INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/94

Salaries tax – overseas employee working in Hong Kong – whether hotel accommodation and local living allowances subject to be assessed to salaries tax.

Panel: Robert Wei Wen Nam QC (chairman), Peter R Griffiths and David Wu Chung Shing.

Date of hearing: 28 October 1994.
Date of decision: 2 December 1994.

The taxpayer resided in the United Kingdom and was employed to work in Hong Kong. During his employment in Hong Kong he was provided with free of charge hotel accommodation and a living allowance at the rate of $400 per day. The taxpayer contended that his permanent residence was in the United Kingdom and that his posting to Hong Kong was temporary. He was subject to United Kingdom tax. He argued that because he was resident in the United Kingdom the hotel accommodation and living allowance should not be assessed to Hong Kong salaries tax. The assessor disagreed with the taxpayer and assessed the taxpayer to tax on both the taxable value of the hotel accommodation and the living allowance. The taxpayer appealed to the Board of Review.

Held:

The permanent residence of the taxpayer in the United Kingdom was not relevant. He was employed in Hong Kong for over 6 months and worked in Hong Kong. The Inland Revenue Ordinance provides that salaries tax shall be assessed on both allowances and the rental value of any place of residence provided by the employer. Accordingly the taxpayer had been correctly assessed to tax. On an alternative ground of appeal the Board held that the expenses which the taxpayer claimed namely his hotel accommodation and living expenses in Hong Kong were not expenses deductible for the purposes of salaries tax. Such expenses are not deductible because they are both expenses of a domestic or private nature and also are not wholly, exclusively and necessarily incurred in the production of the assessable income.

Appeal dismissed.

Cases referred to:

Corry v Robinson 18 TC 911
Fergusson v Noble 7 TC 176
Evans v Richardson 37 TC 181
Income Tax Act [1952] schedule 9, paragraph 7
CIR v Humphrey 1 HKTC 451

Ricketts v Colquhoun [1926] AC 1
Lomax v Newton [1953] 2 All ER 801
Aspin v Estill [1987] STC 723 CA
D12/93, IRBRD, vol 8, 147

J R Simith for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

1. This appeal concerns the inclusion of rental value and living allowance in the computation of salaries tax for the years of assessment 1991/92 and 1992/93.

2. The Taxpayer who is appealing is an individual residing in the United Kingdom (UK). He applied under section 68(2D) to have the appeal heard in absentia on the ground that his remote location and his financial position did not allow him to attend the hearing or appoint a representative for the purpose. The application was granted and the appeal was heard in absentia.

3. The Taxpayer was employed in Hong Kong for the period from 27 November 1991 to 5 June 1992. He was taxed in the UK in respect of his wages from his employment in Hong Kong. At the objection stage in this matter, he contended that he was liable to Hong Kong tax only in respect of the net amount of his wages (that is, the amount after deducting the UK tax). In this appeal, he conceded, rightly in the Board's view, that he is liable to Hong Kong tax in respect of the 'gross amount' of his wages. He has been advised in the UK that he is entitled to unilateral relief under the United Kingdom tax law in respect of any Hong Kong tax paid.

4. During his employment the Taxpayer was provided by his employer with a hotel room free of charge, and was also paid, in addition to his wages paid in the pounds sterling, a local living allowance at the rate of $400 per day. He contended that he was not liable to be taxed on his free hotel accommodation or his living allowance. His reasons were as follows:

> 'My permanent residence is in UK, the posting to Hong Kong was a temporary arrangement made very quickly. In view of the temporary arrangement I could not be classed as a resident totally relocated to Hong Kong (and received no payment to make such a relocation) but had to retain my UK residence available to return at short notice. Because of this and in view of the temporary nature of employment my stay in a hotel and expenses incurred, in Hong Kong was totally work related, that is, the hotel in Hong Kong is not my normal residence but I was living in a hotel because I was working in Hong Kong.'

