

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D78/03

**Salaries tax** – income – whether rent refunds or cash allowances – whether artificial transactions – sections 9(1A) and 61 of the Inland Revenue Ordinance ('IRO').

Panel: Anna Chow Suk Han (chairman), Stephen Lau Man Lung and Daniel Wan Yim Keung.

Date of hearing: 12 June 2003.

Date of decision: 12 November 2003.

The taxpayer was one of the directors and shareholders of Company A, holding 51% of the issued share capital. For the relevant years of assessment, the taxpayer was given substantial sums by Company A for the purported rents he paid to Company B. Company B was a company owned by the taxpayer and his wife.

The main issue is whether there existed a genuine landlord and tenant relationship between the taxpayer and Company B, and hence the amounts he received from Company A being rent refunds.

#### **Held:**

1. The Board found that there was no tenancy between the taxpayer and Company B. The tenancy agreement produced was not stamped as stipulated under the agreement. It shows that the parties had no genuine intention to carry out the terms of the agreement. Besides, the cheques deposited by the taxpayer into Company B's account corresponded with its mortgage repayments to the bank. They did not represent monthly rental payments but the taxpayer's loans to Company B, which the taxpayer would recover from Company A.
2. Furthermore, the fact that rental deposit was not provided under the tenancy agreement highlights the artificiality of the transaction between the taxpayer and Company B.
3. The Board also found the amounts in dispute were simply cash allowance to the taxpayer because he was paid fully even before some of the purported rents had been paid or due.

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### Appeal dismissed.

Cases referred to:

D33/97, IRBRD, vol 12, 228  
D19/95, IRBRD, vol 10, 157  
CIR v Peter Leslie Page HCIA 2/2002  
D8/82, IRBRD, vol 2, 8  
D77/99, IRBRD, vol 14, 528  
D93/01, IRBRD, vol 16, 784

Cheung Mei Fan for the Commissioner of Inland Revenue.

Tam Chi Ming of Messrs C M Tam & Co, Certified Public Accountants, for the taxpayer.

### Decision:

1. This is an appeal by the Taxpayer against the additional salaries tax assessments for the years of assessment 1997/98, 1998/99 and 1999/2000 and the salaries tax assessment for the year of assessment 2000/01 raised on him. He claims that the sum of \$1,265,000 for the year of assessment 1997/98 and the sum of \$1,380,000 for each of the years of assessment 1998/99, 1999/2000 and 2000/01 paid to him by his employer, Company A, were refunds of rent within the meaning of section 9(1A)(a) of the IRO and he should be assessed to tax in accordance with section 9(2) of the IRO in respect of these sums.

### The agreed facts

2. The following are the facts agreed between the parties:

(a) In his tax returns for the years of assessment 1997/98 to 1999/2000, the Taxpayer declared the following particulars of income:

	<b>Year of assessment</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/2000</b>
(i)	Employer	-----Company A-----		
(ii)	Capacity in which employed	-----Director-----		
(iii)	Period of employment	4-1997 to 3-1998	4-1998 to 3-1999	4-1999 to 3-2000
(iv)	Income	\$210,000	\$600,000	\$600,000
(v)	Quarters			

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Provided Address	Address 1 ("The Property")		
	4-1997 to 3-1998	4-1998 to 3-1999	4-1999 to 3-2000
Name of employer providing quarters	-----Company A-----		
Rent paid by him to landlord	\$1,380,000	\$1,380,000	\$1,380,000
Rent refunded to him by employer	\$1,380,000	\$1,380,000	\$1,380,000

- (b) Company A was a private limited company incorporated in Hong Kong. At the relevant time, the Taxpayer was one of the directors and shareholders of Company A, holding 51% of the issued share capital.
- (c) The Property was acquired together with a car parking space at Address 2 ('the Car Park') by Company B at a consideration of \$24,130,000 on 30 April 1997.
- (d) Company B is a company incorporated in Hong Kong on 26 November 1996. On 21 December 1996, the Taxpayer and his wife were appointed as its first directors. The Taxpayer and his wife held the issued share capital of Company B of \$2 equally.
- (e) The assessor raised on the Taxpayer the following salaries tax assessments:

(i) **Year of assessment: 1997/98**

	\$
Assessable income (Fact (a)(iv))	210,000
<u>Add: Rental value</u>	<u>21,000</u>
	231,000
<u>Less: Basic allowance</u>	<u>100,000</u>
Net chargeable income	<u>131,000</u>
Tax payable	<u><u>15,400</u></u>

