Case No. D7/04

Salaries tax – deduction from assessable income - concertmaster - capital expenditure on violin - depreciation allowances - whether the use of violin was essential in the performance of the appellant's duties as concertmaster - onus of proving assessment excessive or incorrect was on the appellant – sections 12(1)(b), 12(2) and 68(4) of the Inland Revenue Ordinance ('the IRO').

Panel: Andrew J Halkyard (chairman), David Li Ka Fai and William Thomson.

Date of hearing: 26 March 2004.
Date of decision: 12 May 2004.

The appellant was employed by Orchestra A/Company B as its first associate concertmaster in April 2000. His main duty was to play violin in its concert performances. Prior to joining Company B, in late 1999, the appellant had been introduced to a violin ('Violin 1'), which he loved. At that time, as he could not afford to purchase Violin 1, so he commenced using it on a loan basis. Upon taking up his post with Company B, he continued to use Violin 1 as well as try out other violins borrowed from Company B. During the year of assessment 2001/02, the appellant used Violin 1 for all his concerts with Company B except outdoors and outreach concerts, school visits and certain operatic and theatre performances. On these occasions, it was inappropriate to use Violin 1 in view of the heightened risk of damage to the instrument at these locations. By December 2001, the appellant had sufficient funds and purchased the violin for US$150,000 (HK$1,171,200) after having traded in other musical instruments as part payment for the purchase price.

Having incurred capital expenditure of US$150,000 on purchasing Violin 1 during the year of assessment 2001/02 (accepted by the Commissioner), the appellant then claimed depreciation allowances in respect of his Violin 1. However, the Commissioner disallowed the appellant's claim for depreciation allowances for Violin 1 contending that there was nothing inherent in the appellant's duties as first associate concertmaster of Company B that required him to use violin of this quality. Alternatively, if the Board held, on an objective basis, that Violin 1 was necessarily used in the performance of the appellant's duties under different employments (apart from his employment with Company B, he was also a part-time teacher and violin player), then the Commissioner contended that it was not wholly and exclusively used. As the appellant had not adduced any evidence to enable apportionment to be on a fair and reasonable basis, his onus of proof under section 68(4) of the IRO had not been discharged, thus his claim for depreciation allowances should also have failed.

On appeal, the appellant contended that a good fine violin was an essential tool for a professional violinist and that Violin 1 was essential for the performance of his duties with Company B.

The sole issue before the Board to decide was whether the conditions set out in section 12(1)(b) (and section 12(2), if relevant) of the IRO were satisfied so as to grant the appellant depreciation allowances in respect of his Violin 1.

Held:

Section 12(1)(b) of the IRO

1. The Board agreed with the appellant that his purchase of Violin 1 qualified for depreciation allowances in accordance with section 12(1)(b) of the IRO.

2. On the interpretation of section 12(1)(b), the Board accepted that there was no reason why the words 'production of the assessable income' in section 12(1)(a) and section 12(1)(b) should bear a different meaning (D39/98 applied). In interpreting section 12(1)(b) one cannot ignore the jurisprudence governing section 12(1)(a) which imports the test of objective necessity in incurring the expenditure before any claim for capital allowances is granted under section 12(1)(b) (D89/89 and D51/99 followed).

3. In this regard, the Board was bound by the decision in CIR v Humphrey where Scholes SPJ indicated that the words 'production of the assessable income', which appear in both sections 12(1)(a) and 12(1)(b), mean 'in the performance of the duties of the office or employment'.

4. The Board found that the use of Violin 1 was essential in the performance of his duties with Company B and dismissed the Commissioner's argument that the appellant purchased Violin 1 for reasons of his own volition and personal style and that the purchase contained elements of personal choice and a predictable benefit quite separate from the necessities of the appellant's employment as first associate concertmaster (Ricketts v Colquhoun (1926) 10 TC 118 distinguished). The Board was of the view that the benefit was an incidental and unavoidable benefit of the fact that a violin of the quality of Violin 1 was essential for the appellant's employment with Company B.

5. The issue of whether capital allowances can be granted to the appellant must ultimately be decided by reference to the specific nature of his employment. A fine musical instrument for a virtuoso concert performer such as the appellant was not the same as generic items such as journals and a computer for a university lecturer;

not the same as brand items such as a calculator for a teacher and examiner and certainly not the same as a home for a Clerk to the General Commissioners (D89/89, IRBRD, vol 6, 328; D51/99, IRBRD, vol 14, 477 and Baird v Williams (1999) STC 635 considered).

