# Case No. D91/04

**Salaries tax** – hotel, hostel or boarding house – sections 8(1)(a), 9(1), 9(1A), 9(2), 16(F) and 68(4) of the Inland Revenue Ordinance ('IRO') – section 2(1) of the Hotel and Guesthouse Accommodation Ordinance.

Panel: Andrew J Halkyard (chairman), Patrick Ho Pak Tai and Vernon F Moore.

Date of hearing: 3 February 2005.
Date of decision: 10 March 2005.

The appellant resided at a serviced apartment in Apartment B under licences signed by him with Company D, the owner of Apartment B. The appellant's employer fully reimbursed him for the monthly charges during his occupancy in Apartment B. The appellant claimed that the place of residence provided to him by his employer, which constituted a suite at a serviced apartment, was at 'hotel, hostel or boarding house' as provided by proviso (a) to section 9(2) of the IRO.

**Held:**

1. Apartment B is not a boarding house since it lacks the essential quality of 'board', namely, the provision of food in addition to lodging.

2. In the *Stroud's* definition, by referring to the word 'victuals' it appears, as was the case of a 'boarding house', that the provision of meals is a quality that one normally associates with a 'hostel'. For the present purpose, however, the Board proposes to proceed as if the provision of meals was a typical, but not a necessary or defining, quality of a hostel. The ordinary and natural meaning of hostel concerns the provision of *relatively modest and temporary accommodation* for working men and women. Given the level of services and amenities available to the appellant whilst living in Apartment B, the self-contained nature of the accommodation provided, the charges levied for that accommodation, the period of the appellant's stay and taking into account the overall standard and variety of accommodation in all its manifestations throughout Hong Kong, the Board cannot conceive that Apartment B could be considered to fall within the ordinary and natural meaning of 'hostel'.

3. The Board have identified the features of a 'hotel' for the purposes of proviso (a) to section 9(2) as follows:

    1) Historically, the proprietor of a hotel generally lives in and manages the premises himself, or has a servant resident on the premises to manage them on his behalf.

    2) At common law the proprietor of a hotel has a duty of care for safeguarding the property brought into the hotel by a guest and to make good any loss or damage to that property. The liability of the proprietor is strict and applies without any proof of negligence on his part.

    3) A hotel generally offers short-term and overnight accommodation, if vacant, to anyone who presents himself with or without prior booking, and who is in a fit state and able to pay for that accommodation.

    4) Generally a hotel arranges, either itself or through a caterer or restaurant, that some provision of meals or refreshment will be available for its guests.

    5) In contrast with a normal letting of residential accommodation where there is a relationship of landlord and tenant, the relationship between the hotelier and its guest is one of licensor and licensee.

Having weighed the above conflicting factors, the Board has decided, on balance, that Apartment B is not a hotel within the meaning of proviso (a) of section 9(2). In particular there is no evidence before the Board that Apartment B holds itself out to provide lodging for all persons in the same way as does the proprietor of a hotel.

**Appeal dismissed.**

Cases referred to:

The Queen v Triview Ltd HCMA 1176/1995
Aberdeen Shopping Plaza Ltd v The Incorporated Owners of Aberdeen Ka Ning Mansion HCA 9319/2000
Re Karmel & Co Pty Ltd as Trustee for the Urbanski Property Trust v FCT [2004] AATA 481
World Apartments v Lai Bun [1962] HKDCLR 97
Re Niyazi's Will Trusts [1978] 1 WLR 910

Tsui Siu Fong and Poon So Chi for the Commissioner of Inland Revenue.
Taxpayer represented by his representative.

**Decision:**

1. This is an appeal against salaries tax assessments raised on the Appellant for the years of assessment 2002/03 and 2003/04. The Appellant claims that the place of residence provided to him by his employer, which constituted a suite at a serviced apartment, was a 'hotel, hostel or boarding house' as provided by proviso (a) to section 9(2) of the Inland Revenue Ordinance ('IRO'). In this event, the rental value of this place of residence should be computed at 4% of assessable income (as contended by the Appellant) instead of 10% of assessable income (as contended by the Commissioner).

**The facts**

2. The basic facts, which are not in dispute and which we so find, are set out in the Deputy Commissioner's determination dated 14 September 2004. The Commissioner's representative at the hearing, Ms Tsui Siu-fong, provided a summary of the salient facts, which we have adopted with certain modifications.