(ii) **Year of assessment: 1998/99**

	\$
Assessable income (Fact (a)(iv))	600,000
<u>Add: Rental value</u>	<u>60,000</u>
	660,000
<u>Less: Basic allowance</u>	<u>108,000</u>

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Net chargeable income	552,000
Tax payable	<u>83,340</u>

(iii) **Year of assessment: 1999/2000**

	\$
Assessable income (Fact (a)(iv))	600,000
<u>Add:</u> Rental value	<u>60,000</u>
	660,000
<u>Less:</u> Basic allowance	<u>108,000</u>
Net chargeable income	<u>552,000</u>
Tax payable	<u>83,340</u>

The Taxpayer did not object to the above assessments.

(f) Salaries tax for 1997/98 was reduced by \$1,540 to \$13,860 in accordance with the Tax Exemption (1997 Tax Year) Order.

(g) On 9 May 2001, Company A filed an employer's return in respect of the Taxpayer for the year ended 31 March 2001 with particulars as follows:

- (i) Capacity in which employed : General Manager
- (ii) Employment period : 1-4-2000 to 31-3-2001
- (iii) Income particulars :

	\$
Salary	600,000
Housing allowance	1,380,000
Other allowance	<u>1,000</u>
	<u>1,981,000</u>

(iv) No quarters was provided

(h) In his 2000/01 tax return, the Taxpayer declared the following particulars:

- (i) Employment Income from Company A \$600,000
- (ii) Quarters provided by Company A
 

Location of quarters	The Property
Period provided	4/2000 to 3/2001
Rent paid by him to landlord	\$1,380,000
Rent refunded to him by employer	\$1,380,000

(i) The assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2000/01:

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Net assessable income [Fact (g)(iii)]	\$ <u>1,981,000</u>
Tax payable	<u>297,150</u>

- (j) An accountants' firm ('the Representatives') on behalf of the Taxpayer objected to the salaries tax assessment for the year of assessment 2000/01 claiming that the employer's return filed by Company A was incorrect. The Representatives elaborated in the following terms:

'The rental amounting to HK\$1,380,000 is for the quarter provided by the employer – [Company A], therefore the rental value should be 10% of the total income from the employer. In addition, an amount of HK\$1,000 is contributed for the Mandatory Provident Fund by the employer, which is also non-taxable item.'

- (k) In reply to queries raised by the assessor, the Representatives stated that:
- (i) There was no formal employment contract signed between the Taxpayer and Company A.
  - (ii) The Taxpayer paid the 'rent' of the Property monthly by cash.
  - (iii) The Taxpayer transferred lump sums to Company B each month in excess of the 'rent'.
  - (iv) The Taxpayer received the 'reimbursement of rent' from Company A in one payment for the year of assessment 2000/01 and in three payments for the year of assessment 1999/2000 inclusive of his salaries. Company A had checked all the rental receipts and the tenancy agreement for the rental reimbursement to the Taxpayer.
- (l) In support of the objections, the Representatives provided the following documents:
- (i) A letter dated 23 October 2001 issued by Company A to confirm the Taxpayer's remuneration from April 1999 to March 2001.
  - (ii) An agreement headed as 'Tenancy Agreement' ('the Agreement') signed between Company B and the Taxpayer purportedly to lease the Property together with the Car Park for a term of 5 years commencing on 1 May

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1997 at a monthly rental of \$115,000. The Agreement was not stamped. The Representatives asserted that the tenancy agreement was not stamped due to the Taxpayer's ignorance of the legal requirement. The Taxpayer has however paid the rental of HK\$115,000 per month to Company B in the discharge of his obligation under the agreement. Also Company B has reported the rental income in its accounts and to the Inland Revenue Department.

- (iii) Receipts issued by Company B to '[the Taxpayer] [Company A]' in respect of 'rent' paid for the Property and the Car Park for the period from April 1999 to March 2001.
- (iv) The bank advices together with copies of the relevant cheques showing the deposits of the Taxpayer's personal cheques of various amounts into an account of Company B for the period from March 1999 to October 2000 and from December 2000 to March 2001.
- (v) (1) Three payment vouchers of Company A together with copies of the relevant cheques for the years of assessment 1999/2000 and 2000/01 showing the following particulars:

Date	Account	Particulars	Amount \$
17 June 1999	Salary	-	1,000,000
24 March 2000	Salary	Partial 1999-2000 April-March	130,000
19 March 2001	Salary	1-4-2000 – 31-3-2001	1,980,000

- (2) One transfer voucher dated 22 April 1999 showing the following particulars:

	\$	\$
Dr. Salary Account	850,000	
Cr. The Taxpayer's Account		850,000

- (m) In correspondence with the assessor, Company A stated that the Taxpayer's remuneration package was determined by the board of directors of the company.

