Case No. D39/98

Salaries tax – assessable income – meaning – Civil Service Regulations 735 – mileage allowance in respect of home-to-office journeys – section 12(1)(a), section 12(1)(b), section 11B, section 11C and section 11D of the Inland Revenue Ordinance, Chapter 112.

Panel: Ronny Tong Ka Wah (chairman), Gregory Robert Scott Crichton and Paul Ng Kam Yuen.

Date of hearing: 17 February 1998.
Date of decision: 10 June 1998.

The taxpayer, a health inspector in the Government, pursuant to Civil Service Regulations ("CSR") applied for and was granted a mileage allowance in respect of his home-to-office journeys ("the Allowance").

The question for the Board to determine is whether the Allowance should be included in the taxpayer's salaries tax assessments. The assessor determined that the Allowance should be included. The taxpayer appealed against the determination.

Held:

1. It is well established principle that it is the duty of the taxpayer to make himself available for work at the place of employment. The means by which he travels from home to work is not confined to driving his own car. It is, therefore, not essential that he must drive to work.

2. That this is so is in some way confirmed by CSR 735 which provides that a civil servant granted an allowance for using his own private vehicle on home-to-office journeys could claim allowance for all working days in a particular month if he was required to use his private vehicle on official duty for more than 13 days.

3. Further, there is no reason why the words "production of the assessable income" in section 12(1)(a) and section 12(1)(b) should bear a different meaning.

Appeal dismissed.

Case referred to:

CIR v Humphrey [1970] 1 HKTC 451

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background Facts

1. The facts in this appeal are not in dispute. The Taxpayer is a health inspector in the Government. He was, at all times material to this appeal, stationed in District X.

2. By reason of his appointment, he was required to travel between various places of work in the New Territories and pursuant to Civil Service Regulations ('CSR') 726(1), he applied for and was granted a mileage allowance for using his own private car in respect of such trips. No question arises out of this allowance as it was not computed as part of the Taxpayer's assessable income.

3. The Taxpayer, however, received another allowance which does form the subject matter of this appeal. Pursuant to CSR 735, the Taxpayer applied for and was granted a mileage allowance in respect of his home-to-office journeys ('the Allowance').

4. For the years ended 31 March 1994 and 1995, the assessor raised on the Taxpayer salaries tax assessments ('the Assessments') which included the Allowance of $17,386 and $242 respectively.

5. The Taxpayer claimed deductions in the sums of $17,386 and $242 should be made in respect of the Assessments as being capital expenditure depreciation in respect of the car he purchased for the purposes of his travelling to work and on duty.

6. His objection to the Assessments was rejected by the Commissioner of Inland Revenue on 21 July 1997 from which determination ('the Determination') this appeal lies.

7. The Taxpayer concedes that 5% of the use of his car was for private purposes. He did not, however, apportion the use of his car in relation to the allowance he obtained under CSR726(1) (for which he was never taxed) and the Allowance.

The Relevant Provisions

8. The material part of section 12 of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance') reads as follows:

'(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;

(b) allowances 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;

…

(2) Where any machinery or plant is not used wholly and exclusively in the production of assessable income, the amount of the allowances provided for in subsection (1)(b) shall be reduced in the proportion considered by the assessor to be fair and reasonable.'

9. The Taxpayer claims that depreciation allowance for his car falls within the meaning of section 12(1)(b) in that the usage of his car is essential to the production of the Allowance. He does not contend, as we understand it, that the usage of his car is essential to the production of the whole of his assessable income but argues that the words 'the assessable income' in section 12(1)(b) should mean or is capable of including 'the assessable income or part thereof'.

10. We have difficulty in accepting this submission. The IRO clearly draws a distinction between 'assessable income' and 'income' or 'income from a source'. It will be seen that the term 'assessable income' is defined in section 2 as meaning:

'the assessable income of a person in any year of assessment as ascertained in accordance with sections 11B, 11C and 11D …'

11. Section 11B provides that:

'The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.'

12. Section 11C provides that:

'For the purpose of section 11B, a person shall be deemed to commence or cease, as the case may be, to derive income from a source whenever and as often as he commences or ceases –

(a) to hold any office or employment of profit; or

(b) to become entitled to a pension.'

13. The material part of section 11D reads:

'For the purpose of section 11B-

(a) income which has accrued to a person during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, …'

Meaning of assessable income

14. If 'assessable income' in section 12(1)(b) means the aggregate of income from all sources assessable for tax, then plainly the use of the Taxpayer's private car was not essential to the production of *that* income.

15. It is well established principle that it is the duty of the Taxpayer to make himself available for work at the place of employment. The means by which he travels from home to work is not confined to driving his own car. It is, therefore, not essential that he must drive to work.

16. That this is so is in some way confirmed by CSR 735 which provides that a civil servant granted an allowance for using his own private vehicle on home-to-office journeys could claim allowance for all working days in a particular month if he was required to use his private vehicle on official duty for more than 13 days.

17. Although the Taxpayer was required to travel between places of work in District X, he was not required to drive his own car for such travels. What CSR 726 provides is simply that he *could* use his own private car for the performance of these duties and if he did so, he could be reimbursed at certain rates. In any event, as we understand it, this allowance was not taxed by the Revenue.

18. It follows that, in our view, the contention of the Taxpayer is not tenable and is hereby rejected.

Other Submissions

19. Furthermore, as the Revenue rightly pointed out, the words 'production of the assessable income' appear both in section 12(1)(a) and (b). Plainly, where they appear in the same subsection, they should be given the same meaning unless the context in which they appeared otherwise suggests. Both section 12(1)(a) and (b) deal with deductions from the assessable income. Paragraph (a) concerns recurring outgoings and expenses while paragraph (b) concerns capital expenditure. There is no reason why the words 'production of the assessable income' should bear a different meaning in different paragraphs.

20. These same words were considered by the Hong Kong Full Court in CIR v Humphrey [1970] 1 HKTC 451 in relation to the predecessor of section 12(1)(a) and were found to mean:

> *'in the performance of the duties of the office or employment' (at page 467).*

21. The Taxpayer sought to argue that the use of the different preposition of 'to' in section 12(1)(b) instead of 'in' means that the following words 'production of the assessable income' should bear a different meaning in each paragraph. In our view, this submission is wholly without merit. The use of the preposition is dictated by the choice of word used in each paragraph and is purely necessary to give grammatical meaning to the sentence there and nothing else. In section 12(1)(a), the verb used was 'incurred' whereas the adjective used in section 12(1)(b) was 'essential'.

22. This can be confirmed by looking at subsection (2) which speaks of the machinery or plant not being used wholly and exclusively '*in* the production of assessable income' (*emphasis added*) for the purposes of section 12(1)(b).

23. In our view, there is nothing in this point either.

Conclusion

24. For all these reasons, we are of the view that this appeal must be dismissed and the determination is hereby confirmed.