1. The Appellant is a citizen of Country A.

2. During the following periods the Appellant resided at a serviced apartment, Apartment B in Address C, under 16 licences signed by him with Company D:

   (a) from 22 February 2002 to 21 December 2002; and

   (b) from 1 January 2003 to 27 November 2003.

   The duration of the 16 licences ranged from 21 days to two months and nine days.[1] The Appellant first occupied Room E (until 21 November 2002), then Room F (from 22 November to 21 December 2002) and then Room G (from 1 January to 27 November 2003). The accommodation consisted of one bedroom, an open kitchen, a bathroom, and a living and dining room.

3. Between 1 May 2002 and 30 November 2003 the Appellant was employed by Company H.

[1] It appears from Apartment B's general terms and conditions (see below) that the minimum period of an initial licence was one month. Thereafter, as shown by the Appellant's subsequent extensions, this could be extended for periods of less than one month.

4. In accordance with the licence agreement (see 2. above) the Appellant paid the monthly charges for accommodation in Apartment B in advance. The charges were inclusive of room rates, government rates, management charges, water charges, electricity charges, gas charges, cost of garbage collection, local telephone calls, provision of furniture, fittings, household appliances and utensils and certain cleaning services. Other facilities provided by Apartment B included free satellite and cable television reception, free broadband internet access, a fitness room and a self-service laundry room. Apartment B's general terms and conditions provided that the term of each licence was from one to 12 months duration.

5. Company H fully reimbursed the Appellant for the monthly charges described above during the periods of occupancy when the Appellant was employed by Company H.

6. The place of residence provided by Company H to the Appellant was described as 'Service Apartment' in the Employer's Returns filed by Company H and as 'Hotel (1 Room)' by the Appellant in his tax returns.

7. The Occupation Permit for the building in which Apartment B was located was for the following purposes:

   Ground floor – 2 shops, 1 switch room, 1 transformer room and 1 porter's room for non-domestic use;

   1st to 3rd floors – 1 office per floor for non-domestic use;

   4th floor – 9 offices for non-domestic use;

   5th to 18th floors – between 7 and 8 European type flats per floor for domestic use;

   19th floor – 1 office for non-domestic use.

8. At all relevant times Company D was the owner of Apartment B. In its application for Business Registration Certificate it described the nature of its business as 'Property Investment'.

**The hearing**

3. At the hearing before us the Appellant did not appear. He was represented by Ms I. The Commissioner was represented by Ms Tsui Siu-fong. Ms I told us that all the arguments and evidence relevant to the appeal were contained in the documents placed before us. No further evidence, oral or documentary, was submitted by either party. With the consent of the Commissioner we did, however, after the formal conclusion of the hearing, consider the Appellant's written right of reply to the Commissioner's submissions.

**Statutory provisions**

4. The parties referred us to the following provisions of the IRO: sections 8(1)(a), 9(1), 9(1A), 9(2), 16F and 68(4).

5. For salaries tax purposes section 9(2) provides for the computation of rental value of a place of residence. It states:

> '*(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:*
>
> *Provided that –*
>
> *(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;*
>
> *(b) ...*'

6. The words 'hotel, hostel or boarding house' referred to in the proviso are not generally defined in the IRO. There is, however, a definition of 'hotel' in section 16F(5), a provision which allows a deduction for profits tax purposes for capital expenditure incurred on the renovation or refurbishment of a building or structure other than a domestic building or structure. Section 16(5) states:

> '*In this section –*
>
> ...

> *"domestic building or structure" means any building or structure used for habitation, but does not include any building or structure used as a hotel or guesthouse, or any part of a hotel or guesthouse;*
>
> *"hotel" and "guesthouse" have the same meaning as in the Hotel and Guesthouse Accommodation Ordinance (Cap 349).'*

7. Section 16F was enacted in 1996. At that time 'hotel' was defined in section 16F(5) as follows:

> *'In this section, "hotel" includes commercial premises that are within the hotel premises and are incidental to the operation of the hotel.'*

8. In Ordinance No 32 of 1998, this original definition of 'hotel' was replaced by the current version quoted above. Apart from section 16F(5), there is no definition of 'hotel' contained in the IRO.