6. The 'objective necessity' test must be judged according to the substantive requirements of the employment. Thus, the higher degree of virtuosity required to properly discharge the performance duties of a musician's employment, the standard of what is 'objectively necessary' is also commensurately higher. Moreover, the objective character of the deductions allowed relates to their nature, not to their amount (Dictum of Lord Wilberforce in Pook v Owen (1969) 45 TC 571, at page 596).

7. The Board accepted the appellant's unchallenged evidence that, notwithstanding that he was periodically obliged to return Violin 1 to the lender, he did use this violin for all his concert performances with Company B other than the outdoor and outreach and other non-concert hall performances. It was simply not realistic for someone in his position to borrow an appropriate violin or violins for life and that given the suitability of Violin 1 for the performance of his duties he purchased it as soon as he could afford it. The appellant quite properly purchased Violin 1 to ensure that it was exclusively available to him in the performance of his duties with Company B (Brown v Bullock (1961) 40 TC 1 distinguished).

8. The Board also accepted the appellant's unchallenged evidence that the other violins available to him by way of loan through Company B were not of the requisite quality for someone in the appellant's position of first-chair violinist.

9. As to the Commissioner's other possibilities for the appellant acquiring a suitable violin, there was no evidence of the existence of any Hong Kong museum, foundation, supplier or dealer who could have been a benefactor to the appellant; and the Board accepted that the appellant knew of no Hong Kong collector who could fill this role. It seemed wholly unreasonable to require the appellant to search the world at large in order to borrow or hire another suitable as yet unidentified violin.

Section 12(2) of the IRO

10. The Board dismissed the Commissioner's argument that Violin 1 was not wholly and exclusively used in the production of his assessable income in accordance with section 12(2) of the IRO. There was no evidence before the Board that the appellant used Violin 1 for any purpose other than to earn income from his employment with Company B. The Board accepted that the appellant played Violin 1 for all his concerts with Company B other than the outdoor and outreach

and other non-concert hall performances; and inferred that he did use the violin for private practice at home, and that he did not use the violin in any way incompatible with his employment other than to a purely de minimus extent.

Section 68(4) of the IRO

11. The Board concluded that the appellant had discharged his onus of proof under section 68(4) of the IRO and thus his claim for depreciation allowances in respect of his Violin 1 was allowed.

Depreciation for the Appellant's violin bows

12. There seemed no obvious reason to distinguish the case of Violin 1 from violin bows in respect of which capital allowances had been granted by the Commissioner.

Appeal allowed.

Cases referred to:

CIR v Humphrey (1970) 1 HKTC 451
D39/98, IRBRD, vol 13, 275
D89/89, IRBRD, vol 6, 328
D51/99, IRBRD, vol 14, 477
Nolder v Walters (1930) 15 TC 380
Baird v Williams [1999] STC 635
Lomax v Newton (1953) 34 TC 558
Brown v Bullock (1961) 40 TC 1
Ricketts v Colquhoun (1926) 10 TC 118
Pook v Owen (1969) 45 TC 571

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. The issue for the Board's decision is whether the Appellant, a concertmaster employed by Orchestra A, was, in accordance with section 12 of the Inland Revenue Ordinance ('IRO'), entitled to claim depreciation allowances in respect of his violin ('Violin 1').

The agreed facts

2. The agreed facts, which we so find, are contained in the Deputy Commissioner's determination dated 24 November 2003. These were supplemented by various documents adduced by both parties. The Commissioner's representative for this appeal, Ms Wong Ki Fong, very usefully summarized the salient facts for us. We adopt these, with minor modifications:

(a) During the year of assessment 2001/02, the Appellant was employed by Company B as its first associate concertmaster and Institution C as its part-time teacher. He was also a violin player for Mr D. The Appellant's income during the year was:

Employer	**Capacity**	**Income**
		$
Company B	first associate concertmaster	850,030
Institution C	part-time teacher	180,940
Organization E		21,750
Mr D	violin player	4,550
		1,057,270

The Appellant agreed that the income from these four sources was liable to salaries tax.

(b) The Appellant's main duty in his employment with Company B was to play violin in its concert performances.

(c) Company B acknowledged that musicians usually provide their own instruments. It informed the assessor that the Appellant provided his own violin(s) in performing his duties, but that it did not specify the cost of the instruments with which the Appellant performed his duties.

(d) Clause 4.09 of the Appellant's contract with Company B stated that Company B would provide insurance cover for the Appellant's instruments and accessories.

