

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D47/03

Salaries tax – every employee is responsible to get himself from his home to his place of work – a fundamental rule in tax law – travelling expenses – personal and private expenditure – whether partial reimbursement from an employer of taxi fares incurred by an employee travelling in early morning hours from his home to his place of work was taxable as part of the employee's assessable income – crucial to ascertain the duty of the appellant.

Panel: Ronny Wong Fook Hum SC (chairman), Gerard Chung Wai Hung and Stephen Yam Chi Ming.

Date of hearing: 3 April 2003.

Date of decision: 7 August 2003.

Since 1999, the appellant was employed as a driver by the Government Department. His place of work was at the Employer's Office on Hong Kong Island.

Benefits were extended in favour of the appellant by Civil Service Regulations No 732 ('CSR 732') which, subject to conditions, provided for the *'reimbursement of fares on taxi and/or other appropriate modes of public transport incurred on journeys in Hong Kong between an officer's home and place of work (i.e. office or place of outside duty) if the officer is required to perform duties outside his normal duty hours to report for/go off duty at such times.'*

At the material times, the appellant resided in District B in the New Territories. By virtue of operation requirements of the Government Department, the appellant was asked on numerous occasions to report for duty well prior to eight o'clock in the morning.

The appellant submitted claims pursuant to CSR 732. His claims were supported by receipts issued by various taxi drivers. The receipts depicted the times he boarded and the times he alighted from the taxis. For the year of assessment 2000/01, he was paid a total of \$17,542 in respect of such claims. The Revenue contended that he was chargeable to salaries tax for the sum so received.

Apart from his claims under CSR 732, the appellant also claimed overtime allowance for the days when he reported early for duty. The claims for overtime allowance were invariably premised on times well after the times he alighted from the taxis that took him from District B to the Employer's Office.

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The issue on appeal was whether partial reimbursement from an employer of taxi fares incurred by an employee travelling in early morning hours from his home to his place of work was taxable as part of the employee's assessable income.

The facts appear sufficiently in the following judgment.

Held:

1. The appellant was not on duty as a driver of the Government Department when he travelled in a taxi from District B to the Employer's Office. As indicated by his claim for overtime allowance, he was not 'doing the things which it is his duty to do' until after his arrival at the Employer's Office.
2. The crucial question was the duty of the appellant. The fact that his employer was the Government Department and the fact that he was a member of the disciplined forces added little to the nature of the journey in question which in essence was travelling from his home to his place of employment.
3. As pointed out by Blair-Kerr J in CIR v Humphrey the responsibility of every employee to get himself from his home to his place of work was a fundamental rule in tax law.
4. The appellant was paid something by the Government towards the costs of the journeys which it was his responsibility to pay. He had thereby obtained an additional benefit in money from his employer. The allowance under CSR 732 was therefore income from his employment. He was not entitled to deduct the taxi fares which he incurred as the same constituted his personal and private expenditure.
5. For these reasons, the Board rejected the submission of the appellant and dismissed his appeal.

Appeal dismissed.

Cases referred to:

Nolder v Walters (1930) 15 TC 380
CIR v Humphrey 1 HKTC 451
Owen v Pook 45 TC 571

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Tsui Siu Fong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. The issue before us is whether partial reimbursement from an employer of taxi fares incurred by an employee travelling in early morning hours from his home to his place of work is taxable as part of the employee's assessable income.

2. By letter dated 4 February 1999, the Appellant was employed as a driver by the Government Department. His place of work was at the Employer's Office on Hong Kong Island.

3. The terms of engagement of the Appellant were governed by the 'Memorandum on conditions of service for officers appointed on common agreement terms' ('the Memorandum'). The Memorandum contained, inter alia, the following provisions:

(a) **' 2 WORKING HOURS**

The normal hours of work for officers whose conditioned hours are 44 hours gross per week are from 8:45 a.m. to 5:15 p.m. from Monday to Friday with one hour for lunch and from 9:00 a.m. to 12:00 noon on alternate Saturdays. The normal hours of work for officers whose conditioned hours are 45 hours net per week are from 8:30 a.m. to 12 noon and 1:00 p.m. to 5:00 p.m. from Monday to Saturday. However, the hours of work for the officer may vary depending upon the operational need of [the Employer]. The officer may be required to work shifts'.

(b) **' 5 ELIGIBILITY FOR FRINGE BENEFITS**

5.1 An officer will only be eligible for fringe benefits, including those benefits referred to hereunder and the benefits laid down in Civil Service Regulations, in accordance with the regulations relating to the provision of such benefits and the regulations relating to the prevention of double benefits'.

4. We are concerned with the benefits extended in favour of the Appellant by Civil Service Regulations No 732 ('CSR 732') which provided as follows:

'(1) Subject to the conditions in paragraphs (2) to (4), a Head of Department may approve reimbursement of fares on taxi and/or other appropriate

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modes of public transport incurred on journeys in Hong Kong between an officer's home and place of work (i.e. office or place of outside duty) if the officer is required to perform duties outside his normal duty hours to report for/go off duty at such times when

- (a) public transport is unavailable or manifestly inadequate; and*
- (b) it is neither practicable nor economical for departmental or pool transport to be used.*

This is normally confined to be period from 0000 hours to 0600 hours unless in very exceptional circumstances as considered appropriate by the Head of Department.