9. Section 68(4) deals with the burden of proof in tax appeals under the IRO. It states:

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

10. We were also directed to the Hotel Proprietors Ordinance (Chapter 158), the Hotel Accommodation Tax Ordinance (Chapter 348), the Hotel and Guesthouse Accommodation Ordinance (Chapter 349) ('HGAO'), the Hotel and Guesthouse Accommodation (Exclusion) Order (Chapter 349C) and the Landlord and Tenant (Consolidation) Ordinance (Chapter 7) (at the relevant time, this latter ordinance provided security of tenure for tenants of domestic premises and restricted the right of the landlord to enter and obtain possession of rented premises).

11. Section 2(1) of the HGAO defines 'hotel' as follows:

> *'"hotel" and "guesthouse" mean any premises whose occupier, proprietor or tenant holds out that, to the extent of his available accommodation, he will provide sleeping accommodation for any person presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and is in a fit state to be received.'*[2]

**Other materials and cases**

[2] Compare the section 2(1) definition of 'hotel' in the Hotel Proprietors Ordinance and the section 2(1) definition of 'hotel' in the Hotel Accommodation Tax Ordinance.

12. To assist us in interpreting the terms 'hotel', 'hostel' and 'boarding house', Ms Tsui referred us to definitions contained in the following publications: The Shorter Oxford English Dictionary (3rd ed), The Oxford Dictionary and Thesaurus (American ed), Oxford Advanced Learner's Dictionary, Collins Cobuild English Dictionary for Advanced Learners (3rd ed) and Stroud's Judicial Dictionary of Words and Phrases (6th ed).

13. Ms Tsui also referred us to the following cases:

An unpublished Board of Review decision dated 22 December 1965;

The Queen v Triview Ltd HCMA 1176/1995;

Aberdeen Shopping Plaza Ltd v The Incorporated Owners of Aberdeen Ka Ning Mansion HCA 9319/2000; and

Re Karmel & Co Pty Ltd as Trustee for the Urbanski Property Trust v FCT [2004] AATA 481.

**The case for the Appellant**

14. In his submissions the Appellant argued that in accordance with proviso (a) to section 9(2) the place of residence provided to him by Company H should be taxed on the basis that it was a 'hotel, hostel or boarding house'. The Appellant contends that Apartment B, operated as a commercial establishment providing fully furnished and serviced suites to occupants, is owned, managed and leased out by one single operator (Company D) providing accommodation and services similar to a hotel, hostel or boarding house. He noted that this is very different from the case of a residential unit in a housing complex, which is normally individually owned with some units owner-occupied or tenanted. The simple fact that he executed licence agreements with Company D, and the inclusion of a kitchen, living and dining facility in suites contained in Apartment B should not, in the Appellant's view, distinguish this accommodation from that of a 'hotel, hostel or boarding house'.

15. In his submissions the Appellant also noted that Apartment B had a lounge with a television and computers for use by residents only, and a front reception located on the ground floor similar to a hotel. In his right of reply, the Appellant stated that the front reception was staffed by three employees, who handled all guest services including room reservation and extension of stays, payment, telephone calls, messages, use of office facilities (such as facsimile and photocopying), as well as arranging for viewing of the suites by potential customers. In addition, the Appellant also stated that Apartment B had a team of security guards, maintenance technician and housekeeping crews.

16. The Appellant also referred to the Landlord and Tenant (Consolidation) Ordinance and distinguished the licence he executed (no security of tenure, no exclusive possession, and short-term duration[3]) with the situation pertaining under a normal lease of domestic premises. The Appellant thus contends that Apartment B cannot simply be considered as a 'residential apartment'.

17. The Appellant relied upon the definition of 'hotel' in the HGAO (quoted above) and argued that this generally fits the broad category of accommodation provided at Apartment B.

18. The Appellant pointed out that many hotels have converted their rooms and leased them out as fully furnished serviced suites or apartments similar to Apartment B.

19. At the hearing, Ms I adopted the Appellant's arguments above. She also argued that 90% of the services provided to the Appellant by Apartment B were similar to those provided by a hotel or hostel.

20. Finally, noting that the IRD had changed its grounds for justifying its assessment,[4] Ms I reiterated the Appellant's submission that the meaning of the phrase 'hotel, hostel or boarding house' was ill-defined and that any benefit of the doubt should go to the taxpayer.

**The case for the Commissioner**

21. Ms Tsui provided us with a very detailed and comprehensive submission. At the risk of oversimplification, we would summarise this as follows:

- The words 'hotel, hostel or boarding house' in proviso (a) to section 9(2) are not defined in the IRO (except for the definition of 'hotel' in section 16F(5) which applies only for the purposes of that section). Thus, we should ascertain their usual, natural and ordinary meaning, by reference to their standard dictionary meanings, together with assistance from relevant case law.