5. In the Board's view, the Taxpayer's argument is misconceived. The fact that his 'permanent residence' was in the UK had no bearing on his chargeability to Hong Kong salaries tax. He was employed in Hong Kong, and throughout the over-6-month period of

his employment, he worked in Hong Kong. Either one of those two facts was sufficient to bring the Taxpayer within the tax net of section 8 of the Inland Revenue Ordinance (the IRO), which provides, so far as it is relevant, as follows:

> *'8(1) Salaries tax shall … be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources:*
>
> *(a) any office or employment of profit …*
>
> *1(A) For the purposes of this part, income arising in or derived from Hong Kong from any employment:*
>
> *(a) includes … all income derived from services rendered in Hong Kong including leave pay attributable to such services …'*

In the Board's view, the Taxpayer is liable to salaries tax in respect of his income from his employment in Hong Kong.

6. There is no exhaustive definition of 'income from employment', but it is defined as including, among other things, wages (section 9(1)(a)), allowance (ditto) and rental value (section 9(1)(b)). The relevant provisions are set out below:

> *'9(1) Income from any office or employment includes:*
>
> *(a) any wages … or allowance, whether derived from the employer or others …*
>
> *(b) the rental value of any place of residence provided rent-free by the employer…'*

7. The representative of the Commissioner of Inland Revenue relied on the above cited provisions for saying that the Taxpayer is liable to be taxed in respect of his wages, his local living allowance and the rental value of his free hotel room (calculated at 4% of his principal income, that is, his wages and local living allowance). The Board accepts that; all the 3 heads of income are clearly within the meaning of section 9(1)(a) and (b) respectively.

8. In the course of his submissions, the representative of the Commissioner referred to the following United Kingdom case law to show that there the position as to 'allowance' is similar, even though it is not expressly included in the charging provisions:

(a) In Corry v Robinson 18 TC 911, a civil servant was appointed to a post in Singapore from 1928 to 1931. In addition to salary, he received a 'colonial allowance' to meet the incurred cost of living abroad. During part of the period he occupied an official house, and during the other part of the period he was paid a housing allowance in lieu of an official house. It was held that he had been properly assessed to income tax in respect of

the salary, the colonial allowance and the housing allowance and that no deduction was due for the cost or extra cost of living abroad.

(b) In Fergusson v Noble 7 TC 176, a detective sergeant in the Glasgow police force was paid an allowance for clothing. Detective officers wore plain clothes; in order to avoid uniformity each officer received an allowance in cash out of which he supplied his own requirements. It was held that the allowance was assessable to income tax. At page 181 Lord Skerrington said, *'The allowance was simply a contribution towards his expenses, in other words, pecuniary relief given to the man, in other words, an addition to his emoluments.'*

(c) In Evans v Richardson 37 TC 181, an army officer was allotted a civilian billet in lieu of barrack accommodation and was paid a lodging allowance. It was held that the allowance was assessable to income tax. Wynn-Parry J adopted the above words of Lord Skerrington and said, *'On that basis the allowance is rightly to be regarded as income.'*

9.1 The representative of the Commissioner also submitted on the alternative question of whether any deduction was due in respect of hotel accommodation and expenses. Deductions are governed by section 12, which provides, so far as it is relevant, as follows:

> *'12(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 …'*

Only expenses actually incurred can form the subject of deductions. The rental value and the local living allowance, being both 'income' within the meaning of section 9(1)(a) and (b) respectively, are not allowable deductions. As for expenses actually incurred, the Taxpayer mentioned food, laundry and medical expenses. None of those expenses are deductible because they do not come within section 12(1)(a) for two reasons:

(a) The expenses were *'of a domestic or private nature';* and/or

(b) They were not *'wholly, exclusively and necessarily incurred in the production of the assessable income'.*

9.2 Reason (a) does not require explanation. As for reason (b), the words in inverted commas are similar to the words *'wholly, exclusively and necessarily in the performance of the duties of the office or employment'* contained in comparable United Kingdom legislation, that is, the Income Tax Act [1952], schedule 9, paragraph 7. In CIR v Humphrey 1 HKTC 451, the Full Court treated the phrase *'in the production of the*

assessable income' in the Hong Kong legislation as having the same import as the phrase '*in the performance of the duties of the office or employment'* in the United Kingdom legislation. It is generally accepted that the United Kingdom principles relating to the application of those words and the words '*wholly, exclusively and necessarily'* are applicable to claims for deductions under our section 12(1)(a).

