INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D5/93

Salaries tax – whether certain travel and entertainment expenses could be deducted from the assessable income of the taxpayer.

Panel: William Turnbull (chairman), Philip Fu Yuen Ko and Richard Lee.

Date of hearing: 3 March 1993.
Date of decision: 27 April 1993.

The taxpayer was employed as an assistant sales manager and claimed as a deduction from his assessable income certain expenses being entertainment and travelling. In support of his claim he provided certain vouchers issued by various restaurants on which he had written the names of customers and a schedule of travelling expenses. The employer of the taxpayer paid to the taxpayer a travelling allowance which the taxpayer claimed should not be subject to salaries tax.

Held:

The entire travel allowance was subject to assessment to tax. The taxpayer could claim a deduction of the actual amount of the travel expenses which he had incurred. With regard to the entertainment expenses the Board was not satisfied that the taxpayer had incurred the entertainment expenses and noted that he had not claimed reimbursement of the same from his employer even though he was entitled so to do.

Appeal dismissed.

Cases referred to:

D17/93, IRBRD, vol 1, 113
CIR v Humphrey 1 HKTC 451
Lomax v Newton 34 TC 558
D36/90, IRBRD, vol 5, 295

May Chan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a salaries taxpayer against a determination of the Deputy Commissioner for Inland Revenue which refused to allow the Taxpayer to deduct certain travel and entertainment expenses from his assessable income. The facts are as follows:

1. The Taxpayer was employed by a company as an assistant sales manager. In his salaries tax return for the year of assessment 1990/91 the Taxpayer returned his income from his employer as salary of $180,900 and bonus of $30,150 making a total of $211,050. The Taxpayer claimed as outgoings and expenses the sum of $11,350, being entertainment of $4,050 and travelling of $7,300.

2 In support of the claim for deduction in respect of entertainment and travelling expenses the Taxpayer provided three vouchers issued by various restaurants with surnames of the customers written at the back of each and a schedule of travelling expenses incurred for the year ended 31 March 1991. The schedule of travelling expenses was very detailed and showed for each month of the year, broken down into a number of daily entries, monies which the Taxpayer stated had been expended by him on travel.

3. The assessor did not accept the claim by the Taxpayer for the deduction of entertainment and travelling expenses and rejected the claim for $11,350 and assessed the Taxpayer to salaries tax accordingly.

4. The Taxpayer objected to the assessment on the ground that he was entitled to deduct the expenses of $11,350.

5. The assessor made enquiries of the employer of the Taxpayer and was informed that for the year of assessment 1990/91 the employer had paid to the employee a total travelling allowance of $10,080 made up of a fixed amount initially of $770 per month and subsequently increased to $1,050 per month. The amount of this travel allowance had not been included in the Taxpayer's return nor in the return filed by his employer. With regard to entertainment expenses the employer informed the assessor that the employer would approve reimbursement of entertainment expenses for business purposes which were supported by valid bills. The employer had reimbursed to the Taxpayer entertainment expenses totalling $3,550 for the year ended 31 March 1991 and had no record of rejecting any claim by the Taxpayer for reimbursement during that year. The employer further informed the assessor that there was no maximum limit for reimbursement under its policy but that if the Taxpayer did not submit claims for reimbursement he would have to bear the entertainment expenses himself.

6. In view of the information set out in fact 5 above the assessor considered that the excess of the travelling allowance paid to the Taxpayer over the travelling expenses actually incurred as claimed by the Taxpayer should be assessed to salaries tax and that the entertainment expenses claimed by the Taxpayer should be disallowed.

7. The Deputy Commissioner by his determination dated 3 November 1992 decided in favour of the assessor and directed that the assessment for the year of assessment 1990/91 should be increased accordingly.

8. The Taxpayer duly appealed against the determination of the Deputy Commissioner.

At the hearing of the appeal the Taxpayer appeared in person. He informed the Board that he had previously appealed against an assessment in respect of the year of assessment 1988/89 regarding travelling expenses. He said that his appeal had been successful. He had also appealed with regard to certain entertainment expenses but he considered the amount to be negligible and so he withdrew that appeal. He went on to say that the individual assessors in the Inland Revenue Department were not consistent and did not follow a standard set of guidelines. He submitted that there should be a standard set of guidelines because it had taken a lot of his time and the time of his employer to maintain records of his travel expenses. He said that he was paid a bonus yearly because he was an assistant manager. He said that the Inland Revenue Department granted a lump sum deduction for expenses with regard to salesmen and he submitted that the nature of his job was the same. He said that salesmen were rewarded monthly whereas his bonus was paid annually. He said that his job was to be responsible to maintain a close relationship with salesmen and sales outlets and to meet sales targets set by the employer. He said that nine persons worked under him and he was responsible for the schedules of his sales team. He said that it was necessary for him to have social contact with customers.

