Privy Council Appeal No. 23 of 1989

David Hardy Glynn *Appellant*

v.

The Commissioner of Inland Revenue *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD ACKNER
LORD LOWRY

*[Delivered by **Lord Templeman**]*

By an agreement in writing dated 1st April 1982 the appellant, Mr. Glynn, agreed to work for Intergroup Associates Limited ("the company") as an executive director at a monthly remuneration of HK$5,000 and on the terms *inter alia* that:-

> "(e) The company will pay education costs of your children and all family medical and dental expenses."

By an exchange of correspondence between Mr. Glynn, Roedean School and the company culminating in a letter dated 9th June 1982 from the school to the company, it was agreed that primary liability for the payment of the school fees of Miss S.V. Glynn, a daughter of Mr. Glynn, at Roedean School should be borne by the company. Mr. Glynn became liable to pay if and only if the company defaulted. Thereafter the company paid the school fees. The Board of Review held that the school fees paid by the company, Mr. Glynn's employer constituted income of Mr. Glynn from his employment assessable to Hong Kong salaries tax. The decision of the Board of Review was reversed in the Supreme Court by Rhind J. but restored by the Court of Appeal (Cons V.-P. and Hunter J.A., Clough J.A. dissenting). Mr. Glynn now appeals.

By section 8(1) of the Inland Revenue Ordinance, as amended, salaries tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from *inter alia* any office or employment of profit. The salary paid to Mr. Glynn by the company is liable to salaries tax. Section 9 of the Ordinance, so far as relevant, provides that:-

> "(1) Income from any office or employment includes -
>
> (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, except -
>
> (i) the value of any holiday warrant or passage granted by an employer to an employee in so far as it is used for travel; ...
>
> (b) the rental value of any place of residence provided rent-free by the employer ..."

The respondent, the Commissioner of Inland Revenue, contends that each sum paid by the company to Roedean School is a perquisite of Mr. Glynn liable to salaries tax. Mr. Glynn contends that a perquisite must be a sum of money paid to an employee if it is to be taxed. In support of this argument counsel for Mr. Glynn pointed to the following provisions of the Ordinance:-

> "11B. The assessable income of a person chargeable to salaries tax ... shall be the aggregate amount of income accruing to him from all sources ..."

Nothing, it is said, accrued to Mr. Glynn; monies were paid to Roedean School for the benefit of Mr. Glynn's daughter.

> "11D. ...
>
> (b) income accrues to a person when he becomes entitled to claim payment thereof."

Mr. Glynn, it is said, never became entitled to claim payment of the school fees paid by the company to Roedean School.

Alternatively it is submitted, on behalf of Mr. Glynn, that Mr. Glynn is not taxable in respect of the school fees because income only includes the value of a perquisite. Since the right to require payment of school fees cannot be sold by Mr. Glynn that right is a perquisite which has no value, or at any rate no calculable value, in money terms and therefore cannot be taxed.

The principles of the Inland Revenue Ordinance are based on the provisions of the United Kingdom Income Tax Acts, albeit with modification, to meet the requirements of the Hong Kong economy and establishment. In particular the taxation of a perquisite involves the same problems in Hong Kong as in the United Kingdom. Consequently the legislation of the United Kingdom Parliament and the decisions of the United Kingdom courts will provide some assistance in construing the Ordinance.

By the United Kingdom Income Tax Act 1842, income tax was charged under Schedule E on all "salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of" *inter alia* employment of the taxpayer. Perquisites were deemed to be "such profits of offices and employments as arise from fees or other emoluments and payable either by the Crown or the subject in the course of executing such offices or employments ...".

