Case No. D105/00

Salaries tax – salary income – rental value of place of residence provided by employer – the existence of landlord and tenant relationship – sections 8(1), 9(1), 9(1A), 9(2), 61 and 68(4) of the Inland Revenue Ordinance (' IRO').

Panel: Anna Chow Suk Han (chairman), Aarif Tyebjee Barma and Paul Shieh Wing Tai.

Date of hearing: 26 September 2000.
Date of decision: 11 December 2000.

The taxpayer appealed against the salaries tax assessment for the year of assessment 1995/96 raised on him. He claimed that a part of the income assessed was not his salary income but was the rent he received from Company B in respect of the Property.

It has been the taxpayer' s contention that Company B agreed to provide him with a rent-free quarter, and as a result Company B rented the Property from him and his wife and that the amounts of $360,000 and $60,000 paid to him by Company B were respectively the rents of the Property and reimbursement of utilities charges which were wrongly assessed as his income. He claimed that he should be assessed as provided under section 9(2) of the IRO, at the rate of 10% of his salary of $225,000 for the year of assessment under review.

In support of his contention, the taxpayer asserted that he had (a) an employment contract with Company B whereby Company B agreed to provide him with a rent-free accommodation, (b) a tenancy agreement between him and his wife as the landlord and Company B as the tenant in respect of the Property and (c) rent receipts in respect of the Property.

The assessor disagreed that the sum of $360,000 represented the rent in respect of the Property in that there was no evidence that the parties intended to enter into a landlord and tenant relationship, nor it represented a refund of rent or a housing allowance to the taxpayer. As to the amount of $60,000, the Respondent contended that even if it did represent a reimbursement of utilities charges, it would still be taxable as a prerequisite under section 9(1)(a).

The assessor also contended that the alleged letting of the Property by the taxpayer and his wife to Company B was artificial and fictitious within the terms of section 61 of the IRO.

Thus, the question before the Board is whether there was a landlord and tenant relationship between the taxpayer and his wife as the landlord and Company B as the tenant in respect of the

Property, and if there was a tenancy agreement between them, whether the agreement was artificial or fictitious within the terms of section 61 of the IRO. The burden is on the taxpayer to show that the determination was wrong.

Held:

1. The Board did not find that there was landlord and tenant relationship between the taxpayer and Company B:

   (a) The letter dated 26 June 1995 did not constitute a tenancy agreement. Even if it were a tenancy agreement as it was not stamped, it is inadmissible as evidence.

   (b) As to the submission that under the provisions of section 6 of the Conveyancing and Property Ordinance, a tenancy agreement for a term not exceeding three years need not be in writing to be legally valid, the Board ruled that the taxpayer knew well that a tenancy agreement should be stamped in order that the respective rights and obligations of the landlord and the tenant thereunder could be enforced in the court of Hong Kong. Notwithstanding this the taxpayer chose not to stamp the purported agreement. This strongly suggests the fact that there was never any intent on the part of the parties to enter into a legally binding relationship.

   (c) The taxpayer has also failed to prove that rents in respect of the Property had in fact been paid by Company B to him or his wife.

   (d) An equal inference that no landlord and tenant relationship existed can be drawn from the property tax return for the year of assessment 1995/96 filed by the taxpayer in respect of the Property on 7 May 1996. He declared that the Property was self-occupied. Though this statement was subsequently corrected by the taxpayer' s representatives, the subsequent correction' being not contemporaneous, carries little weight in favour of the taxpayer.

   (e) More glaringly the alleged tenancy of the Property was not shown in Company B' s financial statements ended 31 March 1996. By contrast, in those financial statements, Company B reported the rent paid by the company to its other director, Mr C, but no rent was reported as paid to the taxpayer and his wife.

(f) In response to a question from the Board at the hearing, the taxpayer' with the assistance of his representative, explained that the amount of rent paid by Company B in respect of the Property was included in the item of ' Salaries' under the profit and loss account (D33/97 IRBRD, vol 12, 239 considered).

2. Though it was not necessary for the Board to consider whether the letting of the Property by the taxpayer and his wife to Company B amounted to a transaction which was fictitious or artificial within the terms of section 61 of the IRO, had it been necessary for the Board to do so, the Board would conclude that, on the basis of the evidence before the Board, the tenancy agreement or the letting was fictitious because the parties did not intend to be bound by the terms thereof.

Appeal dismissed and a cost of $3,000 charged.

