

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D46/87

Board of Review:

William Turnbull, *Chairman*, Michael W. Y. Choy and Chan Cheuk-yuen, Raphael, *Members*.

27 October 1987.

Salaries Tax—whether the house available for the use of the Appellant a ‘place of residence’ provided rent free by his employer within the meaning of section 9(1)(b) of the Inland Revenue Ordinance.

The Appellant, a Hong Kong Government employee purchased an apartment under the Home Purchase Scheme and he and his family lived there. In view of the special nature of his duties he was also provided with a house at the place of work and he was required to stay there at certain periods when he was on duty. The Commissioner relied on section 9(6) of the Inland Revenue Ordinance which states that a place of residence includes a residence provided by an employer notwithstanding that the employee is required to occupy that place of residence by or under his terms of employment and whether or not by doing so he can better perform his duties. The Appellant should therefore pay tax on the rental value of the house.

Held:

A place of residence means a dwelling and home where a man is supposed usually to live and sleep. For rental value of a place of residence to be held to be taxable as income arising from employment there must be some element of benefit to the employee beyond enabling him to eat, sleep and relax while on duty. On this basis the Appellant’s place of residence was the apartment he purchased, not the house he was provided with.

Appeal allowed.

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

Reasons:

The appeal is brought by the Appellant who was an employee of the Hong Kong Government. The question to be decided is whether or not the Appellant should pay tax on the rental value of a house at the place of work which was provided by the Government for his use.

At the hearing of the appeal the Appellant himself gave evidence and was cross-examined. In addition another senior officer working at the same office of the Appellant at the time gave evidence and was cross-examined and a written statement from a second officer was submitted.

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We accept the evidence given by the Appellant and the relevant facts can be summarised. The appellant was a married man with a family who lived in an apartment at Tai Koo Shing which he owned and which he had purchased with the assistance of the Hong Kong Government through its Home Purchase Scheme. The Appellant was required in the course of his duties to be physically present at the place of work for periods of duty starting at 8:00 a.m. in the morning on day 1 and ending at 5:00 p.m. on day 2, that is a continuous period of duty of some thirty-three hours. He was provided with an office for his exclusive use and the exclusive use of the house at the place of work which was reserved for him. He was permitted, if he so wished, to reside with his family at the house but he did not do so because he lived with his family in his own flat at Tai Koo Shing. Further more he said he would not live at the house reserved for him with his family because it would mean that his young children would be brought up in the environment of a detention center and would have to pass through the detention center whenever they went to and from their home. The only access road to the house was through the detention centre.

The Appellant made use of the house when he was on duty for sleeping overnight, to prepare his own meals when on duty, and to rest.

The Appellant's deputy who gave evidence which we also accept a being true and correct said that he likewise lived with his family at Tai Koo Shing, also performed hours of duty of similar length and also was provided with accommodation at the place of work. In his case he shared the accommodation with two brother officers no assessment to tax was made on him in respect of the accommodation provided for him.

We find that the facts relating to the Appellant and his deputy are in all material respects identical except that the appellant had the exclusive use of a house whereas his deputy shared a house with two brother officers. The representative for the Commissioner sought to make one important distinction. This was that the Appellant could have used the house exclusively provided to his for his family and could have decided to reside there when not on duty, whereas the other officers shared accommodation which was not available for their exclusive use with their families had they so wished. With due respect we find that this distinction is not relevant or correct. The Appellant could not perform his duties unless he had the ability to sleep, eat and rest at the place of work. He could not remain continuously on duty without sleep, food or relaxation for a continuous period of thirty-three hours. He did not live at the place of work but lived at home with his wife and family. The only time which he spent at the house was directly attributable to the duties which he performed. As the Appellant was a senior officer his accommodation was of a higher standard than his subordinates, but that is all. The use to which it was put and the purpose for which it was provided was identical to the other officers who lived away from the place of work.

The question for this Board to decide is whether or not the house available for the use of the Appellant is a place of residence provided rent free by the employer within the meaning of section 9(1)(b) of the Ordinance.

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Sub-section 6 of that section states that a place of residence includes a residence provided by an employer notwithstanding that the employee is required to occupy that place of residence by or under his terms of employment and whether or not by doing so he can better perform his duties. The representative for the Commissioner argued that the definition contained in Sub-section 6 was a conclusive answer to this appeal and that accordingly the Appellant should pay tax on the rental value of the house. With due respect we do not agree with this submission on the facts of this case. Sub-section 6 of Section 9 only states that a place of residence continues to be a place of residence notwithstanding that the employee is required to reside there as part of his employment contract. It does not convert something which is not a place of residence into a place of residence. It was introduced because it had been argued by employees that a place of residence ceased to be a place of residence if they were required to occupy it contractually. That is the meaning of Sub-section 6 and no more. We now turn to find out what is the meaning of the expression "place of residence" and whether or not the house made available to the Appellant was a place of residence subject to Salaries Tax.