(e) The Appellant applied to Company B for insurance coverage of the following violins:

Date of form	**Violin**	**Amount (US$)**
23-6-2000	Violin 1	120,000
6-9-2001	Violin 2	28,000

According to the list of instruments insured by Company B, Violin 2 was only deleted

for insurance purposes in January 2004.

(f) Company B had five violins in its possession – two were donated and three were loaned to it. Company B invited its musicians to make applications to borrow these violins. The Appellant was eligible to make such application.

(g) During the year of assessment 2001/2002, Company B permitted the following players to use the above violins:

Violin	Updated Valuation on 27-9-2003	Player	Permission since
Violin 3	US$110,000	xxxxx	10-2001
Violin 4	US$120,000	xxxxx	8-1992
Violin 5	US$150,000	xxxxx	10-2001
Violin 6	US$170,000	xxxxx	12-2001
Violin 7	US$150,000	xxxxx	10-2001

(h) Company B was not concerned with verifying the legal ownership, the manufacturer and year of manufacture of musical instrument(s) used by its players in the performance of their duties.

(i) The Appellant was employed by Institution C to teach violin/viola in its music lessons. He was not provided with any musical instruments by Institution C, but he could make a request to use its instruments in performing his duties. Otherwise, he could use his own instruments in performing his duties.

(j) In addition to his claim for depreciation allowances for Violin 1, the Appellant claimed – and was granted – depreciation allowances on various violin bows purchased in both the earlier year of assessment (2000/01) and the year of assessment under appeal (2001/02, as confirmed by the Deputy Commissioner).

(k) In his letter objecting to the assessment disallowing his claim for depreciation allowances on Violin 1, the Appellant stated:

> ' [My] title and my employment agreement are basic on my performing ability and high standard level. Therefore, I do need to spend such huge amount of money to buy this violin in order to support my high standard of performing and to maintain the stability of my job. … In fact, *I spent most of my income on that instrument instead of buying an apartment or other enjoyments.* As a serious and sincere musician, I do believe with my enthusiastic on music

and the help of this magnificent 19th century instrument, I can do my job even better and also, serve better for the cultural and art environment of Hong Kong.' (*emphasis added*)

(l) In support of his objection, the Appellant (through this tax representative) stated:

'Many other outstanding artists and concert masters in Asia are performing with violins of values 5 to 10 times cost of [Violin 1]. ... *His use of this particular violin was mentioned in his biography which was printed and circulated before a concert, an added acknowledgement of his skill and proficiency*. … Prior to the purchase of that violin, he had been performing with a similar violin made by the same master on a loan basis.[1] [The Appellant] would mention that every professional violin artist craves for owning a violin to his/her perfection. It seems that [the Appellant] is no exception and he did make his choice. ... He needs to perform his contract and to perform well so that his contract can be renewed and even at a higher salary.' (*emphasis added*)

The Commissioner's submissions on the law

3. Section 12 of the IRO states:

'*(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;

(b) allowances calculated in accordance with Part VI in respect of capital expenditure on machinery or plant the use of which is essential to the production of the assessable income;

(2) Where any machinery or plant is not used wholly and exclusively in the production of assessable income, the amount of the allowances provided for in subsection (1)(b) shall be reduced in the proportion considered by the assessor to be fair and reasonable.'

1.

[1] It is now clear from the Appellant's oral evidence (see below) that the 'similar violin' was indeed Violin 1.

4. The words 'production of the assessable income' appear in both sections 12(1)(a) and 12(1)(b). It was held in CIR v Humphrey (1970) 1 HKTC 451 at page 467 that, in relation to the predecessor of the current section 12(1)(a), these words meant 'in the performance of the duties of the office or employment'.

5. In D39/98, IRBRD, vol 13, 275 at page 279 the Board of Review stated that there was no reason why the words 'production of the assessable income' in section 12(1)(a) and section 12(1)(b) should bear a different meaning.

6. In D89/89, IRBRD, vol 6, 328 at page 332 the Board of Review held that the words 'the use of which is essential to the production of the assessable income' in section 12(1)(b) of the IRO were equivalent to the words 'necessarily used in the performance of the duties of the office or employment' or words of a similar import. The Board added that this approach had the merit of bringing section 12(1)(b) in line with section 12(1)(a), thereby maintaining consistency between the two. A differently constituted Board in D51/99, IRBRD, vol 14, 477 at page 490 adopted the same approach.

7. Section 12(2) imposes the elements of 'wholly' and 'exclusively' in the operation of section 12(1)(b). In this connection, for depreciation allowances to be granted under section 12(1)(b), the plant and machinery should have been used wholly, exclusively and necessarily in the performance of the duties of the office or employment.