A copy of the member's resolution of Company A dated 1 April 1999, resolving that with effect from 1 April 1999 the Taxpayer's monthly

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remuneration was \$50,000 and a housing allowance of \$115,000, was produced.

- (n) The assessor considered the amount of \$1,380,000 received by the Taxpayer from Company A for the respective years ended 31 March 1998, 31 March 1999 and 31 March 2000 was his employment income and should be chargeable to salaries tax. He raised on the Taxpayer the following additional salaries tax assessments:

(i) **Year of assessment : 1997/98**

	\$
Net assessable income ('NAI')	
{ \$210,000 (fact (a)(iv)) + \$1,380,000 (fact (a)(v)) }	1,590,000
<u>Less:</u> Net chargeable income previously assessed (fact (e)(i))	<u>131,000</u>
Additional net assessable income	<u><u>1,459,000</u></u>
Tax on NAI after 10% tax rebate	214,650
<u>Less:</u> Tax previously assessed (fact (f))	<u>13,860</u>
Additional tax payable	<u><u>200,791</u></u>

(ii) **Year of assessment : 1998/99**

	\$
NAI { \$600,000 (fact (a)(iv)) + \$1,380,000 (fact (a)(v)) }	1,980,000
<u>Less:</u> Net chargeable income previously assessed (fact (e)(ii))	<u>552,000</u>
Additional net assessable income	<u><u>1,428,000</u></u>
Tax on NAI	297,000
<u>Less:</u> Tax previously assessed (fact (e)(ii))	<u>83,340</u>
Additional tax payable	<u><u>213,660</u></u>

(iii) **Year of assessment : 1999/00**

	\$
NAI { \$600,000 (fact (a)(iv)) + \$1,380,000 (fact (a)(v)) }	1,980,000
<u>Less:</u> Net chargeable income previously assessed (fact (e)(iii))	<u>552,000</u>
Additional net assessable income	<u><u>1,428,000</u></u>



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Housing 1,380,000

For 1998/99

Salary 600,000

Housing 1,380,000

- (d) [R1-21] The Employer's Return ended 31 March 2001 filed by Company A in respect of the Taxpayer stated that the Taxpayer's income included a salary of \$600,000 and a taxable housing allowance of \$1,380,000.
- (e) Apart from the production of Company A's member's resolution in writing dated 1 April 1999 referred to in Fact 2(m) above resolving on the Taxpayer's remuneration at \$50,000 per month and a housing allowance of \$115,000 per month effective from 1 April 1999, the Taxpayer through his Present Representatives also produced two board minutes of Company A of 22 February 1999 and 22 February 2000 respectively, resolving that the payment of \$1,590,000 during the year ended 31 March 1998 and \$1,980,000 during the year ended 31 March 1999 to the Taxpayer as director's emolument would be ratified and confirmed in the respective next annual general meetings.
- (f) Company A paid the Taxpayer the following lump sums during the assessment years in question as evidenced by the under-mentioned documents produced before the Board:

1997/98	a bank statement of 23 January 1998 showing a payment by cheque of \$1,380,000 [R1-52]	supported by transfer voucher dated 31 March 1998 transferring the same amount from the salary account to the housing account [R1-51]
1998/99	a cheque \$1,980,000 of 18 March 1999 [R1-53]	supported by a bank payment voucher of the same date showing entries of \$600,000 for salary and \$1,380,000 for housing [R1-53]
1999/2000	a transfer voucher of 22 April 1999 in respect of \$850,000 [B1-52], showing a transfer from Savings account to Salary account as a partial payment of the Taxpayer's salary for 1999/2000 [B1-52]	

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	a cheque of 17 June 1999 in respect of \$1,000,000 [B1-49]	supported by a bank payment voucher of the same date, as a partial payment of the Taxpayer's salary [B1-49]
	a cheque of \$130,000 of 24 March 2000 [B1-50]	supported by a bank payment voucher of the same date as salary [B1-50]
2000/01	a cheque of 19 March 2001 of \$1,980,000 [B1-51]	supported by a bank payment voucher of 19 March 2001 as salary for the year [B1-51]

- (g) The Taxpayer gave evidence before the Board that Company A was run and controlled by him and he discussed his remuneration with the other director of Company A once a year.

