REPORTABLE

IN THE TAX COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

BEFORE :

THE HONOURABLE MR. JUSTICE B. WAGLAY : PRESIDENT
MS. YOLANDA RYBNIKAR : ACCOUNTANT MEMBER
MR. TOM POTGIETER : COMMERCIAL MEMBER

CASE OF

NO : 11253

(Heard in Cape Town on 20 October 2005)

JUDGMENT

1. The Appellant, an expatriate employee of A Company of the United Kingdom ("A UK") was assigned to A South Africa Limited ("A SA") for a period of two years as from 1 July 2000.

2. The Appellant arrived in South Africa and commenced his South African assignment on or about 1 August 2000. His period of assignment was extended by 8 months and he left South Africa on 30 April 2003.

3. The Appellant retained his United Kingdom residence, to which he intended to return, while assigned to A SA. He currently lives and works there.

4. While the Appellant was in South Africa, A SA was obliged to pay him the salary which he would have earned had he remained in the United Kingdom, converted into South African rands. There was also an element in his salary that was payable by A SA (referred to in the schedule to the assignment agreement as “Base salary” and “Host element”). A SA was also obliged in terms of the assignment agreement to furnish the Appellant with residential accommodation for the duration of his period of assignment in South Africa.

5. A SA complied with the terms of the assignment. With respect to the accommodation it was obliged to provide, it leased in its own name residential accommodation and paid the rental therefore while it was occupied by the Appellant for the period of his assignment.

6. The Statement of Remuneration that A SA issued to the Appellant every month however reflected under the heading “Remuneration” amongst

other items the following: “Rent allowance – taxable 27 034.48” and under the heading “Deductions”: “Cheque issued 15 680.00”, as also “Total tax…”.

7. The “Rent allowance - taxable” was in fact a notional amount calculated by taking the rental paid by A SA and grossing up this figure to reflect a notional pre-tax amount i.e. the rental payable by A SA was the sum of R15 680.00 and to obtain this amount after deduction of 42% the amount of R15 680.00 was grossed to R27 034.80. The cheque issued under deduction was thus the rent actually paid to the Lessor and the 42% of the “Rent allowance” was paid over to the Receiver of Revenue. The “Rent allowance” less the tax deducted thereon and the “cheque issued” equaled nil on the Statement of Remuneration. Thus no amount was physically paid by A SA to the Appellant by way of a “Rent allowance”. What was provided to the Appellant was actual accommodation.

8. The correspondence between the parties hereto point to the belief held by A SA that it would be “safer” to reflect the rental paid by it on the Appellant’s Statement of Remuneration, pay the tax thereon and issue an IRP5 certificate in respect thereof.

9. It also needs to be recorded that the Respondent has always had the practice of exempting tax on residential accommodation to assigned expatriates where their period of stay or assignment in the Republic is

twelve months or less. In fact Respondent itself contends that this practice has been in place for many years and “can be regarded as part of our tax system”.

10. Against the above background, the Respondent issued assessments against the Appellant in respect of the amounts paid by A SA as rental on the grounds that:

    (a) The amounts paid for accommodation by A SA to the Lessor constituted receipts in the hand of the Appellant and were therefore taxable in terms of paragraph (c) of the definition of gross income in s1 of the Act;

    (b) alternatively the amounts were taxable as they constituted taxable benefits in terms of paragraph 2(d) of the Seventh Schedule of the Act read together with paragraph (i) of the definition of gross income in s1 of the Act.

11. The Appellant objected to the assessment on the basis that his “usual place of residence” is not South Africa and as provided for in terms of paragraph 9(7) of the Seventh Schedule of the Act no value should be placed on the residential accommodation benefit that he received.

12. Unable to persuade the Respondent of the validity of his objection Appellant appeals to this Court against the rejection of his objection

13. The first issue is whether the Appellant received a housing allowance as contended for by the Respondent. The Respondent argues that having regard to:

    (i) the Statement of Remuneration which records “rent allowance” under remuneration; and

    (ii) the tax returns which reflect the provision of accommodation under the column “other allowances”.

the only reasonable inference that can be drawn is that the Appellant actually received housing or residential accommodation allowances from A SA. Respondent adds that A SA’s explanation for the amounts as reflected in the Statement of Remuneration and included in the tax returns is contrived. This, it argues, is so because the explanation is illogical because if A SA believed that the amount was not taxable, why did it then declare the allowances as taxable? In addition Respondent contends that A SA’s claim that the amounts were referred to as an allowance to guide the company in monitoring accommodation benefits provided to expatriate employees is less than convincing as such a label could cause confusion rather than provide assistance.

