INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D89/89

Salaries tax – deduction of expenses – sections 12(1)(a) and 12(1)(b) of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), Alexander R Hamilton and Wilfred Lee Che Wah.

Date of hearing: 4 September 1989.
Date of decision: 20 December 1989.

The taxpayer was employed as a senior lecturer in a local university. He claimed that he should be granted a deduction for the course of attending an overseas conference and depreciation allowance in respect of his expenditure on journals and a personal computer. The question to be decided by the Board of Review was whether the expenses had been necessarily incurred in the production of the assessable income.

Held:

It was not necessary for the taxpayer to attend the conference in question and accordingly this ground of appeal by the taxpayer was dismissed. With regard to the depreciation allowances, the question to be decided was whether the expenditure was essential. The taxpayer acquired the journals for his personal convenience and not as a matter of necessity. The acquisition of a microcomputer was also not necessary. The taxpayer's appeal with regard to the journals and microcomputer was also dismissed.

Appeal dismissed.

Cases referred to:

CIR v Humphrey 1 HKTC 451
Ricketts v Colquhoun [1926] AC 1
Taylor v Provan [1975] AC 194
BR 12/75, IRBRD, vol 1, 183

Wong Chi Wah for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This appeal concerns the salaries tax assessment for the year of assessment 1986/87 raised on the Taxpayer. He claims that he should be granted a deduction for the cost of attending an overseas conference and depreciation allowance in respect of his expenditure on journals and a personal computer.

2. At all material times the Taxpayer was employed as a senior lecturer in a local university ('the University').

Cost of Attending an Overseas Conference

3. Allowable deductions are governed by section 12(1)(a) of the Inland Revenue Ordinance which provides for the deduction of outgoings and expenses which are 'wholly, exclusively and necessarily incurred in the production of the assessable income'. In the present case nothing turns on the words 'wholly' and 'exclusively'. The only issue is whether the conference expenditure was necessarily incurred in the production of the assessable income.

4. In CIR v Humphrey 1 HKTC 451, the Full Court treated the words 'in the production of such assessable income' contained in the then section 12(1)(b) which corresponded to the current section 12(1)(a) as having the same meaning as the words 'in the performance of the duties of the office or employment' contained in comparable UK legislation dealing with the deduction of expenses from emoluments, that is, the Income Tax Act 1952, schedule 9, paragraph 7. It has been generally accepted that the UK principles and tests relating to the application of those words and the word 'necessarily' are applicable to claims for deductions under section 12(1)(a). So the issue in the present case is in effect whether the conference expenditure was necessarily incurred in the performance of the duties of the Taxpayer as a senior lecturer in the Taxpayer's academic discipline. This involves two questions: (1) whether the expenditure was incurred in the performance of duties, and (2) whether it was necessarily so incurred.

5. The terms of service 1 of the University, which apply to the Taxpayer, provide, inter alia, as follows:

> '4. Duties
>
> (a) The duties of a teacher shall be:
>
> (i) the conduct of such forms of tuition, such examinating and invigilation, and such supervision of advanced students and others engaged in research work, as may reasonably be required of him by the head of the department to which he is assigned or by the University for teaching purposes;

(ii) contributing to scholarship:

…'

6. The Taxpayer's contention is that the duty of contributing to scholarship involves conference participation and that it is a matter of his own judgment what conference or conferences he should attend. In the present case the conference in question was held in France. The Taxpayer applied to the University for a conference grant to cover the expenditure and was awarded a grant of $6,470 which he accepted. The letter from the Committee on Research and Conference Grants to the Taxpayer stated, inter alia, as follows:

> 'The Committee administers only a limited budget for conference grants, and the award made is to enable you to meet the cheapest available passages to the place of the conference where possible. If you can obtain air tickets for an amount less than the sum awarded, you may use the savings towards conference registration fee and other expenses.'

The award was equivalent to about 90% of the return air fare and the Taxpayer paid out of his own pocket the rest of the air fare. He also paid to the conference the sum of 1900 FF to cover the conference, accommodation and meals, and that constitutes the conference expenditure in respect of which he is claiming a deduction.