9.3 For present purposes it is sufficient to refer to Ricketts v Colquhoun [1926] AC 1, where the taxpayer, a barrister residing and practising in London, was required to and did sit as a recorder in Portsmouth four times in the year in question. It was held that he was not entitled to deduct from his emoluments as a recorder the expenses incurred by him for the purpose of holding his courts in Portsmouth such as the hotel and food expenses. Viscount Cave, LC, stated at page 6:

> *'A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.'*

The fact that the taxpayer was treated as having elected to live away from his work (that is, as a recorder at Portsmouth) illustrates the stringent application of the words '*wholly, exclusively and necessarily in the performance of the duties'*. In Lomax v Newton [1953] 2 All ER 801 at page 822, Vaisey J stated:

> *'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.'*

Applying the same stringent test to the present case, the Board is of the view that the Taxpayer's food, laundry and medical expenses incurred in Hong Kong are not deductible from his assessable income.

10.1 For the above reasons, this appeal fails. But that is not the end of the matter. By his notice of appeal the Taxpayer made a complaint about the conduct of a Revenue officer who interviewed him on 9 August 1993. In the Board's view it has no jurisdiction over this complaint; if the Taxpayer has a remedy, it must lie in judicial review proceedings in the High Court. The complaint arose in this way. The Taxpayer was assessed 3 times for each of the 2 years in question in respect of his income from his employment in Hong Kong: in the original assessment for each year he was assessed in respect of (a) his wages less the United Kingdom tax deducted and (b) rental value; in the additional assessment for each

year he was assessed in respect of (a) his wages without deducting the United Kingdom tax and (b) rental value; in his determination the Commissioner of Inland Revenue revised the additional assessments by incorporating the local living allowance. Briefly, the Taxpayer's allegation is this: on 9 August 1993, having arrived in Hong Kong to visit the Revenue, he was interviewed by a Revenue officer; after some discussion, the Taxpayer agreed to pay the tax payable under the original assessments; he was asked to return to the interviewer after payment of the tax to show the receipt and sign a form; when he returned to the interviewer, he was given the additional assessments and was informed that immigration had been requested to prevent his departure from Hong Kong until the tax payable under the additional assessments was paid.

10.2 It is not for the Board to say whether the allegation could ground an application for a judicial review. The function of the Board is to decide whether the subject assessment has been made properly in accordance with the IRO or whether it is correct in terms of the IRO (Aspin v Estill [1987] STC 723 CA; D12/93, IRBRD, vol 8, 147). In the Aspin case, Sir John Donaldson MR stated at pages 725-727:

> *'The function of the General Commissioners is to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes … In other words, the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power was one thing, and a matter only to be considered by the High Court. Whether, if he was right to make such an assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners … My conclusion therefore is that, even if the General Commissioners were to find these facts, they could not found their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. If the taxpayer has a remedy … it must lie in the judicial review route, subject to any facts which might emerge on an investigation of the facts if leave were granted.'*

Likewise, the proper course for the Board in the present case is to put the allegation on one side and make no investigation or finding.

10.3 The Taxpayer stressed that he had been assessed again and again with the result that he had an 'ever increasing bill' to pay. The Board notes that the Taxpayer was not over-taxed by the assessments or the revision of the Commissioner of Inland Revenue. Furthermore, in his determination dated 10 August 1994, the Commissioner of Inland Revenue apologised for the fact that the assessor had neglected to advise the Taxpayer of the full extent of his liability to Hong Kong salaries tax at an early date.

11. It follows that this appeal is dismissed and that the additional salaries tax assessments as revised by the Commissioner of Inland Revenue are hereby confirmed.