### **The Taxpayer**

- (h) In his individual tax returns, the Taxpayer declared that he received from Company A salaries of \$1,680,000 for the year of assessment 1996/97 (the year prior to the years of assessment in question), \$210,000 for the year of assessment 1997/98, \$600,000 for each of the years of the assessment 1998/99, 1999/2000 and 2000/01, and a rent refund of \$1,380,000 for each of the years of assessment 1997/98, 1998/99, 1999/2000 and 2000/01.
- (i) The Taxpayer produced monthly receipts in respect of the Property issued by Company B for the period from May 1997 to March 2001 (both months inclusive). Each monthly receipt stated that the sum received was rent of \$115,000. Save for a few receipts where the mode of payment was not specified, the rest stated that the payments were made by cash. The receipts were dated between the 1st day and 8th day of the months. As urged upon us by the Revenue's representative, we note that there are irregularities on the serial numbers of a few receipts in that a few receipts of later dates bear serial numbers prior to those borne on receipts of earlier dates. For example, the receipt dated 1 May 1997 for the rent of May 1997 bears the serial number '683561' while the receipt dated 6 December 1997 for the rent of December 1997 bears the serial number '683560'. The Revenue has complied and produced before the Board a summary of the extracts of these receipts issued by Company B [R1-34] which is attached hereto as Appendix A.

### **Company B**

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- (j) On 18 April 1997, Company B entered into a provisional agreement to purchase the Property at the purchase price of \$24,130,000 under which \$1,000,000 was paid upon the signing thereof, \$3,826,000 was to be paid on 25 April 1997 and the balance upon completion on 30 April 1997. The purchase was duly completed on 30 April 1997. The vendor under the provisional agreement was selling the Property as a confirmor.
- (k) In Company B's profit and loss accounts for the period from 26 November 1996 (the date of incorporation) to 31 March 1998, and for the respective years ended 31 March 1999, 31 March 2000 and 31 March 2001, the respective sums of \$1,265,000, \$1,380,000, \$1,380,000 and \$1,380,000 were declared as rental income.
- (l) There were produced to the Revenue the statements of Company B's account with Bank D from which the Revenue has compiled a summary of extracts of certain deposits and withdrawals [R1-33]. This summary is attached hereto as Appendix B. The deposits referred to in the summary were deposits made by the Taxpayer and the withdrawals were withdrawals auto-deducted by the bank to meet the monthly mortgage repayment of the Property. As can be seen from this summary a deposit was always made one or two or a few days before a withdrawal and the amount of the deposit always more or less matched the amount of the monthly repayment.
- (m) In the Taxpayer's account with Company B [R1-138] for the period from 26 November 1996 to 31 March 1998, there were two credit entries of the respective sums of \$516,000 and \$1,370,200 and a subsequent adjustment in the Taxpayer's account adjusting the sum of \$1,265,000 as rental payment. For the years of assessment 1998/99, 1999/2000 and 2000/01, there were credit entries of the respective sums of \$723,000, \$570,000 and \$365,000 while we note that the Taxpayer's total payments to Company B in these years exceeded these amounts. However, there was a single entry of \$1,380,000 in Company B's rental income account in each of those years.

### **Tenancy Agreement**

- (n) There is a printed tenancy agreement in Chinese ('the Agreement') produced before us. It stated that Company B was the landlord and the Taxpayer was the tenant in respect of the Property and the term was 5 years commencing from 1 May 1997 to 30 April 2002 at a rent of \$115,000 per month payable in advance on the 1st day of each month. On its front page, the Agreement was said to have been signed on 29 April 1997 but in the Agreement itself on 1 May 1997. The Agreement had never been produced for stamping although clause

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18 of the Agreement stipulated that the stamp duty should be borne by the parties in equal shares. According to the land search of 18 July 2002 on the Property, the Agreement was not registered at the Land Registry. Also there is no provision for payment of rental deposit under the Agreement.

- (o) The Taxpayer gave evidence before the Board to the following effect. He entered into a tenancy agreement with Company B so that the rents would meet Company B's mortgage repayments. He was given to understand that he would gain tax benefit by such arrangement. Since Company B was a private company, he did not think that the Agreement needed to be stamped. He decided that a rental deposit was not necessary because Company B was a private company controlled by him and he knew he could pay the rent. He consulted an estate agent before he decided on the rent. There was no rent adjustment within the five year term because the rent was fixed according to his salary, which must be within his means. In order to save time and effort, he paid the rent and his loan to Company B by one cheque each month.