- In considering the phrase 'hotel, hostel or boarding house' there is a basic hierarchy commencing with 'boarding house' (which provides accommodation of a cheaper and inferior kind), to 'hostel' (which belongs to the same genus as 'hotel' but possesses less extensive features), and finally to 'hotel' (which provides accommodation of a more expensive and superior kind).

[3] In this regard, the Appellant stated in his submission that Apartment B only requires an initial payment of one month's accommodation changes and thereafter the residents can extend their stay by a multiple of two days. For convenience, the Appellant stated that he generally extended his stay at Apartment B month by month.

[4] For example, the Deputy Commissioner's determination primarily relied upon the fact that Apartment B was not licensed as a hotel under the HGAO and not liable to Hotel Accommodation Tax in justifying the conclusion that Apartment B was not a hotel – but this is now not the major thrust of the Commissioner's arguments before us.

- Apartment B is not a 'boarding house' – there is no element of board provided (Aberdeen Shopping Plaza Ltd v The Incorporated Owners of Aberdeen Ka Ning Mansion HCA 9319/2000).

- Apartment B is neither a 'hostel' nor a 'hotel' – the key elements of hostelry, namely, (1) a proprietor or caretaker living in and managing the premises, (2) the provision of short-term or overnight accommodation, and (3) board, are absent in this case (Re Karmel & Co Pty Ltd as Trustee for the Urbanski Property Trust v FCT [2004] AATA 481 and The Queen v Triview Ltd HCMA 1176/1995).

- From the dictionary meaning and all the cases cited above, the usual and natural meaning of 'hotel', 'hostel' and 'boarding house' necessarily required the provision of food (which comprises meals) as well as lodging for a charge. Apartment B does not provide meals.

**Analysis**

22. *Introduction*. This has proved to be a deceptively simple case, since at the outset one might be tempted to dismiss the appeal on the basis that a so-called serviced apartment looks like a normal residential flat – thus, why should its provision not be taxed like one? However, having read the submissions and heard the arguments of both parties, and then having examined the dictionary definitions and case authorities placed before us, it only fair to record that we have not found our decision so straightforward.

23. Specifically, we found the dictionary definitions of 'hotel' and 'hostel' quoted to us tended to be mutually circular; and that the cases interpreting these words must be read cautiously in the context of the specific statutory background to which they relate. We also appreciate – as did both Ms I and Ms Tsui – that the standard (as well as the amenities and services provided) by which one typically refers to accommodation as being a 'hotel' or 'hostel' can vary enormously. New types of public accommodation are continually appearing and they challenge the old precepts of what would formerly be considered as a hotel or hostel. It was pleasing, in this regard, to see Ms Tsui acknowledge that the phrase 'hotel, hostel or boarding house' should not be entombed by its 1947 meaning (the year in which the IRO was enacted) and that its normal and natural meaning should be viewed in today' s time. We agree, and in our decision we have endeavoured to adopt an ambulatory interpretation of the phrase 'hotel, hostel or boarding house'. As a final preliminary matter we note that in the more recent edition of *The Shorter Oxford English Dictionary* (5th ed; 2002), than that referred to by Ms Tsui, the relevant definitions tend to be somewhat sharper and more precise – this may well reflect a more modern connotation, particularly of the word 'hotel'.

24. *Boarding house*. Of all the components of the phrase 'hotel, hostel or boarding house', this is the easiest to deal with. Apartment B is not, in any way, a boarding house since it

lacks the essential quality of 'board', namely, the provision of food in addition to lodging. As Suffiad J held in Aberdeen Shopping Plaza Ltd v The Incorporated Owners of Aberdeen Ka Ning Mansion at paragraph 16 (quoting Huggins J in World Apartments v Lai Bun [1962] HKDCLR 97 at 99):

> *'If there is one thing which clearly appears from these definitions [referring to the Shorter Oxford Dictionary definitions of "board" and "lodge"] it is that food is the very essence of a boarding house. It is to be distinguished from a lodging house and indeed the common expression in the English language is 'board and lodging', distinguishing on the one hand the provision of food and on the other the provision of accommodation.'*

25. In the present case, the Appellant admits that meals are not provided by Apartment B. The proximity of restaurants in and around the location of Apartment B does not cure the absence of this critical element.