Case referred to:

D33/97, IRBRD, vol 12, 239

Cheung Lai Chun for the Commissioner of Inland Revenue.
David Yeung M K of Messrs David M K Yeung & Co for the taxpayer.

Decision:

The appeal

1. This is an appeal by Mr A (' the Taxpayer') against the salaries tax assessment for the year of assessment 1995/96 raised on him. He claims that a part of the income assessed was not his salary income but was the rent he received from Company B in respect of the Property.

The background facts

2. The following are the facts upon which the Commissioner arrived at her determination that the alleged rental value of the Property was assessable as the income of the Taxpayer. These facts were not disputed by the Taxpayer.

3. The Taxpayer and his wife, Mrs A, were the joint owners of the Property. They acquired the Property and Carparking Space No 1 on the second basement at the same location on

31 August 1993 at a price of $6,800,000 and disposed of them on 2 August 1996 at a price of $9,800,000.

4. At all relevant times, the Taxpayer was (and still is) a director of Company B.

5. In his tax return for the year of assessment 1995/96 completed on 29 November 1996, the Taxpayer reported the following income particulars:

Employer	:	(Company B)
Capacity in which employed	:	director
Income – salary (for July 1995 to March 1996)	:	$225,000
Quarters provided		
Address of quarter	:	(The Property)
Name of employer providing quarters	:	(Company B)
Period provided	:	July 1995 to March 1996
Rent paid by [the Taxpayer] to landlord	:	$360,000
Rent refunded to [the Taxpayer] by the employer	:	$360,000

6. The assessor did not accept that the sum of $360,000 was refund of rent and issued to the Taxpayer the following salaries tax assessment for the year of assessment 1995/96:

	$	$
Assessable income ($225,000 + $360,000)		585,000
Less : Married person' s allowance	158,000	
Child allowance	55,000	213,000
Net chargeable income		372,000
Tax payable		66,600

7. The Taxpayer, via his representatives, Messrs David M K Yeung & Company (' the Representatives'), objected against the salaries tax assessment for the year of assessment 1995/96 in the following terms:

(a) ' We ... hereby object to the said assessment on the ground that the assessable income of $585,000 is excessive and incorrect. We would like to advise that the assessable income of $585,000 has included an amount of $360,000 which is in the nature of housing benefit and should be calculated at 10% on [the Taxpayer' s] salaries of $225,000 for salaries tax purpose.

In this regard, [the Taxpayer's] employer, [Company B] has rented the Property and provided it rent free to [the Taxpayer].'

(b) ' Please note that the 1995/96 BIR 60 section D2 [that is, that part of the tax return relating to particulars of quarters provided] was wrongly completed. The $360,000 rental should be completed in the column "Rent paid by my employer or associated corporation to landlord". We enclose a copy of the BIR57B for this.'

8. The assessor requested the Taxpayer to submit (a) a copy of his employment contract with Company B, (b) a copy of the tenancy agreement with Company B in respect of the Property, and (c) copies of rent receipts in respect of the Property.

In their reply dated 8 October 1997, the Representatives supplied the following documents:

(a) A copy of a letter dated 15 June 1995 from Company B, signed by a Mr C, to the Taxpayer. The full contents of the letter are as follows

' With effect from 1 July 1995, your salaries will be revised to $25,000 per month. You are also entitled to a free quarter provided by the company.'

(b) A copy of a letter dated 26 June 1995 from the Taxpayer to Company B. The full contents of the letter are as follows

' This is to confirm your renting of my property stated below together with the details terms:

(1)	Property	:	[The Property]
(2)	Rent	:	$40,000 per month
(3)	Period	:	Two years commencing on 1 July 1995

Either party can terminate the above terms by giving one month's notice to the other party.'

(c) Copies of some papers described as receipts. Particulars shown on the papers are summaized below

Receipt of rent for	**Date of receipt**	**Amount**
		$
July 1995	1 August 1995	40,000
August 1995	1 September 1995	40,000
September 1995	29 September 1995	40,000

October 1995	2 November 1995	40,000

9. The Representatives also informed the assessor that the Taxpayer held 33 1/3% of the share capital of Company B.

10. In a letter dated 9 October 1997, the Representatives, on behalf of Company B, gave the following explanations in connection with the alleged housing benefit provided to the Taxpayer:

(a) ' The amount of housing allowance was determined by the board of directors taking into account of the performance of [the Taxpayer] and his overall package of remuneration. The board finally decided to pay [the Taxpayer] a housing allowance between HK$30,000 and HK$50,000 per month.'

