Case No. D8/82

Board of Review:

L. J. D'Almada Remedios, *Chairman*; W. F. W. Bischoff, C. G. Large & D. A. L. Wright, *Members.*

22 June 1982.

Salaries Tax—section 9(1) Inland Revenue Ordinance—employee receiving housing allowance in lieu of free accommodation—whether allowance additional emolument or rental refund.

The appellant declined free accommodation provided by his employer and negotiated a monthly lump sum payment in lieu described by the employer as "a housing allowance". The appellant was assessed to Salaries Tax for the years 1978/79 and 1979/80 on these lump sum payments. The appellant appealed, *inter alia*, on the ground that his employer was the tenant of the premises in which he resided.

Held: An additional allowance received in lieu of free quarters is part of an employee's emoluments and is taxable.

Appeal dismissed.

Wong Ho-sang for the Commissioner of Inland Revenue.
The appellant was absent and unrepresented.

Reasons:

An establishment in Germany has a subsidiary in Hong Kong (hereinafter called "the Hong Kong Company"). The Appellant was initially appointed as Assistant to the Manager of the Hong Kong Company. He was promoted to General Manager in October 1977. The terms of his employment included supervision of an associated company in Taiwan (hereinafter referred to as the "Taiwan Company").

A fixed sum of $60,000 was paid by the Taiwan Company to the Hong Kong Company as management fee for the supervision of the Taiwan Company by the Appellant.

During the years of assessment 1978/79 and 1979/80 to which this appeal relates, the Appellant was employed by the Hong Kong Company. He was not provided with quarters but his salary includes what is described as a "housing allowance".

In the course of his employment, the Appellant made regular trips to Taiwan to supervise the operation or affairs of the Taiwan Company. The Appellant is married. His wife earns

income from employment in Hong Kong. According to the Appellant the only means of transportation available to his wife from home to office and back is by car.

What we have to decide is whether the Appellant is right in the following contentions he has put forward: (i) that only a portion of his remuneration is chargeable to Salaries Tax since part of it is attributable to services he has rendered in and outside the Colony for the Taiwan Company; (ii) that he is entitled to a deduction for motor car expenses for his wife; and, (iii) that the "housing allowance" he received is not chargeable to tax.

At the Appellant's request he has asked that his appeal to the Board of Review be heard in his absence. He has so elected notwithstanding that he was made aware that if any issue of facts arises, we may not be able to resolve such issue in his favour if the burden of establishing it rests on him and he fails to discharge it.

Services rendered for the Taiwan Company

The Appellant says that he is the general manager for both the Hong Kong Company and the Taiwan Company; that these companies operate independently of each other; that he renders services for the Taiwan Company not only in Hong Kong but also abroad. So he says he is only taxable on that part of his income referable to the services he renders to the Hong Kong Company.

Even if the Appellant devoted all or most of his time to the affairs of the Taiwan Company, that does not in any way affect the quantum of his tax liability. He is not taxed on any income he received from the Taiwan Company. Although the Taiwan Company may benefit from the services he renders, such services on the facts before us, are not rendered by him but by the Hong Kong Company through him as its servant or agent in respect of which the Taiwan Company paid the Hong Kong Company a fee of $60,000. The Appellant is, therefore, taxable on the total emoluments he has received from the Hong Kong Company.

Deduction for motor car expenses

It is well settled that travelling expenses from home to office is a non-allowable deduction: C.I.R. v. Humphrey H.K.T.C. 451.

Housing Allowance

On the material before us the Appellant was not provided with quarters. Although it appears that expatriate managers are offered free quarters, the Appellant, who would be entitled to such benefit did not accept it but negotiated for what the Company in its letter to the Assessor refers to as:—

> "... a lump sum refund rather than claiming back from the Company the individual amounts spent for accommodation …"

The lump sum referred to was the addition of $4,000 per month for the period up to November 1979 and thereafter $6,000 per month effective from December 1979, described by the Company as a monthly "housing allowance". The Appellant maintains that such allowance is not to be deemed income.

To label a payment in addition to salary as a "housing allowance" or to split a taxpayer's remuneration into two parts and call one part a "housing allowance" would not necessarily render that portion so described as exempt income. It is quite capable of falling into the category of a perquisite or allowance so as to be taxable by virtue of section 9(1) of the Inland Revenue Ordinance.

If a place of residence is not provided by the employer or an associated company, the taxpayer must be able to show that the sum he has received and claimed by him as a "housing allowance" is a rental refund, either wholly or in part, which would entitle him to such tax relief as mentioned in section 9(1A)(*a*), (*b*) or (*c*) of the Ordinance.

In the Appellant's grounds of appeal he states that in the years of assessment under review he resided and still resides in premises of which his employer is the tenant. But he did not accept the offer of free quarters. It would appear then that he may have elected to receive the additional allowance in lieu of free quarters. If so, the additional allowance became part of his emoluments and is taxable. What precisely were the arrangements between him and his employer are not clear to us. He chose not to be present in the appeal before us and no evidence was adduced on his behalf. In the circumstances, he has failed to discharge the burden of satisfying us that what he has referred to as a "housing allowance" is exempt income as claimed by him.

The Appeal is, therefore, dismissed and the assessments confirmed.