8. Case law has established the following principles/tests on 'necessarily in the performance of the duties':

(a) '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. (Nolder v Walters (1930) 15 TC 380 – quoted in Baird v Williams [1999] STC 635 at 641)

(b) Expenditure may be 'necessary' for the holder of an office without being necessary to him in the performance of the duties of that office. (Lomax v Newton (1953) 34 TC 558 – quoted in Baird v Williams [1999] STC 635 at 640)

(c) Something that is directly referable to carrying out a duty need not be necessary for performing that duty. (Baird v Williams [1999] STC 635 at 642)

(d) The test for necessity is an objective one. The test is not whether the employer imposes the expense, but whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay. (Brown v Bullock (1961) 40 TC 1 at 10)

(e) The language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties – namely, to expenses imposed upon each holder ex necessitate of his office, and to such expense only. The terms employed are strictly, and purposely, not personal but objective. The deductible expenses do not extend to those that the holder has to incur mainly and, it may be, only because of circumstances in relation to his office that are personal to himself or are the result of his own volition. (Ricketts v Colquhoun (1926) 10 TC 118 at 135)

(f) The existence of personal choice and benefit is a strong indicator that it is not objectively necessary for the employee to incur the expenditure for the purpose of carrying out his duties. (Baird v Williams [1999] STC 635 at 641)

9. Baird v Williams [1999] STC 635 is a case concerning section 198(1) of the Income and Corporation Taxes Act 1988 which is similar to section 12(1)(a) of the IRO. The taxpayer was a clerk to the General Commissioners. The duties of that office required the clerk to maintain an office. He sought to deduct mortgage interest paid by him on moneys borrowed to purchase and improve properties used partly for residential purposes and partly for maintaining an office.

(a) The court did not accept that the natural and normal consequence of the taxpayer's employment (in particular, his obligation to maintain an office) was to require him to purchase a building in which the office was to be located. (page 642)

(b) Nor did the court accept that whereas the payment of rent would have been deductible the payment of mortgage installments should be equally so. (page 642)

(c) Further, the court held that the purchase of the properties in question and the taking out of the mortgages contained elements of personal choice and a predictable benefit quite separate from the necessities of the office of clerk. This was not a mere incidental and unavoidable benefit of the office and it was no part of the duties of a clerk that the taxpayer had undertaken. (page 642)

10. In the Special Commissioner's decision in Baird v Williams (quoted at page 642), it was stated:

'The duties do not require him to borrow money to enable him to buy an office nor for that matter to use his own capital for that purpose.'

The court did not have any adverse comment on this part of the decision.

11. In considering the application of section 12(1)(b), sections 39A, 39B, 39C and 39D in Part VI of the IRO are relevant. If the machinery or plant is used wholly and exclusively in the production of assessable income, the applicable provisions are sections 39B and 39D. If the machinery or plant is not used wholly and exclusively in the production of assessable income, the applicable provisions are sections 39A and 39C.

12. Where there is no evidence to enable apportionment to be done, the claim for allowable deduction must fail. (D51/99, IRBRD, vol 14, 477 at 490)

13. Section 68(4) of the Ordinance provides:

> *'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

14. We are generally in agreement with the Commissioner's submissions on the law.

The proceedings before us

15. The Appellant gave sworn evidence on the basis of a written statement handed up and read to us. He was cross-examined thereon by Ms Wong Ki Fong, the Commissioner's representative. We found the Appellant to be a competent witness and make the following findings of fact:

(a) Having graduated from an institute in Country F with a Master's degree, and then having attended another institute in Country F on full scholarship, the Appellant joined the national orchestra in Country G in 1993. He stayed in this post for seven years and became an associate concertmaster. During the latter part of that period, he began to look for a good fine violin, which is an essential piece of equipment for anyone seeking a position as a professional artist and concertmaster.

(b) During his time in Country G, the Appellant made the acquaintance of a Mr H, an international supplier and collector of stringed instruments. Mr H introduced the Appellant to, and loaned him, various fine instruments for some of his concert performances. It is a common practice for collectors and musical sponsors to loan musical instruments to up and coming or prominent young artists for lengthy periods of up to five years. While in Country G the Appellant performed and recorded with several borrowed violins from various sources.

(c) In late 1999, Mr H introduced the Appellant to the Violin 1. The Appellant loved the instrument. Although he could not then afford to purchase it, he commenced using it on a loan basis.

(d) In April 2000, the Appellant was offered the post of first associate concertmaster with Company B. This was a career advancement or promotion for the Appellant. He took up the position in September 2000.