In *Tennant v. Smith* [1892] A.C. 150 the Revenue sought to charge an employee, Mr. Tennant, with income tax on the value of free accommodation provided for him by his employer, a bank. The House of Lords held that tax was not payable. The effect of this decision was summarised by Lord Diplock in *Heaton v. Bell* [1970] A.C. 728 at page 764 in these terms:-

> "In *Tennant v. Smith* the House of Lords placed a judicial gloss upon the word 'perquisite' appearing in the corresponding sections of the Income Tax Act 1842, by confining it to actual money payments and to benefits in kind variously described by Lord Halsbury L.C. at page 156 as 'capable of being turned into money', by Lord Watson at page 159 as 'that which can be turned to pecuniary account', by Lord Macnaghten at page 163 as 'payments convertible into money' and by Lord Hannen at page 165 as 'that which could be converted into money'. ... In the Income Tax Act 1918, the relevant sections were re-drafted and in the process the word 'payable' disappeared, but this professed to be a consolidation Act and the presumption is that the change in wording was not intended to give to the new enactment a meaning different from that of the enactment which it replaced. Further changes in drafting and arrangement which were made by subsequent legislation, including the Income Tax Act 1952, and the Finance Act 1956, which are applicable to the present appeal, have not, in my view, affected the meaning which the word 'perquisite' bore in the Income Tax Act 1918. I think that it must be accepted that 'perquisite' in each of these subsequent statutes still means what it meant in the Income Tax Act, 1842."

Although a perquisite must mean the payment of money common sense requires that a perquisite must

also include money which can be obtained from property which is capable of being converted into money. A perquisite also includes not only money which is actually paid to an employee but money which is paid in discharge of a debt of the employee.

In *North British Railway Company v. Scott* [1923] A.C. 37 a railway company paid Schedule E tax on the salaries of its officers as required by the Income Tax Act 1860 but chose not to deduct the amount of the tax when paying the salary. The House of Lords held that the amount of the Schedule E tax not deducted formed part of the income of each official for tax purposes. Lord Wrenbury said at pages 46 and 47:-

> "If the salary which the officer is to receive net is £100 the 'salaries, fees, wages, perquisites, or profits whatsoever' which form the reward of his service, are the £100 and the contractual benefit that when the company has paid the tax due for his income tax (whose payment is imposed upon the company by the statute) they will not deduct it against him as they might. This is a further valuable consideration or profit accruing to the officer by reason of his office and is a factor in arriving at his assessable income for income tax purposes."

Similarly in *Hartland v. Diggines* [1926] A.C. 289 a shipping company voluntarily paid income tax over a series of years on the salaries of their employees, including their accountant, and it was held that this payment was part of the accountant's profits and emoluments as an officer of the company for which he was assessable to income tax. Viscount Cave L.C. said at pages 291 and 292:-

> "The company had entered into no agreement, either verbal or in writing, to pay income tax on the appellant's salary, but in fact it had been paid year after year ... But is it a profit, a perquisite, or an emolument? That the payment is voluntary makes no difference; ... But it is said - and this is the main argument used on behalf of the appellant- that the sum is not an emolument, because it was not paid to the appellant or at his request, although in fact it was paid regularly over a series of years. I do not agree with that argument. ... the effect of the payment was in practice and in fact to relieve the appellant year after year from his liability for the payment of the tax. It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot resist the conclusion that the payment was in fact a part of his profits and emoluments as an officer of the company for which he has been properly assessed to tax."

The result of the authorities is that a perquisite includes money paid to the taxpayer and money expended in discharge of a debt of the taxpayer. There is no difference between a debt of the taxpayer discharged by an employer pursuant to the contract of service and money paid for the benefit of an employee by his employer pursuant to the contract of service. When a service agreement is under negotiation, the employer decides what the employee is worth to the employer. If the employer decides that the employee is worth £40,000 a year, it matters not to the employer how this sum is expended, so long as it serves the purpose of obtaining and rewarding the services for which the sum is to be paid. It would be absurd if an employee engaged at £40,000 paid tax on that sum whereas an employee engaged at £35,000 plus a covenant to spend £5,000 for his benefit in the manner specified in the service agreement is only liable to tax on £35,000. In both cases it could truly be said that the employee obtained a sum of £40,000 as a salary for his services. In the latter case it could also be said that the employee obtained a salary of £35,000 and a perquisite of £5,000. In both cases salaries tax is chargeable on £40,000. The amount which the employer agrees to pay for the benefit of the employee may fluctuate; in the present case if the annual school fees are increased from £12,000 to £15,000 per annum the benefit to Mr. Glynn will increase correspondingly. But in each case the amount of the payment made by the company for the benefit of Mr. Glynn, pursuant to his contract of service, will be ascertainable and taxable. If the burden became too onerous for the company because of the number and expense of Mr. Glynn's family, then no doubt the company would seek a revision of the contract of service or terminate the contract. If the benefit to Mr. Glynn ceased because his children completed their education, he might seek a revision of the contract of services or terminate the contract. As *Tennant's* case shows, the employer may provide some advantages for an employee which do not involve the expenditure of money for the benefit of the employee, or which involve an expenditure which cannot be attributed wholly or proportionately to one employee. For example, if an employer contracts to provide a nursery school for the children of all its employees and to allow each employee to use the facilities of the school, there is no or no identifiable sum expended for the benefit of any particular employee. If the legislature wishes to tax the benefit of a nursery school only statute can provide for this. Money may also be expended indirectly for the benefit of an employee without being taxable; for example, if a contract of service does not provide for medical expenses to be paid and the employer does not normally pay medical expenses, the employer may, for compassionate or other reasons, as a special case, voluntarily pay the medical expenses of transporting and treating a child of the employee. The expense if not contractual and if lacking