7. The word 'necessarily' in the United Kingdom rule was interpreted by Lord Blanesburgh in Ricketts v Colquhoun [1926] AC 1 at page 7 to 8 as follows:

> '… 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 – to expenses imposed on each holder ex necessitate of his office, and to such expenses only … the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition.'

In the present case, the relevant duty of the Taxpayer's office or employment is simply that of contributing to scholarship and the question is therefore whether the conference expenditure was necessarily incurred in the performance of that duty. The answer has to be no because (1) it was not proved or even suggested that each and every person holding the post of senior lecturer in the Taxpayer's academic discipline would have found it necessary to incur the conference expenditure in performing the duty of contributing to scholarship, and (2) the expenditure was incurred on account of the Taxpayer's personal circumstances or personal volition. It may be said that the offer and acceptance of the conference grant imposed a contractual duty on the Taxpayer to attend the conference in France. However, in our view, that does not help him because the contractual duty is caught by the following observation of Lord Wilberforce in Taylor v Provan [1975] AC 194 at 218:

> ‘If, as I believe to be the law, expenses incurred on account of personal circumstances are not deductible under the rule, they cannot be made so merely by the technique, or device, of injecting them into the contract of employment. To hold that they could, would invite the creation of arrangements which might not correspond with reality and which would produce gross inequality of treatment. The commissioners must always have the right to examine the whole circumstances and to decide what, objectively, the duties of the office or employment were and what was necessary in their performance.’

Lord Wilberforce and Lord Simon who fully supported him were in a minority. The majority, consisting of three law lords, held that there were at least two places of work required by Mr Taylor’s very special employment which entailed work that could be done by no one else and that accordingly the travelling expenses were necessarily incurred when he was travelling between Canada and the United Kingdom on the business of the English companies by which he was employed. In the words of Lord Reid at 205 to 206:

> ‘I can understand a distinction between what the parties’ contract requires and what the work requires when the office has an independent existence so that if this man had not been appointed someone else would have been. But here the office or employment was created for the taxpayer because of his special qualifications and there is nothing to suggest that if he had not been available anyone else would or could have been appointed for this very special work. The taxpayer clearly would not have agreed to reside in England. So I do not see how in any reasonable sense it can be said that this travelling was unnecessary if this peculiar work was to be done.’

Lord Morris and Lord Salmon also stressed the unique nature of the services which Mr Taylor alone could render. In other words, the majority did not question the validity of Lord Wilberforce’s observation where there is a distinction between the duties of the office or employment and those laid down by a contract, but in the case before them, they found no such distinction because the office was not one that could have been filled by anyone other than Mr Taylor.

8. The conference expenditure consisted of the conference fee and charges for accommodation and meals. It was argued for the Revenue (1) that the conference expenditure was not deductible because attending the conference was by the Taxpayer’s own choice as opposed to obligatory; (2) that in any event the charges for accommodation and meals were not allowable because, conference or no conference, he had to eat and sleep somewhere, and because while eating and sleeping he was not performing his duties, and (3) that the conference expenditure was of a private nature in that the main purpose in attending that conference was the presentation of his paper. As for the first ground, we have already stated our views in paragraph 7 above and we accept the Revenue’s submission. As for accommodation and meals, Lord Cave said this in Ricketts v Colquhoun at 6:

> ‘A man must eat and sleep somewhere … Normally he performs those operations in his own home, and if he elects to live away from his home, 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.’

It may be said that the necessity test disregards the realities of life in modern day conditions and in particular in the present case there was really no question of the Taxpayer electing to live away from France. However, except that the ‘in the course of performance’ test has been modified in respect of expenses incurred in travelling between two places of work, both tests have been consistently and rigidly applied for a long time and will remain the law until they are further modified or altered by the highest authority. The claim in respect of accommodation and meals therefore would have failed in any event. We do not find it necessary to deal with the third ground except to say that we do not think that presenting a paper necessarily stamps the conference expenditure as private in nature, because it may be a contribution to scholarship.