(e) Prior to joining Company B the Appellant was asked to provide a list of the instruments he would use in performing his contract with Company B. He included the Violin 1 (Fact 5 above refers) since he was the one responsible for the insurance and had to take good care of it during the loan period.

(f) Upon taking up his post with Company B, the Appellant continued to use the Violin 1. He also tried out other violins, including Violin 4 on loan to Company B (Fact 7 above refers). At that time Violin 4 was on loan to his Company B colleague. In the Appellant's view none of these violins was in any way comparable to Violin 1.

(g) On or around 6 September 2001, the Appellant arranged to insure another (borrowed) violin, Violin 2, with Company B. The insured value was US$28,000. From September 2001 until 31 March 2002, the Appellant used Violin 2 on several occasions for his work with Company B, but these were restricted to activities such as outdoors and outreach concerts, school visits and certain operatic and theatre performances. On these occasions it was inappropriate to use Violin 1 in view of the heightened risk of damage to the instrument at these locations. For all other Company B performances the Appellant used Violin 1. Although he occasionally used Violin 1 while playing at home for leisure, he did not use it for non- Company B concerts and performances.

(h) By December 2001, the Appellant had sufficient funds and was able to purchase Violin 1 for a price of US$150,000. As is common practice in the supply of fine violins, the Appellant traded-in other musical instruments as part payment for the purchase price.

(i) When cross-examined as to why he purchased Violin 1 (since he had been borrowing it on a long-term basis), the Appellant said it was painful to return it ('borrowing is not for a lifetime') since he had fallen in love with the instrument and he expressed himself, as well as his love and appreciation of music, through that instrument. The Appellant stressed that continuous borrowing was not a realistic option since he had no control of the violin and he had to

return it periodically when the lender needed to take it overseas or to exhibit it.

(j) The Appellant was cross-examined specifically as to why he did not borrow Company B's violins. In response, the Appellant acknowledged that although (1) these violins were used by his colleagues (but noting that they were not first chair in the string section, as he was) and (2) he could have applied to borrow any of them, the main reason he did not do so is that they were simply nowhere near as good as Violin 1. He particularly noted that these violins had not been played regularly before they had been loaned, they had deteriorated, and that some needed repair to such an extent that the original quality was compromised.

(k) When questioned as to other avenues available to him for borrowing a good fine violin, the Appellant stated that, unlike musical communities such as those in Country F and Country I, there were no private violin collectors in Hong Kong to whom he could turn.

(l) The Appellant disagreed that Violin 1 was not wholly and exclusively used in the performance of his duties. He pointed out that the insurance coverage for the violin arranged by Company B did not cover performances other than those for Company B.

The issue before the Board

16. Since the Commissioner has now accepted that the Appellant had incurred capital expenditure of US$150,000 (HK$1,171,200) on purchasing Violin 1 during the year of assessment 2001/02, the sole issue before us is whether the other conditions set out in section 12(1)(b) (and section 12(2), if relevant) of the IRO are satisfied.

Arguments of the Commissioner

17. On the basis of the submissions on the law detailed earlier in this decision, the Commissioner's representative, Ms Wong Ki Fong, argued that the cumulative effect of the authorities is to limit depreciation allowances available under sections 12(1)(b) and 12(2) to plant and machinery which is 'wholly, exclusively and necessarily used in the performance of the duties of the office or employment'. Given the similarity in the key words between section 12(1)(a) and sections 12(1)(b) and 12(2), Ms Wong contended that the operation of sections 12(1)(b) and 12(2) should be interpreted in a rigid, narrow and restricted manner.

18. The main duty of the Appellant's employment as first associate concertmaster of Company B was to play violin in its concerts. In this regard, Ms Wong acknowledged that it was essential for the Appellant to have a good fine violin in order to perform his duties under that

employment. However, Ms Wong argued that how he got the violin was another matter altogether.

19. In this regard, Ms Wong asked us to consider *what violin* was required in the performance of the duties of first associate concertmaster with Company B. She noted that Company B did not have any specific requirements. How well a musician plays a musical instrument is dependent upon many factors like musical attainments and devotion. Of these the most crucial is the human factor.

20. Ms Wong reminded us that Violin 1 is an antique musical instrument. She contended there is nothing inherent in the Appellant's duties as first associate concertmaster of Company B that required him to use a violin of this quality. She also argued that the Appellant purchased Violin 1 for reasons of his own personal style and choice.