(b) ' As Company B directly entered into tenancy terms with the landlord (and then provided the quarter to [the Taxpayer]), it was rather clear that the rental allowance was actually expended in the payment of rent.'

(c) ' The rental allowance was paid by cheques which are with the following details:

Cheque no	**Date of cheque**
521353	1 May 1996
521419	1 June 1996
521480	1 July 1996
521547	1 August 1996
521624	2 September 1996
521693	1 October 1996
521757	1 November 1996
521798	2 December 1996
521855	2 June 1997
521960	1 February 1997
521993	1 March 1997
119561	1 April 1997

The drawer bank is Bank D'

11. The assessor pointed out to Company B that the payments listed in paragraph 10 (c) above were not related to the year of assessment 1995/96. The assessor also enquired the manner of payment of the alleged rent and whether they were paid together with the monthly salary.

12. In their reply dated 9 January 1998 on behalf of Company B, the Representatives said the following:

(a) ' Rental was paid by Company B to the landlord, [the Taxpayer], by cheque. Details of these cheques from 1 July 1995 to 31 March 1996 are as follows:

Cheque no	**Date**	**Amount (including salary)**
		$
520638	1-8-1995	60,000
520722	1-9-1995	60,000
520814	29-9-1995	60,000
520900	2-11-1995	60,000
520977	1-12-1995	60,000
521053	2-1-1995	60,000
521158	1-2-1996	120,000
521224	1-3-1996	60,000
521281	1-4-1996	60,000

(b) ' The rental allowance was paid to [the Taxpayer] together with his monthly salary for convenience purpose – [the Taxpayer] is a staff [sic] receiving salary and also the landlord receiving the rental.'

13. The assessor wrote to the Representatives and expressed his view that the information and documents supplied by them did not support the Taxpayer' s claim that the sum of $360,000 in dispute was rent paid by Company B to him. In a letter dated 19 May 1998, the Representatives put forward the following contentions:

(a) ' [Company B] is owned by [the Taxpayer] and his two brothers, each holding 33 1/3%. It is purely due to such close relationship, the payment of salary and housing allowance is not made in a formal way as stated in your letter, that is, it (the tenancy agreement) does not have the form of a tenancy agreement, for example, no agreement by both parties, no stamp. Unlike other tenancies, the monthly rent, instead of being paid in advance, was paid in arrears.'

(b) ' However, we disagree with your comment namely he did not receive his remuneration as prescribed by the employment contract dated 15 June 1995 nor the tenancy agreement dated 20 June 1995. For this, we advise that as [the Taxpayer] is the managing director of Company B, he frequently withdraws funds from the company and pays expenses for the company and that all these transactions are recorded in his current account in the company' s books. Treating in the same manner, the salary ($25,000 per

month) and housing allowance ($40,000 per month) [the Taxpayer] entitles and the amount he withdraws from the company ($60,000 per month) were credited and debited respectively into his current account. We are of the view that, as long as [the Taxpayer' s] employment terms, that is, $25,000 salary and $40,000 housing allowance and his withdrawal of $60,000 were agreed by the other directors, these employment terms are valid. With the same logic, the tenancy agreement which was agreed between the landlord, [the Taxpayer' s] couple and the company' s three directors was also enforceable.'

(c) ' The fact that [the Taxpayer' s] salary and housing allowance were credited to his current account and [the Taxpayer] has in fact withdrawn funds from the company out of his employment package even not at the same amount as stated in the employment contract can sufficiently approve that he did receive his remuneration as prescribed by the employment Contract. It is because [the Taxpayer] can, at any time, withdraw all the money standing in his current account and the company has to pay it.'

(d) ' Accordingly we consider that [the Taxpayer' s] assessable income should be $308,000 ($280,000 x 110%) and that we cannot accept your suggested amount of $600,000 [that is, the total amount of the sums listed in paragraph 12(a) above].'

14. In response to the assessor' s further enquiries, the Representatives, on behalf of the Taxpayer, said the following in a letter dated 14 August 1998:

(a) ' We confirm that the salary and rent were credited to [the Taxpayer' s] current account and not through payments.'

(b) ' The additional $60,000 [withdrawn in February 1996, see paragraph 12(a) above] was for [the Taxpayer] to meet his spending for the Chinese New Year.'

(c) ' [The Taxpayer' s] salary was raised to $18,000 per month starting from 1 April 1996. Breakdown of $280,000 [see paragraph 13(d) above] is as follows:

	$
Salary from April 1996 to March 1997 ($18,000@12)	216,000
Bonus	64,000
	280,000 '

15. Despite the assessor's request, the Representatives did not supply any copy of the ledgers of the Taxpayer's current account with Company B for the year ended 31 March 1996.