The representative of the Commissioner drew our attention to the fact that there is no legal definition of the word residence for the purposes of the Inland Revenue Ordinance and produced to the Board the definitions set out in the shorter Oxford English dictionary, in the dictionary of English Law by Earl Jowitt and in Stroud's Judicial dictionary. He argued that place of residence should be given a very wide meaning.

The definition contained in the Oxford dictionary though not limited to, does imply that in general residence means the place where a person lives. It refers to "one's usual dwelling place or abode, one's permanent or usual abode", "the place where a person resides, his dwelling place, the abode of a person".

Earl Jowitt describes residence, inter alia, as "to denote that fact that a person dwells in a given place", "the idea of home, or at least of habitation, and need not necessarily be permanent or exclusive. The word denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep". Earl Jowitt makes clear that the meaning of the word residence depends upon the context in which it is used or appears and also clearly demonstrates the distinction between residence as describing the situation of a person and residence referring to a place or building.

Reference to Stroud makes it clear that when Earl Jowitt refers to residence as the place where an individual eats, drinks and sleeps, etc., in fact the definition in question is relating to the verb "reside" and not the noun "residence". Perhaps the most meaningful statement is in Stroud where it states that residence has a variety of meanings according to the statute in which it is used and that it is an ambiguous word which may receive a different meaning according to the position in which it is found. The word residence is flexible and must be construed according to the object and intent of the particular legislation where it may be found. Stroud goes on to say that primarily the word residence means the dwelling and home where a man is supposed usually to live and sleep. It is this latter definition appearing in Stroud which we prefer when considering the meaning of the word residence or place of

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residence appearing in Section 9 of the Inland Revenue Ordinance. The correct interpretation within the object and intent of the Inland Revenue Ordinance is the dwelling and home where a man is supposed usually to live and sleep.

If we apply this definition to the present case it is clear that the home of the Appellant was at Tai Koo Shing where he lived with his family and accordingly his place of residence was his home at Tai Koo Shing. Having found this as a fact it is necessary for us to consider whether or not the house made available to the Appellant at the place of work was also his place of residence for the purposes of Section 9. We find on the facts that it was not. As stated above we can see no difference between the Appellant and other officers in the Appellant's Department who were provided with accommodation where they could eat, sleep and relax in the course of the duties which they were performing but which could not reasonably be described as either a dwelling or a home. Neither the Appellant nor his brother officers could be said to be living at the place of work. Many employees are provided by their employers with places where they can eat, sleep and relax. Sometimes this is by law and regulation, for example, the crew of an aeroplane flying non-stop for 12 hours or more have reserved for them space on the aircraft for eating, sleeping and relaxing in the course of their duties. Likewise a marine policeman is provided with accommodation on a police launch where he can eat, sleep and relax. The air crew, the marine policemen, and the Appellant all have much in common. They are all required to perform hours of duty of such a length that it is necessary for the employer to provide them with accommodation to eat, sleep and relax, but such accommodation is not the place where they reside.

The representative for the Commissioner was invited to refer to decided cases in Hong Kong but chose not to do so and suggested that they were not applicable because of the amendment to the Ordinance contained in Sub-section 6. As mentioned above, Subsection 6 is not a definition of the word residence but is an amendment to the law to remove the concept of representative occupation.

The representative for the Commissioner argued that a distinction should be drawn between the accommodation provided to the Appellant and the accommodation provided to others because the Appellant had the right of exclusive use and was permitted if he wished to live there with his family. We reject the first distinction without difficulty. It is not unreasonable for a senior officer of the Appellant's Department to have the status of having his own accommodation in the same way as he has his own private office. Indeed to consider otherwise would be degrading to the officer. With regard to the right to have his wife and family living with him at the house available at the place of work the fact is that the Appellant did not live there but lived at home at Tai Koo Shing. He could have used the accommodation provided at the place of work as a residence but did not do so. Whilst it might be possible to give the words "any place of residence provided rent free by the employer" an extreme interpretation as meaning something provided by the employer even though not taken up by employee we are not prepared to accept that the words have such a meaning. There must be some element of agreement on both sides and some element of benefit to the taxpayer. The employer offered the employee a place of residence but the employee declined the offer. The employer provided the employee with a house which

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could either be used by the employee as a place where he could eat, sleep and relax in the course of his duties or could be used as a place of residence. The employee rejected the offer by the employer to provide a place of residence rejected and only made use of the accommodation for the purpose of eating, sleeping and relaxing when performing his duties. He received no personal benefit. Section 8 of the Ordinance charges to Salaries Tax the "income" of a person arising from his employment. For the rental value of a place of residence to be held to be taxable as income arising from employment there must be some element of benefit to the employee beyond enabling him to eat, sleep and relax while on duty. For the reasons given and on the facts of this case we find in favour of the Appellant and order that the taxable emoluments of the Appellant for the year in question be reduced by the amount of the rental value incorrectly included in the assessment and that the tax assessed be reduced accordingly.