14. While Respondent’s arguments are not without merit, the evidence presented in Court confirms the claim made by A SA. The evidence is unchallenged and the explanation is not that far fetched so as to warrant being rejected by this Court. The explanation is also not without merit

when consideration is given to the fact that A UK guaranteed the Appellant free accommodation in South Africa; that the lease agreement was concluded between A SA and the landlord; and payment of rental was made directly by A SA and not the Appellant.

15. The reality is that the Appellant did not receive any money to pay for the accommodation, nor was he promised any money towards accommodation; he was in fact given accommodation. Furthermore, the evidence presented pointed out that the Appellant did not have a choice in the accommodation he was given. The accommodation provided was provided in accordance with a set formula which is recorded in the "Local International Assignment Policy for South and Southern Africa", a document issued by A UK.

16. Paragraph (c) of the definition of gross income in s1 must be considered against the above background. This paragraph provides as follows:

> *"… any amount, including any voluntary award, received or accrued in respect of services rendered or to be rendered or any amount . . . received or accrued in respect of or by virtue of any employment or the holding of any office: Provided that –*
>
> > *the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply . . ."*

17. As is evident from what I have recorded above, the Appellant did not receive nor was he entitled to receive any allowances, notwithstanding the recordal as such on his Statement of Remuneration and the income tax returns. Paragraph (c) as quoted above therefore does not apply.

18. Turning to whether paragraph (i) of the definition of "gross income" is applicable, this paragraph provides that:

> *"… the cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said schedule, and any amount required to be included in the taxpayer's income under Section 8A; …"*

19. The benefit that the Appellant received was the right to occupy the accommodation hired by A SA and this right clearly fell within the ambit of paragraph (i) of the definition of "gross income" in s1 of the Act.

20. I may also add that had I found that both paragraphs (c) and (i) of the definition of gross income were applicable, then paragraph (i) would still be the only applicable paragraph as the proviso in paragraph (c) specifically states that:

"the provisions of this paragraph shall not apply in respect of any benefit or advantage in respect of which the provisions of paragraph (i) apply".

21. Having thus established that the benefit received by the Appellant fell within the definition of gross income as provided for in paragraph (i), paragraph 2(d) of the Seventh Schedule becomes relevant. Paragraph 2(d) provides that residential accommodation is a fringe benefit which must be valued in terms of paragraph 9 of the same Schedule.

22. Paragraph 9(7) which is the applicable sub-paragraph provides that:

"No rental value shall be placed under this paragraph on any accommodation away from an employee's usual place of residence provided by his employer while such employee is absent from his usual place of residence for the purposes of performing the duties of his employment . . . ".

23. The Respondent contends that paragraph 9(7) is not of application because the Appellant's usual place of residence while rendering services to A SA was not the United Kingdom but South Africa. Relying on ITC 1668 (61 SATC 444) the respondent argued that Appellant exercised a choice when he accepted the assignment and that the choice he

exercised was to accept employment far away from his residence. Having done so, the fact that he has to find accommodation close to his place of employment does not entitle him to claim that the accommodation he then occupies for purposes of being close to his employment is not his place of residence. According to the Respondent, his new place of residence would thus become his “usual place of residence”.

24. The above argument is misconceived. The Appellant in the matter of ITC 1668 accepted employment far from his residence which resulted in him being obliged to find accommodation close to his place of employment. The Court found that where an Appellant accepts employment which requires him/her to seek accommodation close to the place of employment, then such Appellant is not entitled to a subsistence allowance in terms of the then s8(1) of the Act because his new place of residence would become his “usual place of residence”.

25. The above *dictum* is understandable because the Appellant there was not required by his employer, on a temporary basis, to move away from his usual place of residence to carry out certain duties for a determinable period of time. In that matter, the Appellant actually sought and accepted employment away from his usual place of residence on a permanent basis. It therefore could not be said that the Appellant in that instance retained his past residence as his “usual place of residence”.

26. To contextualize this debate it may be instructive to note that in the year 2000 South Africa changed the basis of its income tax from a source-based system to a residence-based system. With this change a newly introduced definition of “resident” in s1 of the act was enacted to refer in the first instance, in the case of a natural person, to a person who is “ordinarily resident in the Republic”.

27. The notion of “ordinary residence” is crucial and the Legislature in choosing the words “ordinarily resident” must be taken to be fully cognisant with the meaning ascribed thereto by our Courts given that there is a prescription of statutory interpretation favouring preservation of existing meaning of words and phrases which extends to subsequent use by the Legislature of words that have already been pronounced upon and interpreted by our Courts. Thus in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 (HL) at 447, approved in *Ex Parte Minister of Justice: In Rex v Bolon* 1941 AD 345 at 359 – 60 it was held that:

> *“the safe and well-known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them.”*

28. The meaning of the expression "ordinarily resident" in the Act was authoratively first dealt with by Schreiner JA in *Cohen v Commissioner for Inland Revenue* 1946 AD 174 at 184 – 5 where the Court said:

