Case No. D5/87

Board of Review:

William Turnbull, *Chairman*, E. J. V. Hutt and LEE Wing-kit, *Members.*

27 May 1987.

Salaries Tax—Assessability of benefits—section 9(1)(*a*) of the Inland Revenue Ordinance—whether utility and telephone charges paid by employer on behalf of the Appellant assessable.

The Appellant's employer paid utility and telephone charges but none of the contracts for the supply of electricity, gas or telephone were in the name of the employer. The Appellant argued, inter alia, that the payment of utility charges on behalf of the Appellant to the utility companies was a genuine fringe benefit provided by the employer and was not taxable.

Held:

The employer paid these charges direct to the person to whom taxpayer owed the money and thereby discharged the obligation of the taxpayer. The word "perquisite" included in Section 9(1)(*a*) of the Inland Revenue Ordinance is a word which has a very wide meaning; it includes all incidental emoluments.

Appeal dismissed.

Cases referred to:

C.I.R. v. Humphrey 1 HKTC 451
Hartland v. Diggines [1926] AC 289
Hochstrasser v. Mayes 38 TC 673
Nicoll v. Austin 19 TC 531
Tennant v. Smith [1892] AC 150

J. G. A. Grady for the Commissioner of Inland Revenue.
Appellant in Person.

Reasons:

This Appeal involves a simple but important point.

The relevant facts are that the Taxpayer was employed by a large Hong Kong company. He was one of many similar employees. During the year of assessment 1983/84 the Taxpayer's employer paid utility and telephone charges ("the utility charges") on behalf of the Taxpayer.

The terms of employment of the Taxpayer included the following provision:—

> "The Company will meet the costs, to a reasonable level, of electricity, gas and telephone (excluding overseas calls). If any of these costs should become excessive, the Company may find it necessary to apply upper limits beyond which you would be responsible".

The utility charges were paid by the employer but none of the contracts for the supply of electricity, gas or telephone were in the name of the employer. The Taxpayer contracted direct with the Gas and Telephone companies and accounts were in the name of the Taxpayer. The electricity charges were in the name of the landlord of the Taxpayer and there was a contract between the Taxpayer and his landlord under which the Taxpayer would pay to the landlord the electricity and water charges. The tenancy agreement in the name of the Taxpayer included the following provision:—

> "To pay all maintenance, electricity and water charges and all other outgoings in respect of the said premises (Crown Rent and Property Tax excepted)."

The question for this Board to decide is whether or not the amount of the utility charges should be included in the Taxpayer's income chargeable to Salaries Tax under Part III of the Inland Revenue Ordinance.

The Taxpayer submitted that it was inequitable that the Commissioner should charge him to tax on the utility charges because:—

i. The payment of utility charges on behalf of the Taxpayer to the utility companies was a genuine fringe benefit provided by the employer and was not designed to avoid tax.

ii. United Kingdom decided tax cases have established that a perquisite cannot be treated as taxable income unless it is capable of being converted into money. As the utility charges were paid direct by the employer under the terms of the employment contract, the amounts paid represented benfits in kind and were not convertible into money's worth.

iii. Fellow employees of the Taxpayer do not pay tax on their benefits if the utility charges contracts are in the name of the employer even though the employment contract in each case is the same. It is incorrect that the Taxpayer in this Appeal should pay tax when some of his fellow employees under identical employment contracts are not paying tax.

The arguments for the Commissioner were based on the Inland Revenue Ordinance and decided cases. Section 9(1)(*a*) of the Inland Revenue Ordinance provides that taxable income includes any wages, salary, leave pay, fee, commission , bonus, gratuity, perquisite, or allowance, whether derived from the employer or others.

The Commissioner's Representative relied (inter alia) upon the United Kingdom case of Nicoll v. Austin 1935 19 TC 531. In that case the Taxpayer was the Managing Director of a company. The employer was anxious that the Taxpayer should continue to reside in his own imposing residence because of convenience and prestige. The employer undertook to pay all outgoings in respect of the house and to maintain and gardens in proper condition. The Court held that the sums paid by the employer represented moneys worth to the Taxpayer and were accordingly assessable to Income Tax.

In addition to the case we have just mentioned the Taxpayer also referred to the case of Tennant v. Smith 1892 AC 150. The Commissioner's Representative also referred to CIR v. Humphrey (HKTC 451), Hochstrasser v. Mayes 38 TC 673, Hartland v. Diggines 1926 AC 289 and Wilkins v. Rogerson 1961 CH 133.

On the facts of the case before us we find little difficulty in rejecting the Taxpayer's submissions and dismissing the Appeal. It is immaterial whether or not the payments were genuine fringe benefits not intending to avoid tax. Fringe benefits like all other benefits of employment are taxable unless it can be shown that they are exempt. The word "perquisite" included in Section 9(1)(*a*) of the Inland Revenue Ordinance is a word which has a very wide meaning. It includes all incidental emoluments. In the case of CIR v. Humphrey, Blair-Kerr, J. at page 465 correctly stated the law as follows:—

> "I do not find Section 9(1) of much assistance in reaching a conclusion. The Section is an "inclusive" one. The legislature has enumerated several of the more common kinds of income; but the Section does not purport to define income, and it is perhaps not surprising that no attempt has been made to enumerate all the different kinds of payments which might appropriately be described as "income"."

Fringe benefits constitute income which derives from employment and are prima facie taxable.

The second argument put forward by the Taxpayer was that the fringe benefits were incapable of being converted into moneys worth. With due respect we find no substance in this submission. In fact the fringe benefits were money. The Taxpayer had a liability to pay the utility charges. The employer paid these utility charges direct to the person to whom the Taxpayer owed the money and thereby discharged the obligation of the Taxpayer. This was clearly moneys worth. The employer did not provide the employee with benefits in kind incapable of being converted into money. The employer did not provide electricity or gas or a telephone to the employee.

This leads us to the third submission made by the Taxpayer which likewise must fail. Taxation is a technical matter and it is not appropriate for this Board to ignore the applicable legal principles because it is, in the eyes of the Taxpayer, unfair. The legal principles are simple and must be applied. The discharge of a financial obligation of an individual is taxable. The receipt of money or something which is capable of being converted into money is likewise taxable. These are simple rules which must be followed. It is not appropriate for

us to comment or speculate on whether or not fellow employees of the taxpayer are liable to pay tax.

For the reasons mentioned this Appeal is dismissed.