

Case No. D38/05

Salaries tax – residence provided by employer – rental value – Inland Revenue Ordinance ('IRO') section 9(2).

Panel: Kenneth Kwok Hing Wai SC (chairman), Cheng To Yee and David Ho Chi Shing.

Date of hearing: 23 July 2005.

Date of decision: 27 August 2005.

The appellant was provided residence by her employer.

The issue in the case is whether the rental value of the residence should be assessed as 'one hotel room' at 4% or as 'other residence' at 10% of her income according to section 9(2) of the IRO.

The appellant contended that the place of residence was a hotel which provides lots of facilities that will not be made available in normal residential units.

Held:

The Board found the residence was not a 'one hotel room' but 'other residence' under section 9(2) as it was even more valuable than a residential unit.

Obiter:

The Administration may like to:

- (a) identify the policy reasons for the differential rates and define the meaning of a 'hotel, hostel or boarding house' to give effect to such intention; or
- (b) ask for the repeal of proviso (a).

Appeal dismissed.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

Case referred to:

D91/04, IRBRD, vol 20, 22

Taxpayer in person.

Tsui Siu Fong and Poon So Chi for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 8 April 2005 whereby the additional salaries tax assessment for the year of assessment 2001/02 under charge number 9-1517641-02-4, dated 24 October 2002, showing additional net chargeable income of \$14,250 with tax payable thereon of \$2,423 was confirmed.
2. Paragraph 1(1)– (9) and (12) of the Determination were admitted and we find them as facts.

The issue

3. The issue in this case is whether the rental value of a place of residence provided by the appellant's employer should be assessed at 4% or 10% of her income.
4. Section 9(2) of the Inland Revenue Ordinance, Chapter 112, provides that:

(2) The rental value of any place of residence provided by the employer or an associated corporation shall be deemed to be 10% of the income as described in subsection (1)(a) derived from the employer for the period during which a place of residence is provided after deducting the outgoings, expenses and allowances provided for in section 12(1)(a) and (b) to the extent to which they are incurred during the period for which the place of residence is provided and any lump sum payment or gratuity paid or granted upon the retirement or termination of employment of the employee:

- (a) if such place of residence be a hotel, hostel or boarding house the rental value shall be deemed to be 8% of the income aforesaid where the accommodation consists of not more than 2 rooms and 4% where the accommodation consists of not more than one room;*

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) *if such place of residence be other than a hotel, hostel or boarding house any person may elect to have, in respect of the years of assessment commencing on or after 1 April 1983, the rateable value included in the valuation list prepared under section 12 of the Rating Ordinance (Cap 116) or, if the place of residence is not so included, the rateable value ascertained in accordance with Part III of that Ordinance, substituted for rental value at 10% as aforesaid.'*

The appellant's case

5. In her notice of appeal, the appellant contended that the place of residence was a hotel which 'provides lots of facilities that will not be made available in normal residential units'.

6. The appellant told us that the place of residence had a bedroom, a sitting room and a kitchenette.

7. In support of her case that the place of residence was a hotel, she asserted that the following supplies, facilities and services were provided without any extra charge, being included in the rent and management fee:

- (a) provision and cleaning of bedding and towels, but no toiletries;
- (b) house-keeping services including provision and change of light bulbs, room cleaning and dish washing;
- (c) carriage of luggage from reception area to room;
- (d) provision of free coffee/tea in the reception area;
- (e) presence of sprinklers in room;
- (f) telephone operator service;
- (g) security check of visitors;
- (h) swimming pool;
- (i) gymnasium equipment;
- (j) sauna;
- (k) broadband internet access at business centre;
- (l) self-service laundry room;
- (m) common pressing room with iron and ironing board;
- (n) common pantry room with microwave oven and toaster; and
- (o) shuttle bus services.

The Board's decision

8. In our decision, the appellant's approach is fundamentally flawed and self-destructive of her case that the place of residence was a hotel. The valuation under section 9(2) and proviso (a) for the purpose of salaries tax values one hotel room at 4%, two hotel rooms at 8% and other

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

residence at 10%. What the appellant should have done was to try to satisfy us that her place of residence was less valuable than a residential unit. What she did was precisely the opposite. She pointed to facilities, supplies and services which added value to her residence. She made no attempt to identify any restriction, such as ability to entertain visitors at her residence or to prepare their own meals at her residence.