- (2) All reimbursement under (1) above will be subject to one of the following deductions, whichever is the greater –*
 - (a) “no-claim” limit as stipulated as Section (B) of Annex 4.13; or*
 - (b) the normal amount of travelling expenses which the officer has to bear for the journey between his home and place of work when normal public transport is available’.*

5. At the material times, the Appellant resided in District B in the New Territories. By virtue of operation requirements of the Government Department, the Appellant was asked on numerous occasions to report for duty well prior to eight o'clock in the morning. The Appellant submitted claims pursuant to CSR 732. His claims were supported by receipts issued by various taxi drivers. The receipts depicted the time he boarded and the time he alighted from the taxis. For the year of assessment 2000/01, he was paid a total of \$17,542 in respect of such claims. The Revenue says he is chargeable to salaries tax for the sum so received.

6. Apart from his claims under CSR 732, the Appellant also claimed overtime allowance for the days when he reported early for duty. The claims for overtime allowance were invariably premised on times well after the times he alighted from the taxis that took him from District B to the Employer's Office.

7. At the hearing before us on 3 April 2003, the Appellant was assisted by two colleagues from the Government Department. The Revenue's closing submission was in English. We gave directions for that submission to be translated by the Revenue into Chinese so as to facilitate proper response by the Appellant. We also gave directions for the exchange of further written submissions.

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8. By letter dated 20 June 2003, Solicitors' Firm C sent to this Board a further written submission of the Appellant as settled by Mr D. Although this written submission is not within the directions we gave on 3 April 2003, given the fact that the Appellant was previously unrepresented, we have decided to consider the arguments raised in this submission. We have further decided that the issues are adequately canvassed in previous submissions of the Revenue and it is not necessary to accede to their request for a further written submission in reply.

9. The Appellant made the following submissions:

- (a) The Commissioner
 - (i) in assessing the Appellant's income is wrong to disregard the fact that the Appellant received no 'net monetary gain' from the reimbursements; and
 - (ii) has applied the wrong test to the question whether the reimbursements of taxi fares are 'income' chargeable to salaries tax under section 8(1) of the Inland Revenue Ordinance ('IRO'), by asking whether the taxi fares themselves would have satisfied the stringent requirements for qualifying as allowable deductions under section 12(1)(a) of the IRO.
- (b) The Commissioner is wrong in submitting that Nolder v Walters (1930) 15 TC 380 applies to the present case.
- (c) The Commissioner places excessive reliance on what is described as well established case law in the United Kingdom and Hong Kong that home to office expenses are non-deductible; and has unjustifiably treated the Appellant's claim differently from other similar claims.
- (d) The Commissioner has failed to take full account of the difference between the duties of employment in disciplined services (as in the Appellant's case) and the obligation of employment elsewhere.
- (e) The Commissioner has been misled into an incorrect interpretation of relevant statutory provisions, by stating that 'considerations of fairness or equity are irrelevant' and that 'it is not the facts of but the legal principles laid down in the cases cited that are relevant'.

10. These submissions of the Appellant echo the contentions advanced on behalf of the taxpayer in the leading case of CIR v Humphrey 1 HKTC 451. The taxpayer in that case was a land assistant employed by the Hong Kong Government. He was attached to the District Office in

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Tai Po and was in charge of cadastral survey for the whole of the Tai Po District. Under his contract with the Government, he was entitled to Government quarters. None was available in the New Territories and he was allocated Government accommodation in Kowloon. Government was unable to provide him with a car for his official duties and he used his own car for such duties. In the year of assessment 1968/69, he received \$559.3 from the Government representing refund of toll charges and partial reimbursement of expenses for home-to-office journeys. The Board of Review held that the toll charge and the partial reimbursement were not taxable. In respect of the toll charge the Board took the view (at page 454) ‘... if the Appellant was asked (probably for accounting purposes only) to disburse the toll charges which is later refunded, the position is precisely the same. The Appellant has received no extra profit or gain. His income is unchanged. It is neither more nor less. One does not measure a person’s income by what he has disbursed for his employer. What the Appellant paid out for toll charges was to accommodate the convenience of the employer and what he paid out was refunded, so that we are back to square one, the net result being that the agreement was implemented and the Appellant used the tunnel free of charge’. In respect of the partial reimbursement, the Board (at page 455) held that ‘It is unrealistic to regard such partial re-imburement as a profit. The Appellant made no profit. In fact, he sustained a loss in respect of which he was partially re-imbursed. It was, therefore, not a “perquisite” as the word denotes something extra going into the Appellant’s pocket as distinct from recoupment of actual outgoings’. The decision of the Board of Review was upheld by Brigg J in the Supreme Court (Original Jurisdiction).