### **The Revenue's Submission**

4. It was submitted that the sums of \$1,265,000 (1997/98) and \$1,380,000 (1998/99 to 2000/01) received by the Taxpayer from Company A are cash allowances, not refunds of rent. For the following reasons, the entire sums should be subject to salaries tax under sections 8 and 9(1)(a) of the IRO.

- (a) There was no genuine landlord and tenant relationship between Company B and the Taxpayer. The Taxpayer had not paid any rent to Company B for the years in question. There were no 'rent' payments in the first place.
- (b) Even if the Taxpayer did incur 'rent', the sums in question were not 'refunds' of rent but merely cash allowances.
- (c) The purported 'letting' of the Property by Company B to the Taxpayer and the provision of quarters by Company A to the Taxpayer by way of rent refund were artificial or fictitious transactions within the meaning of section 61 of the IRO and should be disregarded.

### **The Taxpayer's Submission**

5. Mr Tam of the Taxpayer's Present Representatives urged us to consider the totality of facts of this case and the intention of the parties rather than the detailed particulars contained in the documents produced. He admitted that there were mistakes and inconsistencies in the evidence but he asked us to ignore them. He explained that the intentions of the parties were that the

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Property was to be acquired through Company B, Company B was to be paid rent by the Taxpayer which was to meet the mortgage repayment and the Taxpayer was to recover the rents from Company A. He stressed that this kind of arrangements was by no means unusual in Hong Kong.

### **The Relevant Statutory Provisions**

6. Section 8(1) of the IRO is the basic charging section for salaries tax which provides that salaries tax shall be charged on income from employment. Section 8(1) states:

*‘Salaries Tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources:*

*(a) any office employment of profit; and*

*(b) any person.’*

7. Income from employment is defined in section 9(1) of the IRO to include perquisite or allowance. The definition is non-exhaustive and it states:

*‘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, ...*

*...*

*(c) where a place of residence is provided by an employer or an associated corporation at a rent less than the rental value, the excess of the rental value over such rent;’*

8. The rental value of any place of residence shall be deemed to be 10% of the incomes as defined in section 9(1)(a) of the IRO. Section 9(2) of the IRO provides:

*‘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 ...’*

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9. Where rent refunds are made in respect of a place of residence, section 9(1A) of the IRO stipulates that the rent refunds shall be deemed not to be income. Section 9(1A) reads as follows:

*‘(a) Notwithstanding subsection (1)(a), where an employer or an associated corporation:*

*(i) pays all or part of the rent payable by the employee; or*

*(ii) refunds all or part of the rent paid by the employee; such payment or refund shall be deemed not to be income;*

*...*

*(b) a place of residence in respect of which an employer or associated corporation has paid or refunded part of the rent therefore shall be deemed for the purposes of subsection (1) to be provided by the employer or associated corporation for a rent equal to the difference between the rent payable or paid by the employee and the part thereof paid or refunded by the employer or associated corporation.’*

10. Section 61 of the IRO further provides:

*‘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.’*

11. Section 68(4) of the IRO stipulates:

*‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’*

### **Conclusion**

12. The legal principles on refunds of rent are clear.

13. In D33/97, IRBRD, vol 12, at page 239:

*‘A “refund” of rent connotes a repayment or reimbursement, not mere payment (see D19/95, IRBRD, vol 10, 157).’*

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14. In CIR v Peter Leslie Page HC1A 2/2002 at paragraph 17:

*‘As I have indicated above, I agree with the notion that refund should mean “pay back” or “reimbursement”. Hence unless the taxpayer had made a payment as rent, there could be no question of his receiving any refund of rent from his employer. Likewise, if the employer merely made a payment to the employee without regard or reference as to whether the employee had made any payment for rent or not, it would be difficult to see how it could be said that the payment made by the employer could be a refund of rent paid by the employee. ... A “refund” of rent would connote that the person receiving the “refund” has already spent his money to pay rent. ...’*

15. In D8/82, IRBRD, vol 2, at page 10:

*‘To label a payment in addition to salary as “housing allowance” or to split a taxpayer’s remuneration into two parts and call one part a “housing allowance” would not necessarily render that portion so described as exempt income. It is quite capable of falling into the category of perquisite or allowance so as to be taxable by virtue of section 9(1) of the Inland Revenue Ordinance.*

