

Case No. D30/14

Salaries tax – whether the sum received was a refund of rent – whether the sum must be deductible from the income – whether the sum was wholly and exclusively and necessarily incurred in the production of the assessable income

Panel: Huen Wong (chairman), Marshall H Byres and Chau Cham Kuen.

Date of hearing: 9 January 2015.

Date of decision: 24 March 2015.

The Appellant objected to the Salaries Tax Assessment and claimed that a sum received from his former employer was a refund of rent that should not be chargeable to Salaries Tax. He also claimed deductions for certain expenses.

The Assessor considered that the Sum to be a cash allowance which was chargeable to Salaries Tax. The Appellant contended that the Sum was an ‘all-in-one allowance’ which included utility bills such as electricity, gas, water, building management, telephone bills and travelling expenses. The Appellant argued that those expenses were deductible expenses. The Appellant contended that since his employer chose to pay him a package which separated his salaries and his ‘all-in-one allowance’, the latter must be deductible from his income.

Held:

The Board found that the Sum i.e. the ‘all-in-one allowance’ was not in the nature of a rental refund and that the utilities, management fees and travelling expenses were all of a domestic or private nature and were not wholly and exclusively and necessarily incurred in the production of the assessable income. The Sum was therefore income assessable to Salaries Tax and none of the expenses were deductible. (CIR v Peter Leslie Page 5 HKTC 683 and CIR v Humphrey 1 HKTC 451 followed).

Appeal dismissed and costs order in the amount of \$3,000 imposed.

Cases referred to:

CIR v Peter Leslie Page 5 HKTC 683

CIR v Humphrey 1 HKTC 451

Appellant in person.

Yu Wai Lim, Chan Shun Mei and Lee Chui Mei for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A ('the Appellant') had objected to the Salaries Tax Assessment for the year of assessment 2009/10 raised on him. The Appellant claimed that a sum received from his former employer was a refund of rent that should not be chargeable to Salaries Tax. He also claimed deductions for certain expenses.

2. By an employment agreement dated 1 April 2009 ('the Employment Agreement'), Company B offered to employ the Taxpayer as Position C with effect from 1 April 2009. The Employment Agreement contained the following terms:

‘ 3. Remuneration

3.1 During the term of this Agreement, [the Appellant] shall be entitled to the following remuneration:

- (a) an aggregate salary of HK\$23,000.00 per month payable on or before the last working day of each calendar month in 12 equal installments (the "Base Salary") & as an appointed Director of the company [the Appellant] will be provided with a monthly all-in-one allowance of HKD12,500.00 inclusive of and not limited to housing rental, management fees, all utilities charges of the house & travelling expenses etc.’

The Appellant had accepted the terms and conditions of the Employment Agreement.

3. The employer's return filed by Company B in respect of the Appellant for the year of assessment 2009/10 contained the following particulars:

(a) Capacity in which employed	:	Position C
(b) Period of employment	:	1 April 2009 to 31 March 2010
(c) Particulars of income	:	
Salary		\$339,945
Director's fee		<u>48,000</u>
Total		<u>\$387,945</u>

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(d) Place of residence

Address	: Address D ('the Property')
Period	: 1 April 2009 to 31 March 2010
Rent paid to landlord by employee	: ---
Rent refunded to employee	: \$162,500 ('the Sum')

4. In the Tax Return – Individuals for the year of assessment 2009/10, the Appellant declared, among other things, the following particulars:

- (a) an employment income of \$387,945 received from Company B; and
- (b) details of the place of residence provided by Company B:

<u>Address</u>	<u>Period provided</u>	<u>Rent paid by him to the landlord</u>	<u>Rent refunded to him by Company B</u>
		\$	\$
The Property	1 April 2009 to 31 March 2010	92,400	The Sum

5. The Assessor of the Respondent considered that the Sum to be a cash allowance which was chargeable to Salaries Tax and raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2009/10:

	\$
Income (\$387,945 + \$162,500)	550,445
<u>Less:</u> Charitable donations	6,600
Retirement scheme contributions	<u>12,000</u>
Net Income	531,845
<u>Less:</u> Married person's allowance	<u>216,000</u>
Net Chargeable Income	<u>315,845</u>
Tax Payable thereon	<u>35,693</u>

6. The Appellant objected to the above assessment on the ground that the Sum should not be assessed. He contended that the Sum was an 'all-in-one allowance' which included utility bills such as electricity, gas, water, building management, telephone bills and travelling. He further argued that those expenses were deductible expenses.