9. Further and in any event, we reject her contention that the place of residence should be valued on the basis of one room. As stated above, the statutory approach is to value one hotel room at 4% and two hotels rooms at 8% and other residence at 10%. It is absurd to treat a presidential suite as one room and value it at 4%, but to treat two single hotel rooms as two rooms and value them at 8%. One hotel room is valued at 4% because it has no sitting area to entertain visitors. Where there is a sitting room in addition to a bedroom, we have a two-room scenario.

10. We asked Ms Tsui Siu-fong if she could help us on the legislative history of proviso (a) to section 9(2). Her research supports our approach in paragraph 8 above in construing those provisions.

11. When the Inland Revenue Ordinance was first enacted in 1947, there was no mention of a hotel room in relation to rental value. Section 10(1) and (2) provided that:

‘(1) Income from any office or employment includes–

(i) any wages, salary ...

(ii) the rental value of any place of residence provided rent-free by the employer;

(iii) where a place of residence is provided by an employer at a rent less than the rental value, the excess of the rental value over such rent.

(2) The rental of any place of residence shall be the rental value payable by the employer or if the place of residence is owned by the employer the rateable value arrived at in accordance with section 6: Provided that for the purposes of subsections (1)(ii) and (iii), any excess of rental value over –

(a) one-sixth of the income described in subsection (1)(i); or

(b) four thousand dollars, whichever is the lower amount,

shall be disregarded.’

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

12. By section 4 of the Inland Revenue (Amendment) Ordinance, 1949, section 10(2) was amended by substituting ‘The rental value of any place of residence shall be the rental’ for ‘the rental of any place of residence shall be the rental value’.

13. The rental value of a hotel room for salaries tax purposes was introduced in 1950 by Clause 3 of the Inland Revenue (Amendment) Bill, 1950, which provided for the repeal of section 10(2) and the replacement by the following:

‘(2) The rental value of any place of residence provided by the employer shall be deemed to be seven and one-half per cent of the income as described in subsection (1)(i) derived from the employer for the period during which a place of residence is provided:

Provided that –

(a) if such place of residence be a hotel, hostel or boarding house the rental value shall be deemed to be six per cent of the income aforesaid where the accommodation consists of not more than two rooms and three per cent where the accommodation consists of not more than one room;

(b) if such place of residence be other than a hotel, hostel or boarding house any person may elect to have the rateable value arrived at in accordance with section 6 substituted for rental value at seven and one-half per cent as aforesaid.’

14. In explaining the objects and reasons, the then Attorney General gave the following explanation:

‘Clause 3 provides for the repeal and replacement of section 10(2) of the principal Ordinance. Such provision, which governs the valuation for purposes of tax of places of residence provided by an employer, has proved cumbersome and inequitable in practice. The opportunity is therefore taken to provide by the amendment proposed for a simpler method which allows of the application of 7 ½ % of the other income and perquisites derived from an employer in ascertaining the rental value of a place of residence for the purposes of tax. The proposed amendment makes provision whereby inequity to a tax payer may be avoided –

(a) by allowing a lower rate than 7 ½ % of other income and perquisites derived from an employer where place of residence consists of restricted accommodation in a hotel, hostel or boarding house; and

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

(b) in other cases by allowing a person to elect to have rateable value substituted for such rental value at 7 ½%.'

15. The intention was to allow a lower rate for restricted, or less valuable, accommodation in a hotel.

16. Clause 3 was enacted without change as section 3 of the Inland Revenue (Amendment) Ordinance, 1950.

17. Section 2(c)(ii), (iii) and (iv) of the Inland Revenue (Amendment) (No 2) Ordinance, 1975, substituted 'ten per cent' for 'seven and one-half per cent', 'eight per cent' for 'six per cent' and 'four per cent' for 'three per cent'.

Conclusion and disposition

18. The appellant has failed to discharge 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 appealed against as confirmed by the Deputy Commissioner.

Postscript

19. We echo what the Board said in D91/04, IRBRD, vol 20, 22. Perhaps the Administration may like to:

- (a) identify the policy reasons for the differential rates and define the meaning of a 'hotel, hostel or boarding house' to give effect to such intention; or
- (b) ask for the repeal of proviso (a).