanding on the part of the Taxpayer who appeared before us we place on record that we have taken into account the submissions which he made to us and the facts which he outlined before us. We accept that his studies, examination, and membership of a professional body assisted him in the performance of the duties which he carried out and enabled him to command a higher level of salary and gave him improved promotion prospects. However none of that changes the situation. The Taxpayer was not required to incur the expenses which he did and the studies and examination which he undertook and his being a member of Y Association were not things performed or done by him in the course of performing the duties for which he was paid his taxable emoluments.

We hope that having quoted extensively from the decision of Ungoed-Thomas, J in Humbles v Brooks and having adopted his words, this case will assist taxpayers and others to understand the situation under the Inland Revenue Ordinance in Hong Kong. Whilst every case depends upon its own particular facts the principles are quite clear and it should not be difficult to apply these principles to the facts of cases as they arise in the future.

For the reasons given we dismiss this appeal and confirm the assessment for the year of assessment 1990/91 against which the Taxpayer has appealed.