The Issues

7. At the hearing, the Appellant repeated his contentions previously raised to the Respondent. He argued that since his entire income package i.e. his salaries, director's fee and the Sum were chargeable to salaries tax, his rental payment, utilities expenses, management fees and travelling expenses must be deductible from his income. Put it another way, the Appellant was contending that since his employer Company B chose to pay

him a package which separated his salaries and his ‘all-in-one allowance’, the latter must be deductible from his income. In his evidence at the hearing as well as his written submission, the Appellant put forward a lot of facts which were totally irrelevant to this review. In fact, a large part of the Appellant’s written submission was largely unintelligible, obscure and lacking any relevance. This Board needs to decide based on available evidence whether the Sum was assessable income.

The Relevant Legislation

8. Section 8(1)(a) of the Inland Revenue Ordinance (‘the Ordinance’) is the basic charging section for Salaries Tax. The section provides that:

- ‘(1) *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 or employment of profit ...’*

9. Section 9(1) of the Ordinance defines income to include salary, fee, perquisite or allowances:

- ‘(1) *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, except –*
- ...
- (b) *the rental value of any place of residence provided rent-free by the employer or an associated corporation;*
- (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;’*

10. Section 9(1A) of the Ordinance provides that:

- ‘(1A) (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 all the rent therefor shall be deemed for the purposes of subsection (1) to be provided rent free by the employer or associated corporation;*
- (c) a place of residence in respect of which an employer or associated corporation has paid or refunded part of the rent therefor 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.'*

11. Section 12(1)(a) governs the deduction of expenses under Salaries Tax. The section provides:

- '(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person –*
 - (a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income;'*

12. Section 68(4) of the Ordinance places on the appellant the burden of proving that the assessment appealed against is excessive or incorrect:

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

The Relevant Case Law

Rental Refund

13. In CIR v Peter Leslie Page 5 HKTC 683 the Court of First Instance rejected a taxpayer's claim that the housing benefit provided by his employer was a refund of rent even though the taxpayer had rented a property and incurred rental expenses. It was held that the intention of the parties at the time of payment of the money by the employer was important in ascertaining the nature of the payment. The trial judge said:

- ' 7. The crucial question is what is the nature of the payment ... This is a question of fact. The starting point is of course the contract between the*

taxpayer and the employer. If by the terms of the contract, the payment was to be in the nature of rental refund, then plainly due weight must be given to the contractual provisions. However in my view, although the terms of the contract are an important and weighty factor, this is not the sole factor...'

' 15. ...What I am prepared to hold is that as a matter of fact, it would generally be of great assistance to the taxpayer intending to claim the benefit of section 9(1A) to be able to show that his employer does have some sort of system to make sure that the amount paid by the employer to him is in fact in the nature of a refund of the rent paid by him, the taxpayer. In this regard, I accept the view that "refund" means "pay back (money or expenses) or reimburse"'

' 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 amount to a refund of rent paid by the employee...'

Deductible Expenses

14. In CIR v Humphrey 1 HKTC 451, the government was unable to provide the taxpayer with a car and the taxpayer used his own car for his official duties. By such an arrangement, the government reimbursed the taxpayer the toll charges and part of his expenses for home-to-office journeys under a general circular and establishment regulations. The taxpayer contended that the reimbursement of toll charges and expenses was not his income and should not be subject to tax.

15. The Supreme Court ruled that the reimbursement should be subject to tax and dismissed the taxpayer's appeal on the ground that it was the taxpayer's responsibility to pay for his journeys for travelling between his home and place of his work and he was paid by the government towards the cost of the journeys. The reimbursement was an additional benefit in money received by the taxpayer from his employment and was therefore assessable to tax.

Finding

16. From the evidence, it is clear that the Sum i.e. the 'all-in-one allowance' was not in the nature of a rental refund. The terms in the Employment Agreement did not indicate any intention of Company B of providing 'a place of residence' for the Appellant. Most importantly, in a letter sent by Company B dated 29 January 2014 to the Respondent, it

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was stated that ‘the monthly all-in-one allowance was a lump sum payment with no basis. [Company B] have not imposed any restriction on how the allowance was spent and [the Appellant] was free to spend it as he desired.’

17. In the same letter, Company B also confirmed that for official travelling expenses, the Appellant would claim reimbursement upon production of receipts. Company B had provided records of the Appellant’s previous claims for travelling expenses.

18. Based on the above findings and following the relevant authorities, the Board holds that the Sum was not a rental refund and that the utilities, management fees and travelling expenses were all of a domestic or private nature and were not wholly and exclusively and necessarily incurred in the production of the assessable income. The Sum was therefore income assessable to Salaries Tax and none of the expenses were deductible.

19. The Appellant has failed to discharge the onus under Section 68(4) of the Ordinance. The appeal is dismissed.

20. The Appellant shall pay an amount of HK\$3,000 as costs of the Board.