11. The Supreme Court (Appellate Jurisdiction) reversed the decision of the Court below.
 - (a) Scholes SPJ pointed out (at page 462) that ‘It has long been established that travelling from home to office and back is a matter of private or personal nature, and that it is the employee’s responsibility to get himself to his place of work, and that that does not count as travelling on duty’. He held at page 463 that the taxpayer was not travelling on duty from home to office and back and ‘he was paid something by the Government towards the cost of the journeys which it was his responsibility to pay and he was consequently, in my view, obtaining an additional benefit in money from his employers, the Government, additional to his normal emoluments for the job’.
 - (b) Blair-Kerr J observed (at page 473) that the responsibility of every employee to get himself from his home to his place of work is ‘a fundamental rule of tax law’. He pointed out at page 482 that ‘... even if we assume that Government received some “benefit” as a result of this arrangement, this is a far cry from saying that the respondent was on duty from the moment he entered the car in Kowloon to drive to the New Territories. In my view he was not on duty when travelling to and from the office.

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Therefore I find it very difficult to see how it can be said that in partially reimbursing him as regards his home-to-office journeys, Government was, to that extent, not discharging the respondent's obligation of getting himself to his place of work. In my view they were discharging in part the respondent's obligation. They recognized that he was in a special position of having to travel to the New Territories to do his job and that he should have additional remuneration which the mileage allowance provides'.

- (c) Mill-Owens J explained (at page 487) that '*In the case of expenses incurred by an employee using his own car in travelling to and from work, the dividing line must be whether or not he is on duty in so doing. Clearly, in my view, the respondent was not on duty. Accordingly, in my judgment, he was receiving a contribution to his expenses, not being reimbursed employer's expenses initially incurred by him on the employer's behalf*'.

12. In CIR v Humphrey the Supreme Court (Appellate Jurisdiction) considered at length the decisions in Nolder v Walters and Owen v Pook 45 TC 571.

- (a) In Nolder v Walters, an airline pilot operating from Croydon aerodrome chose to reside in Purley to be near the aerodrome. It was necessary for him to keep a motor car as his duties often commenced and ended when ordinary conveyance by public transport was not available. He did not receive any allowance in respect of the car; but he claimed to be entitled to deduct a proportion of the expense of the upkeep of the motor car as being money wholly, exclusively and necessarily expended in the performance of his duties. Rowlatt J said (at page 387):

“In the performance of the duties” 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. A man who holds an office or employment has, equally necessarily, to do other things incidentally, and spend money incidentally, because he has the office. He has to get to the place of employment, for one thing. If he had not got the employment he could stay at home. As he has got he employment he has necessarily got to get there, and it costs him something, if it is only shoe leather, to get there; but that is not in the performance of the office, because in getting there he is not doing the duties, or doing the work of the office. Incidentally, he is obliged to do that, but it is not in doing the work of the office, which begins when he arrives, and sets to work to perform his duties. ... I do not think [he] can be allowed the use of his motor car ... his employers would not be liable for what he did while he was driving his

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motor car to the office. He is not under their commands while he is going to the office, not in the sense that they govern his going. He has to be at the office, wherever: he has to start from ...'

- (b) In Owen v Pook the question was whether travelling expenses reimbursed in favour of a medical practitioner were part of his emoluments. The medical practitioner resided at Fishguard. He held part-time appointments as obstetrician and anaesthetist at Haverfordwest, 15 miles away. Under his appointment he was on stand-by duty for emergencies and he had to be accessible on the telephone when he was on such duty. On receipt of a telephone call telling him of an emergency he would give instructions over the telephone to the hospital staff and then, usually, would set off immediately for the hospital by car. His responsibility for the patient began as soon as he received a telephone call. The House of Lords held that the travelling expenses re-imbursed in his favour were not emoluments. It was further held that he had two places of work and the expenses were necessarily incurred in travelling between them.
- (c) These two cases are illustrative of the 'dividing line' which Mills-Owens J adverted to in his judgment in CIR v Humphrey.

13. We have no doubt that the Appellant was not on duty as a driver of the Government Department when he travelled in a taxi from District B to the Employer's Office. As indicated by his claim for overtime allowance, he was not 'doing the things which it is his duty to do' until after his arrival at the Employer's Office. The crucial question is the duty of the Appellant. The fact that his employer is the Government Department and the fact that he is a member of the disciplined forces add little to the nature of the journey in question which in essence is travelling from his home to his place of employment.

14. As pointed out by Blair-Kerr J in CIR v Humphrey the responsibility of every employee to get himself from his home to his place of work is a fundamental rule in tax law. The Appellant was paid something by the Government towards the costs of the journeys which it was his responsibility to pay. He had thereby obtained an additional benefit in money from his employer. The allowance under CSR 732 is therefore income from his employment. He is not entitled to deduct the taxi fares which he incurred as the same constitute his personal and private expenditure.

15. For these reasons, we reject the submission of the Appellant and dismiss his appeal.