The representative for the Commissioner submitted that the travelling allowance which had been paid to the Taxpayer was an allowance which was assessable to salaries tax. She then submitted that it was necessary for the Board to decide what was the quantum of travelling expenses and entertainment expenses which could be deducted from the Taxpayer's assessable income.

She submitted that the Taxpayer was employed as an assistant sales manager. She said that the travel allowances were clearly taxable as they came within section 8(1) and 9(1) of the Inland Revenue Ordinance.

The representative for the Commissioner then referred to the deductibility of expenses. She said that the deductibility of expenses was governed by section 12(1)(a) of the Ordinance which provides:

> ' 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 assessable income were deductible.'

She submitted that the Taxpayer had to prove that the expenses came within the tests laid down by this section. She then referred us to D17/73, IRBRD, vol 1, 113 which had applied the Hong Kong Court of Appeal decision in CIR v Humphrey 1 HKTC 451.

She then referred us to the case of Lomax v Newton 34 TC 558. Finally she cited D36/90, IRBRD, vol 5, 295.

She said that the Commissioner had accepted that part of the duties of the Taxpayer was to make regular calls on customers and that in so doing the Taxpayer had to visit the places of business of the customers. To achieve this the Taxpayer was obliged to incur certain travelling expenses. She said that the Commissioner accepted that the amount claimed by the Taxpayer of $7,300 was a legitimate expense which should be deducted from his assessable income.

With regard to the entertainment expenses the representative for the Commissioner said that the Taxpayer was entitled to have such expenses reimbursed by his employer. She said that there was not sufficient evidence that the expenses now claimed by the Taxpayer had been wholly, exclusively and necessarily incurred by the Taxpayer in the production of the assessable income and accordingly the same were not deductible.

This case falls into two clear and distinct parts. We will deal with the travelling expenses first.

The employer paid to the Taxpayer a lump sum travel allowance which was no doubt intended by the employer to cover whatever expenses the employee might incur in travelling on his official duties. In most cases such an allowance would be a fair approximation of the actual expenses of the employee and we would expect that in most cases it would be accepted by the Commissioner that the employee would incur expenses of a like amount so that there would be no net benefit to the Taxpayer which could be subject to salaries tax. However that is not the case in the appeal before us. The Taxpayer has kept detailed accounts of all of his business travel expenses. This totals less than the amount paid to him by his employer and in such circumstances it is clear to us that the difference between the actual travel expenses incurred by the Taxpayer and the amount paid to him by his employer is subject to salaries tax. The way in which the Inland Revenue Ordinance achieves this is simple. It makes the entire travel allowance paid to the Taxpayer subject to salaries tax and allows the Taxpayer to deduct from his assessable income the full amount of the travel expenses actually incurred by him. When one is deducted from the other the effect is to assess to salaries tax the difference between the two.

We now turn to the entertainment expenses claimed by the Taxpayer. We are not satisfied on the evidence before us that the Taxpayer has discharged the onus of proof placed upon him in such cases. The Taxpayer was entitled to claim reimbursement from his employer of all entertainment expenses which were legitimately incurred by him in the performance of his duties. In fact he did claim some expenses and the same were duly reimbursed to him. What he now seeks to do is to obtain a tax benefit in respect of certain other expenses which apparently he never sought to recover from his employer. No explanation has been given to us regarding this. We find it strange that the Taxpayer would seek to obtain a comparatively small tax benefit by claiming the deduction of such alleged entertainment expenses when he has failed to claim the full benefit of the same from his employer. It does not seem sensible to us that if the Taxpayer could have recovered such

expenses from his employer he would not have done so. No one is better qualified to adjudicate on the validity of business expenses than the employer. The Taxpayer was entitled to recover 100% of all entertainment expenses which he incurred in performing his duties. In the absence of an adequate explanation we must assume that the Taxpayer would have done so. Accordingly we are not able to find as a fact that the additional entertainment expenses which the Taxpayer claims were incurred by him in the performance of his duties were in fact so incurred.

For the reasons given we dismiss this appeal and confirm the Commissioner's determination. Accordingly we direct that the assessment for the year of assessment 1990/91 against which the Taxpayer has appealed showing net chargeable income of $134,050 with tax payable thereon of $24,112 be increased to net chargeable income of $136,830 with tax payable thereon of $24,807.