21. Finally, Ms Wong argued that if we held, on an objective basis, that Violin 1 was necessarily used in the performance of the Appellant's duties under different employments, nevertheless it was not wholly and exclusively so used. On the basis that the Appellant has not adduced any evidence to enable apportionment to be on a fair and reasonable basis, Ms Wong contends that he has not discharged his onus of proof under section 68(4) and thus his claim for depreciation allowances should fail in toto.

Arguments of the appellant

22. The Appellant simply argued that a good fine violin is an essential tool for a professional violinist. The Appellant contended that this was essential for the performance of his duties since he was judged by Company B, and by all its conductors, on the quality of his playing and this obviously affected contract renewal and promotion. In this regard, the Appellant noted in his final submissions that the employment contracts of 13 of his colleagues had not been extended. Not all of them were poor musicians, but they suffered from not being sufficiently serious about the quality of their instruments.

Decision

23. We agree with the Appellant that his purchase of Violin 1 qualifies for capital allowances in accordance with section 12(1)(b) of the IRO. Leaving aside for present purposes the effect of section 12(2), our analysis is as follows.

The interpretation of section 12(1)(b)

24. We appreciate that previous Board of Review decisions relied upon by Ms Wong, D89/89 and D51/99, have held that the phrase 'the use of which is essential to the production of the assessable income' in section 12(1)(b) was equivalent to the words 'necessarily used in the performance of the duties of the office or employment' contained in section 12(1)(a). It is said in these decisions that this approach has the merit of maintaining consistency between the two

provisions.

25. Initially, we had difficulty in accepting this approach since the wording of section 12(1)(b) *is* different from that contained in section 12(1)(a) where the test is '… *necessarily incurred* in the production of the assessable income', whereas section 12(1)(b) speaks of capital expenditure on plant and machinery '*the use of which is essential* to the production of the assessable income'. If the two subsections should, as Ms Wong claimed, import the same meaning (again leaving to one side the issue of wholly and exclusively) then why are they not phrased in the same way?

26. Notwithstanding the above comments however, we agree with the Board of Review decision D39/98, which concluded that there was no reason why the words 'production of the assessable income' in section 12(1)(a) and section 12(1)(b) should bear a different meaning. And, in this regard, we are bound by the decision in CIR v Humphrey where Scholes SPJ indicated that the words 'production of the assessable income', which appear in both sections 12(1)(a) and 12(1)(b), mean 'in the performance of the duties of the office or employment'.

27. Reading section 12(1)(b) in a purposive way (when considered in the context of section 12 as a whole), it is apparent that an interpretation simply focusing upon 'the use of' the plant (or machinery) as satisfying the test of being 'essential' to the production of the assessable income (which extrapolating from CIR v Humphrey means the test of being 'essential to the performance of [the Appellant's] duties'), is plainly too restrictive and would mean that the test for allowing capital allowances for salaries tax purposes is very much broader than that for allowing deductions for outgoings and expenses. Thus, on reflection, we conclude that the decisions in D89/89 and D51/99 are correct and that in interpreting section 12(1)(b) one cannot ignore the jurisprudence governing section 12(1)(a) which imports the test of objective necessity in incurring the expenditure before any claim for capital allowances is granted under section 12(1)(b) (again leaving aside the issue of wholly and exclusively, and the relationship between section 12(1)(b) and section 12(2)).

Was the use of Violin 1 essential in the performance of the Appellant's duties?

28. We now turn to Ms Wong's main argument, which was that the use of Violin 1 was not 'essential' given the alternatives available to the Appellant to procure a 'good fine violin'.

29. Without putting too fine a point to it, the main thrust of Ms Wong's argument was that the use of Violin 1 was not essential to the performance of the Appellant's employment with the Company B (or with any of his other paymasters) since he could buy, hire or borrow (from sources such as the orchestra, other dealers, museums and music foundations) a violin. According to Ms Wong the Appellant could also have used a violin purchased years before the commencement of his employment with Company B or a violin given to him as a gift. In this regard, Ms Wong noted that Company B itself operated a system whereby the Appellant could make application to borrow violins donated or on loan to Company B. For these reasons she argued that the purchase of Violin

1 was not an expense that each and every occupant in the same position as the Appellant was necessarily obliged to incur in the performance of his duties.

30. Simply put, Ms Wong concluded that the purchase did not qualify for depreciation allowances because it was the result of the Appellant's own volition (see Ricketts v Colquhoun). She contended there is nothing inherent in the Appellant's duties as first associate concertmaster of Company B that required him to use a violin of the quality of Violin 1.