the elements of expectation and continuity would not be taxable. Again the legislature may provide expressly for such benefits to be taxed and define the quantum which shall be taxed. On the other hand legislation may also provide exemption for benefits which would otherwise be taxable. For example, section 9(1)(a) expressly exempts from salaries tax the money expended by an employer, whether pursuant to a contract of service or not, on the purchase of a holiday passage which is enjoyed by the employee. The boundaries of tax principles and tax legislation are sometimes uncertain and frequently surprising. For present purposes it suffices that an identifiable sum of money required to be expended by an employer, pursuant to a contract of service for the benefit of the employee, is money paid at the request of the employee and is either part of the employee's salary or is a monetary perquisite taxable as such according to the law and authorities of the United Kingdom. It is money paid at the request of the employee equivalent to money paid to the employee as Viscount Cave implied in the passage from his speach in *Hartland v. Diggines* already cited.

Salaries and perquisites, expressions which have formed part of United Kingdom income tax law since at least 1842, must have the same meaning in Hong Kong tax law, which is based on United Kingdom law, provided that the Hong Kong legislation does not attach different meanings to those expressions. There is nothing in section 9 to suggest that the expressions "salary" and "perquisite" do not include sums contracted to be paid by the employer for the benefit of the employee. Section 11B provides for aggregation of all sources of income. Section 11D provides for the ascertainment of the year of assessment in which the income is received. Mr. Pinson, on behalf of Mr. Glynn, submitted that section 11D(b) shows that income is only taxable if payment is to be made to the taxpayer. But section 11D provides that income accrues to a person when he becomes entitled to claim payment thereof. Mr. Glynn was at all times entitled to claim payment of the school fees by the company pursuant to his contract of service. If the Hong Kong legislation intended to achieve the result that only sums paid in cash to a taxpayer are taxable the Ordinance would require different language to achieve such an absurd result.

The Court of Appeal felt itself inhibited from applying United Kingdom authorities to the Hong Kong definitions of salary and perquisites on account of *A.-G. for Ontario v. Perry* [1934] A.C. 477 and *Armstrong v. Estate Duty Commissioner* [1937] A.C. 885. In *Perry's* case the somewhat tortuous path of legislation and authority whereby for United Kingdom estate duty purposes a settlement in consideration of marriage was held not to be a gift was held not to apply to Ontario's succession duty charged on a gift. In *Armstrong's* case English decisions in which a settlement for the

purposes of estate duty was defined by reference to the Settled Land Acts were held not to alter the definition of a settlement in a Hong Kong ordinance. In *Armstrong's* case Lord Maugham delivering the advice of the Board said at page 896:-

> "It is well settled that in interpreting a taxing statute in a Dominion or a Colony which contains, on its face, no reference to its origin or to previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken, or to rely on decisions as to the true interpretation in the Courts of Great Britain of those terms or sections."

That statement does not however prevent the application of the logical and sensible principle that expressions employed in British legislation and authorities on the meaning of such expressions are of assistance in construing identical expressions in Hong Kong legislation concerned with the same subject matter. The Hong Kong legislation may, of course, provide to the contrary but in the present case their Lordships consider that perquisites not expressly exempted from salaries tax under the Hong Kong Ordinance are no different from perquisites not exempted from tax under the Income Tax Act.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.