*If a place of residence is not provided by the employer or an associated corporation, the taxpayer must be able to show that the sum he has received and claimed by him as a “housing allowance” is a rental refund, either wholly or in part, which would entitle him to such tax relief as mentioned in section 9(1A)(a), (b) or (c) of the Ordinance.’*

16. Thus in order to succeed in his claim that the respective sums of \$1,265,000, \$1,380,000, \$1,380,000 and \$1,380,000 were refunds of rent, the Taxpayer must be able to prove that there existed a genuine landlord and tenant relationship between him and Company B. If there was no such relationship between the Taxpayer and Company B, the questions of payment of rents and refunds thereof did not arise.

17. Having carefully considered all the evidence before us, the legal authorities produced and the respective submissions of the parties’ representatives, we are not persuaded that a tenancy of the Property subsisted in fact between the Taxpayer and Company B. Quite apart from the fact that the Agreement is inadmissible as evidence for lack of proper stamping, the Taxpayer’s ignorance of the stamping requirement, in itself, reflects that the parties to the Agreement had no genuine intention to carry out the terms of the Agreement. Had they the intention to do so, they would have been mindful to read the Agreement carefully and would have realized that the Agreement needed to be stamped. The lack of intention on the part of the parties to the Agreement

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to carry out the terms of the Agreement is further illustrated by the fact that the Taxpayer never abided by the term of the Agreement to pay the rent in advance on the first day of each month. The Taxpayer admitted that rents were not paid in cash nor on the dates as stated on the purported rental receipts. Thus, we place no weight on the receipts produced which we find are unable to establish the claim of payment of rent or the existence of a tenancy of the Property between the Taxpayer and Company B. While we say this, we are aware of the fact that there were monthly cheques deposited by the Taxpayer into Company B's account which the Taxpayer claimed comprised the monthly rents. However, we are not prepared to accept that a part of this monthly payment by the Taxpayer represented the alleged monthly rental payment. Given the way in which the Taxpayer kept his current account with Company B (see [R1-138] referred to in paragraph 3(m) above) and the fact that the amounts of those cheques always corresponded with the amounts of the mortgage repayments (see Appendix B), we do not believe that parts of those monthly payments were meant to be the purported monthly rents. We are of the view that the monthly cheque deposits were the Taxpayer's loans to Company B to cover the mortgage repayments, which were to be reduced by the amounts which he would recover from Company A.

18. In D77/99, IRBRD, vol 14, 528, the meaning of the words 'artificial' and 'fictitious' in section 61 of the IRO were considered by the Board and their views were summarized in D93/01, IRBRD, vol 16, 784, as follows:

- '(a) The words "artificial" and "fictitious" are to be given the ordinary meaning.*
- (b) "Artificial" is wider than "fictitious". According to the Shorter Oxford Dictionary, "artificial" means not natural, a substitute for what is natural or real, feigned, fictitious. "Fictitious" means artificial, counterfeit, sham, not genuine, feigned, assumed, not real, imaginary, of the nature of fiction.*
- (c) All the circumstances of the particular transaction have to be examined in order to see if it is artificial or fictitious.*
- (d) A transaction is not artificial by reason of the facts that it is between related parties or intended for tax planning purpose. However, if there is no commercial sense for the transaction and no purpose for the transaction other than tax benefit, it may well fit the expression "artificial".'*

19. The sworn evidence given by the Taxpayer (referred to in paragraph 3(o) above), especially those parts such as a rental deposit was not provided under the Agreement because he knew that he could pay the rent and there was no adjustment of rent within the five year term because the rent was fixed according to the amount of his salary, significantly highlights the

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artificiality of the transaction between him and Company B. The ways in which these said terms were determined borne no commercial reality whatsoever. Despite the production of a written tenancy agreement and some receipts, we do not accept there was ever any intent on the part of the Taxpayer and Company B to enter into genuine legal relations.

20. Since the Taxpayer has failed to discharge the onus on him to prove that there was a genuine landlord and tenant relationship between him and Company B, the questions of payment of rent by him and the reimbursement of the rents by Company A do not arise. The amounts in dispute could not be classified as 'refunds of rent'.