31. The difficulty with accepting this submission, in our view, is that it simply does not accord with the evidence before us, particularly the Appellant's oral testimony, which we have accepted and which was not seriously challenged in cross-examination. Before we analyse this matter however, it is useful to state certain key points. First, both parties agreed that it was essential that the Appellant, as first associate concertmaster (and first chair) of Company B, used a good fine violin in the performance of his duties. This illustrates the point that the 'objective necessity test' must be judged according to the substantive requirements of the employment. Thus, a standard violin purchased from a generic supplier of musical instruments simply would not fit the bill,[2] although it may be appropriate for use by an employee in a tavern or restaurant where music is played to accompany a meal. Second, it follows that the higher the degree of virtuosity required to properly discharge the performance duties of a musician's employment, the standard of what is 'objectively necessary' is also commensurately higher.

32. We now turn to the Appellant's oral evidence and our findings thereon. He stated that he needed a good fine violin to perform his Company B duties (this was agreed by Ms Wong); Violin 1 met this requirement (this was agreed by Ms Wong); the other violins available to him by way of loan through Company B were suitable for the other non-first chair violinists in Company B (this was also agreed by Ms Wong); and that these other violins were not of the requisite quality for someone in the Appellant's position of first-chair violinist (this was not challenged by Ms Wong). If the Commissioner did not accept the Appellant's evidence on this last matter – and we reiterate that it was not challenged in cross-examination – then it would have been relatively easy for the Commissioner to lead contrary evidence, either in the form of expert evidence or to the effect that a previous occupant of the Appellant's chair had (or could have) used a violin of lesser quality than Violin 1 to appropriately discharge his or her duties.

33. As to Ms Wong's other possibilities for the Appellant acquiring a suitable violin (apart from those available under the Company B loan scheme dealt with above), there is no evidence before us (apart from that dealt with in the following paragraph) that the Appellant could have bought or hired or borrowed any other suitable violin for his first chair post with Company B than the one he eventually purchased. In particular, there is no evidence before us of the existence of any Hong Kong museum, foundation, supplier or dealer who could have been a benefactor to the

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[2] It is only fair to record our view that Ms Wong would accept this statement. Her submissions certainly did not go as far as suggesting that the availability of *any* violin from *any* source would deny the Appellant his claim for capital allowances.

Appellant. In addition, the Appellant clearly stated, and with regret, that he knew of no Hong Kong collector who could fill this role. It is a fact that the Appellant also borrowed another, less valuable violin (Violin 2) in the year of assessment 2001/02 – but he was very clear in his evidence that he only used that violin for outdoors and outreach performances, school visits and at other non-concert hall locations where for obvious reasons he could not use Violin 1. The Appellant's unchallenged evidence is that, notwithstanding that he was periodically obliged to return Violin 1 to the lender, he did use this violin for all his concert performances with Company B.

34. As we have just indicated, the Appellant's evidence shows that he could have been required by the Country G dealer to return Violin 1 at any time for an exhibition or museum display. The dealer could have sold that violin to someone else. It might be argued in such event that the Appellant could have borrowed or hired another suitable violin, and therefore the purchase of Violin 1 fails the acid test of 'objective necessity' in Brown v Bullock because the Appellant could have performed his duties without incurring the outlay in question. The Appellant did acknowledge that there may be other suitable violins available elsewhere in the world (Country F and Country I were mentioned). But it seems to us wholly unreasonable to require the Appellant to search the world at large in order to borrow or hire another suitable – as yet unidentified – violin. The time, effort and expense to do so would be substantial, and in the meantime he would be compelled to perform his duties with Company B with a violin which, on the evidence, was in no way comparable to Violin 1, thus detrimentally affecting his performances and his ability to retain his position with Company B. The Appellant quite properly purchased Violin 1 to ensure that it was exclusively available to him in the performance of his duties with Company B.

35. Finally in relation to this matter, Ms Wong reminded us that the Appellant had, prior to purchasing Violin 1, been using it on a loan basis. In Ms Wong's submission this shows that the purchase of Violin 1 fails the test of 'objective necessity' referred to above. In this regard however, it is pertinent to note that the Appellant's evidence shows that although he borrowed the violin for a lengthy period of time, it is a common practice within the music instrument trade for instruments to be loaned for lengthy – but not indefinite – periods by dealers or collectors before they are returned or purchased. We also accept the Appellant's evidence that it was simply not realistic for someone in his position to borrow an appropriate violin or violins for life and that given the suitability of Violin 1 for the performance of his duties he purchased it as soon as he could afford it.