26. *Hostel*. In examining the natural and ordinary meaning of the term 'hostel', Ms Tsui relied upon an unpublished Board of Review decision dated 22 December 1965. In its decision the Board referred to the *Complete Oxford English Dictionary* and accepted the meaning of 'hostel' as being:

> *'A public house of lodging and entertainment for strangers and travellers; an inn, a hotel.'*
>
> The Board accepted *'this definition [as] in keeping with the popular sense of the word as it is generally understood'*.

27. The Board also stated:

> *'Usually one regards a "hostel" as a place of lodging with some of the features of a hotel but not so extensive in enterprise. The following is taken from Stroud's Words and Phrases Judicially Defined:*
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> > *"An inn or hostel may be defined to be a house in which Travellers, passengers, wayfaring men, and such other casual Guests, are accommodated with victuals and lodgings and whatever they reasonably desire, for themselves ... at a reasonable price, while on their way ..."*
>
> *That quotation may perhaps be more apposite in the days gone by, but in essence it corresponds very closely to the meaning of the word as one knows it.'*

28. We would make two preliminary comments concerning this decision. First, for present purposes, it is clear (as we indicated above) that the *Complete Oxford English Dictionary* definition of 'hostel' adopted by the Board is circular in the sense that in certain contexts it is synonymous with the word 'hotel' which appears separately in proviso (a) to section 9(2). Second, in the *Stroud's* definition (and arguably in the *Complete Oxford English Dictionary* definition), by referring to the word 'victuals' (and 'entertainment' and 'inn') it appears, as was the case of a 'boarding house', that the provision of meals is a quality that one normally associates with a 'hostel'.[5] If this second matter is a defining characteristic of a hostel, then clearly Apartment B would not qualify as such.

29. For present purposes, however, we propose to proceed as if the provision of meals was a typical, but not a necessary or defining, quality of a hostel. We will return to this matter in detail below when considering the meaning of the related term 'hotel'.

30. Thus, ignoring at this stage the provision (or lack thereof) of meals, the basic thrust of the 1965 Board decision is that the ordinary and natural meaning of hostel concerns the provision of *relatively modest and temporary accommodation* for working men and women (and, we would add, travellers and students). This interpretation is supported by Re Niyazi's Will Trusts [1978] 1 WLR 910 where Megarry VC stated at 915:

> *'The connotation of "lower income" is, I think, emphasised by the word "hostel". No doubt there are a number of hostels of superior quality; and one day, perhaps, I may even encounter the expression "luxury hostel". But without any such laudatory adjective the word "hostel" has to my mind a strong flavour of a building which provides somewhat modest accommodation for those who have some temporary need for it and are willing to accept accommodation of that standard in order to meet the need.'*

31. We appreciate that what is 'modest' and 'temporary' accommodation for a working man or woman's needs is relative. But given the level of services and amenities available to the Appellant whilst living in Apartment B, the self-contained nature of the accommodation provided (which reflects the absence of common cooking facilities), the charges levied for that accommodation, the period of the Appellant's stay covering the greater part of two years, and taking into account the overall standard and variety of accommodation in all its manifestations throughout Hong Kong, we cannot conceive that Apartment B could be considered to fall within the ordinary and natural meaning of 'hostel'. It may be a hotel, given that the two terms share certain similar characteristics, but it is not in our view a hostel.

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[5] Compare the definition of 'hostel' in *The Shorter Oxford English Dictionary* (5th ed; 2002) which, incidentally, contains the same wording as the *Complete Oxford English Dictionary* definition adopted by the Board.

32. *Hotel*. We agree with Ms Tsui that, as a technical matter, the definition of 'hotel' in section 16F(5) does not apply in interpreting the meaning of hotel for the purposes of proviso (a) to section 9(2). It only applies for the purposes of section 16F. This is made clear by the opening words of the definition 'In this section ... "hotel" [means] ...' We also agree that we must ascertain its usual, natural and ordinary meaning. But, in this regard, the definition of hotel in section 16F(5) – which adopts the HGAO definition and which, in turn, is reflected in other Hong Kong legislation[6] – seems a fairly standard form of statutory wording used today in Hong Kong to describe that usual and ordinary meaning. We therefore consider that although this definition is not determinative of the meaning of hotel for the purposes of proviso (a) to section 9(2), and whilst we are aware that it must be understood within its specific (licensing and regulatory) statutory context, it does assist us in helping determine the essential characteristics of a hotel for the purposes of this appeal. We will return to this matter below.