> *"It seems to me that the precise effect to be given to the word 'ordinarily' is linked up with the question whether a man can be 'ordinarily resident' for the purpose of the statute in question in more than one country. That question has not been authoritatively decided in relation to the British Income Tax act and there is no decision on the subject in our Courts. If, though a man may be 'resident' in more than one country at a time he can only be 'ordinarily resident' in one, it would be natural to interpret 'ordinarily' by reference to the country of his most fixed or settled residence. This might not be his country of domicile, for it might not be his domicile of origin and he might not have formed the fixed and settled intention, which 'excludes all contemplation of any event on the occurrence of which the residence would cease', which is necessary to bring into existence a domicile of choice (Johnson v Johnson 1931 AD 391). But his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called <u>his usual or principal residence</u> and it would be described more aptly than other countries as his real home."* (emphasis added).

29. There is therefore no reason to assume that in enacting paragraph 9(7) of the Seventh Schedule with the use of the words “usual place of residence” the Legislature was unaware of the interpretation set out in the *Cohen* matter, and particularly that the notion of “ordinary residence” had been held to equal the notion of a taxpayer’s “usual or principal residence”.

30. The formulation in the *Cohen* matter was cited and confirmed in a unanimous judgment of the then Appellate Division in *Commissioner of Inland Revenue v Kuttel* 1992 (3) SA 247 (A) at 248 – 9 where the Court went on to express the *ratio decidendi* of *Cohen* as follows:

> *“I would respectfully adopt the formulation of Schreiner JA and hold that a person is ‘ordinarily resident’ where he has <u>his usual or principle residence</u>, ie what may be described as his real home.”*

31. Flowing from both *Cohen* and *Kuttel* matters, a person’s “usual place of residence”, as contemplated in paragraph 9(7) of the Seventh Schedule of the Act, is the place where he or she would naturally and as a matter of course return from his or her wanderings, and it would be described more aptly than other places as his/her real home.

32. A person’s usual place or residence is synonymous with his/her “ordinary residence” which according to the facts in the matter before me in as far as the Appellant is concerned has to be the United Kingdom. This is

where the Appellant was ordinarily resident as evidenced by the fact that he retained and maintained his home there while in South Africa and it is there where he has returned to live and work.

33. Respondent however contends that if the Appellant's usual place of residence is the United Kingdom, the Appellant was not "absent from his usual place of residence for purposes of performing his duties of his employment" by reason of the fact that the Appellant had been transferred to a new employment with A SA and as such the "duties of his employment" were in South Africa with A SA. This argument is also contrived.

34. The Appellant was not transferred to a new employment. All that happened was that for a temporary period he was allocated duties to another company for and on behalf of his principal. This was not a case where the Appellant was transferred to A SA and a new employer/employee relationship was constituted between them. The letter of assignment specifically provides *inter alia* the following:

(i) The terms and conditions that applied to Appellant's employment in United Kingdom continued to apply;

(ii) the Appellant's employer in the United Kingdom had a discretion to terminate or extend the assignment;

(iii) the Appellant remained in the employ of A UK and that his services were being temporarily assigned to A SA;

(iv) appellant would be paid by A SA but the amount would be what he would have received in the UK converted to ZAR in addition to an amount from A SA;

(v) the contract of employment remained governed by the laws of the United Kingdom;

(vi) that notwithstanding Appellant being assigned to A SA, A UK could terminate appellant's employment by reason of redundancy.

35. The above is demonstrative of the fact that the Appellant was not employed by A SA but that he remained in the employ of A UK and as such his presence in South Africa was for purposes of performing his duties for his employer in UK, which was A UK.

36. The arguments presented by the Respondent I found surprising, particularly in the light of its own averment that the amount it seeks to include for purpose of taxation would be excluded had Appellant only been assigned for a period of 12 months or less. I fail to see why it should be different where the period is 30 months. I acknowledge that there may be a need to restrict the period of time for when the benefit applies but this cannot be randomly determined by the Respondent. I would suggest that this may require Legislative intervention.

37. In the premises and for reasons recorded above I am satisfied that the amounts in dispute dealing with accommodation, must be excluded from the Appellant's income as paragraph 9(7) of the Seventh Schedule provides that no value shall be placed thereon and accordingly no value falls to be included in the Appellant's income in terms of paragraph (i) of the definition of "gross income" in s1 of the Act.

38. In the result the appeal succeeds and the assessment is referred back to the Respondent for revision on the basis that the amounts in dispute be excluded from the Appellant's income.

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WAGLAY J

Date of Judgment	:	9 February 2006
For the Appellant	:	Adv Emslie, T.S. (SC)
Instructed by	:	Mallinicks Inc.
For the Respondent	:	Adv Tsele, Radichidi of the Respondent