

Case No. D16/05

Salaries tax – rent received from employer – whether genuine landlord and tenant relationship.

Panel: Kenneth Kwok Hing Wai SC (chairman), Leung Hing Fung and David Li Ka Fai.

Date of hearing: 9 April 2005.

Date of decision: 17 May 2005.

On 19 July 1996, the appellant and her husband acquired a residential flat as joint tenants.

The appellant contended she received \$232,000 (\$29,000 x 8) from her employer from August 1996 to March 1997 as rent for the flat.

The issue is whether there was a genuine landlord and tenant relationship. The appellant relied on a tenancy agreement to prove such relationship.

Held:

1. The tenancy agreement that the appellant relied on was dated 20 May 1997. Apparently, no tenancy existed between August 1996 and March 1997. Thus no rent could have been paid.
2. There was also no reason why the appellant's husband should state in the property tax return dated 5 June 1997 that the flat was wholly used by the owners for residential purposes from July 1996 to March 1997. No explanation was offered.
3. The appellant failed to prove that there was in fact a tenancy.

Obiter:

1. Had it been necessary, the Board would have found the transaction being caught by section 61. The appellant's employer had no intention to enter into a genuine tenancy. The document purported to be an agreement which was to govern the position in future in respect of a period of tenancy which had already expired.

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Appeal dismissed.

Case referred to:

Commissioner of Inland Revenue v Peter Leslie Page, IRBRD, vol 17, 854

Taxpayer represented by her representative.

Tsui Nin Mei and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 1 February 2005 whereby the additional salaries tax assessment for the year of assessment 1996/97 under charge number 9-2622051-97-6, dated 13 March 2003, showing additional net chargeable income of \$182,300 with additional tax payable of \$36,460 was increased to additional net chargeable income of \$196,700 with additional tax payable of \$39,340.

2. By an assignment dated 19 July 1996, the appellant and her husband acquired a residential flat ('the Flat') and a car parking space as joint tenants.

3. The appellant was paid the following sums by her employer:

Month	Date of payment	Amount (\$)
April 1996	25-4-1996	65,000
May 1996	25-5-1996	65,000
June 1996	25-6-1996	65,000
July 1996	25-7-1996	65,000
August 1996	22-8-1996	65,000
September 1996	25-9-1996	65,000
October 1996	24-10-1996	65,000
November 1996	25-11-1996	65,000
December 1996	21-12-1996	130,000
January 1997	25-1-1997	65,000
February 1997	25-2-1997	65,000
March 1997	25-3-1997	65,000

4. The appellant contended that out of each of the sums which she received from her employer from August 1996 to March 1997, \$29,000 was paid by her employer as rent for the Flat.

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5. The Deputy Commissioner did not accept that there was a genuine landlord and tenant relationship between the joint owners (that is, the appellant and her husband) and the appellant's employer.
6. The appellant appealed on the ground that there was a genuine landlord and tenant relationship.
7. The appellant did not attend the hearing of the appeal. She was represented by her husband as her representative.
8. No witness was called by either party.
9. The nature of the payment of \$29,000 per month from August 1996 to March 1997 is a question of fact, Commissioner of Inland Revenue v Peter Leslie Page, IRBRD, vol 17, 854. Whether there was a landlord and tenant relationship is a question of fact.
10. Section 68(4) of the Inland Revenue Ordinance, Chapter 112, provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.
11. The onus is on the appellant to prove that there was in fact a tenancy. Neither party to any alleged tenancy gave evidence at the hearing.
12. The appellant relied on a document called 'Tenancy Agreement' said to be 'made the 20th day of May 1997'. There is no allegation that this document had come into existence during the year of assessment 1996/97. If this document was signed on 20 May 1997 as it recited then no tenancy existed at the time of the payments on 22 August 1996, 25 September 1996, 24 October 1996, 25 November 1996, 21 December 1996, 25 January 1997, 25 February 1997 and 25 March 1997 and no part of any of the payments could have been paid as rent.
13. If a tenancy in fact existed, there was no reason why the appellant's husband should state in the property tax return which he signed and dated 5 June 1997 that the Flat was 'wholly used by owner(s) for residential purposes from 7/96 to 3/97'. No explanation was offered by or on behalf of the appellant.
14. In our decision, the appellant has not begun to prove that there was in fact a tenancy and the appeal fails.
15. Strictly speaking, it is not necessary for us to reach a decision on the respondent's reliance on section 61. Had it been necessary, we would have found in favour of the respondent and our reasons in brief are as follows.
16. Section 61 provides that:

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‘Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.’

17. The respondent contended that the ‘Tenancy Agreement’ said to be ‘made the 20th day of May 1997’ was the transaction.

18. To come within section 61, the transaction must reduce or would reduce the amount of tax payable by any person.

19. Without the transaction, the total sum of \$232,000 ($\$29,000 \times 8$) would have been assessed under salaries tax.

20. As ‘rental’, the assessor’s calculations showed that the rental value was \$35,300 and the appellant’s salaried income would be reduced by \$196,700.

21. The rental income of \$232,000 would be chargeable to property tax. By electing for personal assessment, the net assessable value of the Flat, that is, \$185,600 ($\$232,000 \times 80\%$), would be wholly offset by the mortgage loan interest of \$374,795 under the proviso to section 42(1).

22. It is perfectly legitimate for an employer to take out a lease of a residential property and provide that residential property to an employee as quarters. The same cannot be said of an employer who generated documents after the event to facilitate an employee’s claim of employer’s provision of quarters. In its letter dated 13 June 2003, the appellant’s employer stated (written exactly as it stands in the original):

‘However, since the turnover rate in advertising industry is very high, we do not want to be bounded by any agreement on paying rent after the employee left the company. Our practice on staff housing benefit scheme is to enter the tenancy agreement after the service period ended on March 31 every year. Mutual agreement will be made at the beginning at the period.’

23. We attach no weight to the last sentence in view of what the appellant’s employer stated in its letter dated 15 August 2003:

‘A) i) ...

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iii) Due to internal personnel changes and office move, no supporting documents to substantiate the mutual agreement of the tenancy arrangement made between [the appellant] and our Company can be found.

B) ...

D) As mentioned before, the person in charge of the housing benefit scheme has left the company years ago, we have no idea of how the rental reimbursement payments were being recorded in the accounts book.'

24. If cessation of employment was the only concern, this had already been dealt with by the provision in clause 7 to determine the agreement by a month's notice. In our decision, the appellant's employer had no intention to enter into any genuine tenancy. What it did was to sign a document which was a contradiction in terms. The document purported to be an 'agreement' which was to govern the position in future in respect of a period of 'tenancy' which had already expired.

25. The monthly rental of \$29,000 was almost 30% below the market rental of \$41,000.

26. In our decision, the transaction was caught by section 61.

27. Ms Tsui Nin-mei gave an undertaking on behalf of the respondent that in the event of our dismissing the appeal, the property tax assessment for the year of assessment 1996/97 would be revised to exclude the sum of \$232,000.

28. The appellant has not discharged the onus under section 68(4) of proving that the assessment appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessment as increased by the Deputy Commissioner.