33. What then are the characteristics or features of a 'hotel' for the purposes of proviso (a) to section 9(2)? Cases such as The Queen v Triview Ltd and Re Karmel & Co Pty Ltd as Trustee for the Urbanski Property Trust v FCT, both cited above, assist in this regard. We have identified those features – and applied them to this appeal – as follows:

1. Historically, the proprietor of a hotel generally lives in and manages the premises himself, or has a servant resident on the premises to manage them on his behalf.

   *Comment*. Apart from the existence of a front reception desk referred to by the Appellant in his written submissions, and the provision of limited cleaning and maintenance services, there is no evidence before us on this matter. Indeed, in his right of reply the Appellant stated: 'As far as I know neither [Company D] nor any of the staff/employee of Apartment B live at the premises.' It is only fair to note, in this regard, that Ms I made a spirited argument that, since gym and computer facilities were provided at Apartment B, she did not believe that none of Company D's employees were stationed there. Furthermore, and perhaps more importantly, we query whether this feature represents modern practice. Is it the case today that the proprietor or its servants typically live in the hotel premises? Although we think that the question is debatable, the fact remains that there was no evidence adduced on this matter.

2. At common law the proprietor of a hotel has a duty of care for safeguarding the property brought into the hotel by a guest and to make good any loss or damage to that property. The liability of the proprietor is strict and applies without any proof of negligence on his part.

[6] See note 2 above.

*Comment*. At no time has the Appellant suggested that Apartment B has any responsibility for his goods and possessions. Although there is no unequivocal evidence before us on this matter, we note that damage to property is the subject of clause 15 of Apartment B's general terms and conditions, a seemingly ill-drafted exclusion provision which appears inconsistent with the hotelier's common law duties as preserved and modified by sections 3 and 4 of the Hotel Proprietors Ordinance.

3. A hotel generally offers short-term and overnight accommodation, if vacant, to anyone who presents himself with or without prior booking, and who is in a fit state and able to pay for that accommodation.

*Comment*. It is clear that Apartment B offers relatively short-term accommodation, but for a minimum period of one month. There does not appear to be any provision of overnight accommodation. Furthermore, in terms of the HGAO definition (which, as stated above, assists us in interpreting the word 'hotel'), there is no evidence before us whether Company D holds out that, to the extent of its available accommodation, it will provide sleeping accommodation for any person presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and is in a fit state to be received. Can a person walk in off the street and demand accommodation in Apartment B? What responsibility and discretion, if any, do the personnel at the front desk have in this matter? Is accommodation in Apartment B available for any person seeking it, as distinct from a person who had a previous arrangement for accommodation for a fixed period? No concrete evidence has been placed before us on any of these matters.

4. Generally a hotel arranges, either itself or through a caterer or restaurant, that some provision of meals or refreshment will be available for its guests.

*Comment*. We accept that, historically, a hotel makes some arrangement in providing meals, food (or 'victuals') or refreshments for its guests. We doubt, however, that this is an essential characteristic of a hotel in today's Hong Kong and note, in passing, that there is no mention of this factor in the definition of hotel contained in the HGAO. Also, it is not a necessary characteristic of a hotel in the *Shorter Oxford English Dictionary* definition quoted to us by Ms Tsui, except by cross-reference to the older term 'inn'. In colloquial terms however, a hotel generally connotes an establishment providing accommodation *and meals* for payment, and it is a place where people stay usually for a short time.[7] Meals and refreshments are not provided by

[7] Compare the definition of 'hotel' in the *Oxford Dictionary and Thesaurus*; also compare the sharper wording contained in *The Shorter Oxford English Dictionary* (5th ed; 2002) which defines a 'hotel' as 'an establishment,

Apartment B. If they were, this would support the Appellant's argument. Their absence, whilst not conclusive, militates against the Appellant's argument, although we do appreciate that lack of meals seems less and less critical for a hotel in a modern Hong Kong.

5. In contrast with a normal letting of residential accommodation where there is a relationship of landlord and tenant, the relationship between the hotelier and its guest is one of licensor and licensee.