21. We could have disposed of the matter on the basis of our aforesaid findings. However, we also find that the amounts in dispute were simply cash allowance to which the Taxpayer was entitled, regardless whether rents were paid by him or not. We arrive at this conclusion on the basis of the facts found by us. Notwithstanding the term of the purported tenancy commenced on 1 May 1997, the Taxpayer received payment of \$1,380,000 from Company A for the year of assessment ended 31 March 1998 (see [R1-45] referred to in paragraph 3(c), [R1-21] referred to in paragraph 3(d) above and the board minutes of Company A of 22 February 1999 referred to in paragraph 3(e) above). Further, the manner in which the payment of \$1,380,000 in each of the following years of assessment in question was made by Company A to the Taxpayer (see paragraph 3(f) above and Appendix B), befit the case of a payment of cash allowance for housing rather than a refund of rent. The Taxpayer was paid fully the amount of \$1,380,000 in each of those years of assessment notwithstanding at the time of payments of those amounts by Company A to the Taxpayer, some of the purported rents had either not been paid or not yet due.

22. Mr Tam of the Taxpayer's Present Representatives urged us to ignore the mistakes and inconsistencies in the evidence and only to take the parties' intentions into account. No doubt the parties' intentions are factors for consideration but they are not the deciding factors. The surrounding circumstances which present a different picture cannot be disregarded. It is true that every person is entitled to arrange his affairs so to take advantage of any tax benefits which our tax system has to offer. However, in so doing, he must also play his role and comply with the rules in order to obtain the desired tax benefits.

23. For the aforesaid reasons, the Taxpayer has failed to prove that the assessments raised on him were incorrect or excessive. Thus, the appeal must fail.

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Appendix A

**Summary on  
extracts of rental receipts issued by Company B**

Date of receipt	Serial no	Particulars	Amount		Reference
			\$	\$	
1-5-1997	683561	Rental for May 1997	115,000		A1
1-6-1997	683562	Rental for June 1997	115,000		A1
7-7-1997	683563	Rental for July 1997	115,000		A1
6-8-1997	683564	Rental for Aug 1997	115,000		A2
8-9-1997	683565	Rental for Sep 1997	115,000		A2
2-10-1997	683566	Rental for Oct 1997	115,000		A2
3-11-1997	683567	Rental for Nov 1997	115,000		A3
6-12-1997	683560	Rental for Dec 1997	115,000		A3
7-1-1998	683569	Rental for Jan 1998	115,000		A3
3-2-1998	683570	Rental for Feb 1998	115,000		A4
8-3-1998	683571	Rental for Mar 1998	<u>115,000</u>	1,295,000	A4
3-4-1998	683572	Rental for Apr 1998	115,000		A5
3-5-1998	683573	Rental for May 1998	115,000		A5
4-6-1998	683574	Rental for June 1998	115,000		A5
3-7-1998	683575	Rental for July 1998	115,000		A6
5-8-1998	683576	Rental for Aug 1998	115,000		A6
3-9-1998	683577	Rental for Sep 1998	115,000		A6
8-10-1998	683578	Rental for Oct 1998	115,000		A7
2-11-1998	683557	Rental for Nov 1998	115,000		A7
2-12-1998	683559	Rental for Dec 1998	115,000		A7
3-1-1999	683860	Rental for Jan 1999	115,000		A8
2-2-1999	683863	Rental for Feb 1999	115,000		A8
2-3-1999	683864	Rental for Mar 1999	<u>115,000</u>	1,380,000	A8
3-4-1999	683865	Rental for Apr 1999	115,000		B17
2-5-1999	683866	Rental for May 1999	115,000		B17
1-6-1999	683867	Rental for June 1999	115,000		B17
2-7-1999	683868	Rental for July 1999	115,000		B18
3-8-1999	683869	Rental for Aug 1999	115,000		B18
5-9-1999	683870	Rental for Sep 1999	115,000		B18
2-10-1999	683871	Rental for Oct 1999	115,000		B19
5-11-1999	683872	Rental for Nov 1999	115,000		B19
6-12-1999	683873	Rental for Dec 1999	115,000		B19
3-1-2000	753092	Rental for Jan 2000	115,000		B20
4-2-2000	753093	Rental for Feb 2000	115,000		B20
3-3-2000	753094	Rental for Mar 2000	<u>115,000</u>	1,380,000	B20
2-4-2000	753095	Rental for Apr 2000	115,000		B21
2-5-2000	753096	Rental for May 2000	115,000		B21
2-6-2000	753097	Rental for June 2000	115,000		B21
2-7-2000	753098	Rental for July 2000	115,000		B22
2-8-2000	753099	Rental for Aug 2000	115,000		B22
2-9-2000	753100	Rental for Sep 2000	115,000		B22
2-10-2000	753101	Rental for Oct 2000	115,000		B23
3-11-2000	753102	Rental for Nov 2000	115,000		B23
2-12-2000	753103	Rental for Dec 2000	115,000		B23
2-1-2001	753104	Rental for Jan 2001	115,000		B24
2-2-2001	753105	Rental for Feb 2001	115,000		B24