36. Although Ms Wong did not argue in such explicit terms, we had the impression that the Commissioner might have been concerned with the fact that Violin 1 costs an appreciable sum of money and that there may be no distinction between this case than, say, another person in the Appellant's post who had sufficient funds to purchase a Stradivarius violin (which of course could be worth many million dollars). Ms Wong reminded us that Violin 1 is an antique musical instrument. In this regard, Ms Wong noted that the insurance coverage of Violin 2 was just 18.67% of the cost of Violin 1.

37. We think that any concerns in this regard are misplaced. First, it is obvious that a

Stradivarius was not essential, since Violin 1 (or arguably a less expensive violin – if that had been established by evidence) was sufficient to properly discharge the Appellant's duties. Second, and in any event, the Commissioner can also call in aid section 12(2) if any personal element is so great that the conclusion can be reached that the purchase of the instrument was not wholly and exclusively incurred in the production of the assessable income.

38. In considering this matter it is useful to remind ourselves of the dictum of a pre-eminent taxation jurist, Lord Wilberforce, who stated in Pook v Owen (1969) 45 TC 571 at page 596 (a House of Lords decision referred to in CIR v Humphrey):

> *'[The precursor to section 198 of the ICTA 1988] is drafted in an objective form so as to distinguish between expenses which arise from the nature of the office and those which arise from the personal choice of the taxpayer. But this does not mean that no expenses can ever be deductible unless precisely those expenses must necessarily be incurred by each and every office holder. The objective character of the deductions allowed relates to their nature, not to their amount.'*

39. If, as properly conceded by Ms Wong, it was essential for the Appellant to perform with a top quality violin, then the issue of whether capital allowances can be granted must, as we have indicated above, ultimately be decided by reference to the specific nature of the employment. A fine musical instrument for a virtuoso concert performer such as the Appellant is not the same as generic items such as journals and a computer for a university lecturer (D89/89), it is not the same as brand items such as a calculator for a teacher and examiner (D51/99) and it is certainly not the same as a home for a Clerk to the General Commissioners (Baird v Williams). The nature, perhaps unique nature, of the Appellant's employment cannot, in our view, be ignored. We accept the Appellant's evidence that he simply 'loved' Violin 1 and that the other instruments available to him were simply not comparable. We accept his evidence that it was 'painful' to return it, that borrowing is not for a lifetime, that he could not continue to borrow it indefinitely, and that he purchased Violin 1 as soon as he was able to afford it. We also accept his evidence that although Company B's violins were adequate for a lower chair player, they were not adequate for a first chair violinist.

40. On the basis of the analysis above, we are not prepared to accept Ms Wong's argument that the Appellant purchased Violin 1 for reasons of his own personal style and that it could be inferred from the quotations in Facts (k) and (l) in paragraph 2 above that it was more probable than not that this violin gave the Appellant personal enjoyment and pride of possession to such an extent that it could be concluded that the purchase contained elements of personal choice and a predictable benefit quite separate from the necessities of the Appellant's employment as first associate concertmaster. The benefit was, in our view, an incidental and unavoidable benefit of the fact that a violin of the quality of Violin 1 was essential for the Appellant's employment with Company B.

Section 12(2)

41. Finally we turn to Ms Wong's argument that Violin 1 was not wholly and exclusively used in the production of his assessable income. There is no evidence before us that the Appellant used Violin 1 for any other purpose than to earn income from his employment with Company B, apart from his candid admission that 'of course' he played it at home. We doubt that it can be suggested that any private playing by a dedicated professional musician who must practice on his own means that the wholly and exclusively test is not satisfied. And, even when he played Violin 1 at home for love, pleasure and at the occasional family gathering, there is no evidence to show that such use was anything but de minimis. In short, the facts found are that the Appellant played Violin 1 for all his concerts with Company B (other than the outdoor and outreach and other non-concert hall performances referred to in his evidence), we infer that he did use the violin for private practice at home, and that he did not use the violin in any way incompatible with his employment other than to a purely de minimis extent. The Appellant has, in our view, discharged his onus of proof under section 68(4) and thus his claim for depreciation allowances should be allowed.

Depreciation for the Appellant's violin bows

42. Finally, we note that our decision seems to accord totally with the Commissioner's granting of capital allowances in relation to the Appellant's violin bows. If allowances on the bows was proper, and Ms Wong did not seek to withdraw the allowances granted, there seems no obvious reason to distinguish the case of Violin 1.

Conclusion

43. For the above reasons we allow the appeal and direct the Commissioner to grant depreciation allowances for the Appellant's purchase of Violin 1 in the Appellant's salaries tax assessment for the year of assessment 2001/02.