*Comment*. It is common ground in this case that there is no landlord and tenant relationship between the Appellant and Company D. However, although a licence for occupation of relevant accommodation is a necessary or defining element of the relationship between the hotelier and its guests, it is not a conclusive element. It is obvious that accommodation which could not be classified as being in a 'hotel', such as a room or suite of rooms in a residential apartment, could be provided by the owner/tenant occupier to another person under a contractual licence. On the other hand, we think that if a guest wished to stay in a hotel for any extensive period of time, then it would not be surprising for it to require the guest to sign a licence, perhaps similar to the terms of that signed by the Appellant.

34. Before reaching our conclusion on this matter, we note that, subject to the important qualifications made at point 3. above, it appears that Apartment B may be regarded as a hotel under the definition contained in the HGAO, except for the fact that it is exempted under the Hotel and Guesthouse Accommodation (Exclusion) Order (Cap 349C). In this regard, it does not seem a coincidence that Apartment B's minimum initial licence period is slightly greater than the statutory exemption of 28 days.

35. We also note that Apartment B is operated as a commercial establishment and is owned and managed by one single operator (Company D) as a whole and not as individual units. There is no separate electricity meter for each room, a licence is entered into with each occupant, the occupant does not have the sole key, and the whole thrust of the licence agreement looks like Apartment B provides services and amenities similar to those available in modern hotels. Indeed, the licence conditions do not look like a typical agreement governing the occupation of residential property.

36. On the other hand, that part of the Address C premises on which Apartment B operates is not licensed for commercial purposes. Rather, it is licensed for domestic use. Furthermore, the facilities enjoyed by the Appellant (security / broadband internet access / cleaning / furniture and appliances / provision of common areas for residents' use) are available in many

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especially of a comfortable or luxurious kind, where paying visitors are provided with accommodation, *meals*, and other services'. (*emphasis added*)

residential complexes in Hong Kong through the developer or associated management company. They are not the sole province of a hotel.

37. Having weighed these conflicting factors, and having paid particular attention to the normal characteristics of a hotel as well as relevant dictionary definitions identified above, it is now appropriate to step back, examine all the relevant evidence before us, and analyse this case in the round. In so doing, we appreciate the strength of the Appellant's contentions relating to the nature of his licence with Company D (see point 5.), the hotel-like services and amenities provided to him, and the fact that Apartment B is operated and managed as a whole. However, on balance, we have decided that Apartment B is not a hotel within the meaning of proviso (a) to section 9(2). We have reached this conclusion based upon the totality of the remaining factors noted above (see particularly points 1. to 4. inclusive). In particular, it is significant that there is no evidence before us that Apartment B holds itself out to provide lodging for all persons in the same way as does the proprietor of a hotel (see point 3.). At best, the Appellant and Ms I have shown us that the services and amenities provided by Apartment B for the occupants of the suites were *similar to* those provided by a hotel. But this conclusion is a long way from persuading us that residence in Apartment B should itself be regarded as accommodation in a 'hotel', as that term is ordinarily and naturally understood.

38. *Additional comments.* In his submissions, the Appellant noted that many hotels have converted their rooms and leased them out as fully furnished service suites or apartments similar to Apartment B. We do not find this analogy helpful, since a decision whether such accommodation would qualify for the preferential tax treatment under proviso (a) to section 9(2) should be determined, in our view, on the basis of the analysis we have set out above.

39. During the hearing, we asked Ms Tsui what historical information was available to the Department on why there is a difference in the IRO for determining the rental value of a (normal) place of residence (say in a flat) and a place of residence consisting of a hotel, hostel or boarding house. Ms Tsui replied that she had also considered this matter but, in the event, there was no information in the files she consulted to explain the different treatment.

40. In this regard, it is instructive to note the Appellant's comment in his submission that:

> '[I] made the uninformed decision to stay at [Apartment B] which offers cheaper accommodation than a hotel and provide full services which a residential apartment do not provide ... thinking that it falls under the category of "hotel, hostel or boarding house".'

41. Perhaps the Department may wish to study whether the dichotomy enshrined in proviso (a) to section 9(2) is appropriate in today's circumstances and whether it should be retained.

**Conclusion and order**

42. On the facts before us, we conclude that the Appellant has not discharged his burden of proving that the assessments in dispute were incorrect or excessive. Specifically, we are not satisfied that Company H provided to the Appellant a place of residence in a hotel, hostel or boarding house. We hereby order the appeal to be dismissed.

43. It is left for us to thank both Ms I (who made a spirited defence for the Appellant) and Ms Tsui for their helpful and detailed submissions.