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3-3-2001	753106	Rental for Mar 2001	115,000	1,380,000	B24
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Appendix B

**Summary on  
extracts of deposits and withdrawals in  
Company B's current account**

Deposit			Withdrawal		
Date	Amount	Reference	Date	Amount	Reference
	\$			\$	
29-5-1997	175,000.00	R87	30-5-1997	165,014.45	R87
3-7-1997	165,000.00	R88	4-7-1997	165,014.45	R88
31-7-1997	165,000.00	R89	1-8-1997	165,014.45	R89
29-8-1997	170,000.00	R90	30-8-1997	165,014.45	R90
30-9-1997	170,000.00	R91	3-10-1997	165,014.45	R91
29-10-1997	168,000.00	R92	31-10-1997	165,014.45	R92
29-11-1997	170,000.00	R93	1-12-1997	170,992.33	R94
31-12-1997	170,000.00	R94	30-12-1997	170,992.33	R94
27-1-1998	170,000.00	R95	3-2-1998	170,992.33	R95
26-2-1998	170,000.00	R96	28-2-1998	176,976.98	R96
30-3-1998	180,000.00	R97	31-3-1998	176,976.98	R97
29-4-1998	170,000.00	R97	4-5-1998	174,993.06	R97
1-6-1998	180,000.00	R98	3-6-1998	174,993.06	R98
30-6-1998	180,000.00	R98	3-7-1998	174,993.06	R98
30-7-1998	170,000.00	R99	1-8-1998	174,993.06	R99
31-8-1998	180,000.00	R99	2-9-1998	174,993.06	R99
29-9-1998	175,000.00	R100	3-10-1998	174,993.06	R100
29-10-1998	175,000.00	R100	31-10-1998	174,993.06	R100
30-11-1998	180,000.00	R70	?	?	
29-12-1998	175,000.00	R101	31-12-1998	171,234.12	R101
30-1-1999	160,000.00	R102	2-2-1999	167,554.08	R102
1-3-1999	170,000.00	R102	3-3-1999	165,742.19	R102
30-3-1999	170,000.00	R103	1-4-1999	165,742.19	R103
29-4-1999	170,000.00	R103	3-5-1999	165,742.19	R103
2-6-1999	170,000.00	R104	4-6-1999	163,977.14	R104
29-6-1999	170,000.00	R105	2-7-1999	162,234.60	R105
30-7-1999	160,000.00	R106	3-8-1999	162,234.60	R106
31-8-1999	165,000.00	R107	2-9-1999	162,234.60	R107
4-10-1999	165,000.00	R108	6-10-1999	163,940.21	R108
2-11-1999	150,000.00	R109	4-11-1999	163,940.21	R109
29-11-1999	160,000.00	R110	30-11-1999	163,940.21	R110
3-1-2000	165,000.00	R111	5-1-2000	163,940.21	R111
1-2-2000	150,000.00	R112	8-2-2000	164,849.74	R112
29-2-2000	170,000.00	R113	2-3-2000	149,482.49	R113
30-3-2000	140,000.00	R114	1-4-2000	151,038.55	R114
2-5-2000	150,000.00	R115	12-5-2000	153,532.08	R116
30-5-2000	160,000.00	R116	1-6-2000	152,591.45	R116
30-6-2000	160,000.00	R117	4-7-2000	155,674.20	R117
31-7-2000	160,000.00	R118	2-8-2000	155,674.20	R118
30-8-2000	160,000.00	R119	1-9-2000	155,674.20	R119
29-9-2000	165,000.00	R120	4-10-2000	155,674.20	R120
30-10-2000	160,000.00	R121	1-11-2000	155,674.20	R121
29-11-2000	165,000.00	R122	1-12-2000	155,674.20	R122
29-11-2000	165,000.00	R123	3-1-2001	155,674.20	R123

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31-1-2001	125,000.00	R124	2-2-2001	155,674.20	R124
1-3-2001	170,000.00	R125	3-3-2001	164,505.74	R125
2-4-2001	170,000.00	R126	4-4-2001	161,556.45	R126