Depreciation Allowances

9. These allowances are claimed under section 12(1)(b) which applies to allowances ‘in respect of capital expenditure on machinery or plant the use of which is essential to the production of the assessable income’. No authority was cited on the meaning of the words ‘the use of which is essential to the production of income’, but it was submitted on behalf of the Revenue that the United Kingdom authorities on the words ‘necessarily’ and ‘in the performance of the duties of the office or employment’ in paragraph 7 of schedule 9 to the Income Tax Act 1952 should apply. This involves treating the words in question as being equivalent to the words ‘necessarily used in the performance of the duties of the office or employment’ or words of a similar import. This approach has the merit of bringing paragraph (b) in line with paragraph (a), thereby maintaining consistency between the two. For the purposes of this appeal we will apply the United Kingdom authorities.

10. The Taxpayer’s evidence is to the effect that it was necessary to read the journals in question in the course of contributing to scholarship. With one exception the journals were available in the University libraries. However, the Taxpayer bought his own copies of those journals. The question is whether it was necessary in the objective sense to read those journals in performing the duty of contributing to scholarship. Applying the United Kingdom tests as we did in paragraph 7 above, we have to see whether the evidence established that each and every person holding the post of senior lecturer in the Taxpayer’s academic discipline would have found it necessary to read those journals in performing the duty of contributing to scholarship. The journals [whose titles were then cited] do seem to indicate a connection with the Taxpayer’s work. However, we do not think that the evidence goes far enough to prove that those journals were a must for each and every person holding the post of senior lecturer in the Taxpayer’s academic discipline. The Taxpayer referred to a decision of a previous Board dated 19 December 1975 (BR 12/75, IRBRD, vol

1, 183) where it was held that certain expenses for journals and books were reasonably incurred by the Taxpayer who had stated in evidence that the expenses were necessary for him to keep his job. The Board in that case used a test of reasonableness and not the United Kingdom test of objective necessity. Their decision is therefore of no assistance to us. As for those journals that were available in the University libraries, there is another reason why allowances on the Taxpayer's own copies are not claimable. He bought the journals to avoid physical exertion which would have been required in travelling to and from the University libraries. We find this to be a matter of personal convenience and not objective necessity.

11. Microcomputer The Taxpayer used microcomputers extensively in his work, and one of his research projects ('the project') was based on the use of microcomputers. The project was not directed by the University but initiated by the Taxpayer himself. He stated that he had made some informal inquires about the possibility of getting the University to finance the purchase of a microcomputer for the purposes of the project, and that in September 1986 he purchased one himself which he kept and used at home, the reason given being that there were no funds available from the University at the time. On 1 December 1986 he made a fund application to the University for the purchase of a microcomputer and related items for use in the project work. The application was approved and a research grant of the full amount applied for was awarded by the University and accepted by the Taxpayer. In March 1988 he produced a paper jointly with a colleague on the first part of the project, the first paper on the subject ever written. He stated that to develop new knowledge, one had to be the first or one of the first to produce a paper on the subject. Without the microcomputer which he purchased in September 1986, he said he would not have been able to produce the paper in March 1988. We accept that evidence.

12. The question we are concerned with is whether the microcomputer bought by the Taxpayer in September 1986 was necessarily used in the performance of the duty of contributing to scholarship. Like the conference participation dealt with in paragraph 7 above, the project was only one way of contributing to scholarship, and it was not proved or suggested that that was the only way, so that whoever holds the post of senior lecturer in the Taxpayer's academic discipline would have found it necessary to use a microcomputer as the Taxpayer did. The claim in respect of the microcomputer therefore fails.

Termination of Appointment for Good Cause

13. The Taxpayer pointed out that the University can terminate a teacher's appointment for good cause under the University Ordinance and submitted that non-performance of the duty to contribute to scholarship could be such a good cause. That may be so, but we do not think that a good cause is likely to exist where the non-performance is due to the University's refusal to grant the necessary funds because we do not think that in carrying out his duties, an employee is normally under any obligation to subsidise the employer, and there is no evidence that the present case is an exception. In any event, we can hardly see the relevance of the question of good cause to the question for our decision, that is, whether the expenses in question were incurred as a matter of objective necessity in the performance of the duty of contributing to scholarship so as to qualify as

allowable deductions under section 12(1)(a) and (b). For reasons already given, our answer is no.

Decision

14. It follows that this appeal is dismissed and that the assessment in question is hereby confirmed.

It is only after anxious consideration and with regret, particularly with regard to the claim for deduction of the conference expenditure, that we have arrived at this decision.