16. Despite the assessor's request, the Representatives did not supply copies of the cheques listed in paragraph 12(a) above.

17. The Taxpayer and his wife had submitted a property tax return for the year of assessment 1995/96 in respect of the Property on 7 May 1996. In the return, they declared that the Property was wholly used by the owners for residential purposes and did not report any rental income received. Subsequent to the submission of the return, the Representatives, by a letter dated 9 December 1996, told the assessor that the Taxpayer and his wife had in fact received rent of $360,000 for the year of assessment 1995/96. Based on such information, the assessor raised a property tax assessment for the year of assessment 1995/96 with assessable value of $360,000.

18. The Commissioner of Rating and Valuation has advised the assessor that according to his assessment, on the basis of an unfurnished flat the exclusive of rates and management charges, the open market rent for the Property for a two-year tenancy commencing on 1 July 1995 was $29,000 per month.

19. (a) In its audited financial statements for the year ended 31 March 1996, Company B disclosed that total directors' emoluments paid during the year was $645,000.

(b) In its employer's returns submitted for the year ended 31 March 1996, Company B did not report that emoluments had been paid to any director other than the Taxpayer.

(c) Despite the assessor's request, the Representatives did not provide a breakdown of the total director's emoluments of $645,000.

20. Having examined the facts of the case, the assessor is of the views that the sum of $360,000 was not rent paid to the Taxpayer for the Property and that the whole of the director's emoluments of $645,000 charged in Company B's accounts should be assessed as the Taxpayer's income under section 9(1)(a) of the IRO. Accordingly, the assessor considers that the assessment for the year of assessment 1995/96 should be revised as follows:

	$
Assessable income	645,000
Less: Married person's and child allowances	213,000
Net chargeable income	432,000

Tax payable	78,600

The law

21. Section 8(1) of the IRO 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 or employment of profit; and*
>
> *(b) any pension.'*

22. 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;'*

23. 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 ...'*

24. 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.’

25. 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.’*

26. 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.’*

The evidence

27. At the hearing, the Taxpayer was represented by Mr David Yeung of Messrs David M K Yeung & Co, certified public accountants. The Taxpayer gave evidence on his own behalf and also called Mr E, a director of Company B and also his brother, to give evidence on his behalf.

28. The Taxpayer adduced the following evidence.

29. The Taxpayer confirmed that the letter containing tenancy terms in respect of the Property and the four receipts produced to the assessor in the course of the investigation, were

signed by him. He also confirmed that prior to the purported letting of the Property to Company B, he and his wife were residing at the Property.

30. He explained to the Board that Company B was owned by him and his other two brothers. The company was run by him while his two brothers were ' silent partners' not participating in the day-to-day management and operation of the business. He obtained his brothers' consent to the tenancy of the Property and he had only signed one copy of the agreement. As to the rent of the Property, he obtained an estimate from an estate agency in District F, the name of which he had forgotten. That estate agency was no longer at District F. Since there was a big garden attached to the Property, its monthly rent should be more that $29,000, the figure suggested by the Rating and Valuation Department. The Taxpayer had forgotten the amount of his previous salary. He said that it was about the same as the revised salary plus the rental value of the free quarter provided and what happened was that under the revision, Company B classified part of the former salary as ' free quarters' and decreased the amount of salary. The Taxpayer confirmed that there were other terms of his employment which were not included in the employment contract, such as his entitlement to traveling expenses and double pay at Chinese New Year. In response to a question from this Board, the Taxpayer said that his tenancy with Company B in respect of the Property should have been stated in the company' s financial statements and its absence from it must be a mistake. With the assistance of Mr Yeung, the Taxpayer told the Board that the amount of rents paid to the Taxpayer by Company B was included in the item ' Salaries of $1,196,600' in the profit and loss account of the company. Again with the assistance of Mr Yeung, he told the Board that the credit balance due to him under the director' s current account was included in the item ' Sundry creditors and accruals of $1,311,319' under the balance sheet. The Taxpayer also told the Board that the outgoings of the Property were the responsibility of Company B. He explained that his wife first settled the outgoings of the Property, such as management fees, water, electricity and gas charges and was subsequently reimbursed by the company. He said that those charges should come to more than $60,000 and the reimbursement of $60,000 was only a ' round sum estimate' . As to the cheque payment of $120,000 on 1 February 1996, he explained that $60,000 represented the double pay. As to the declaration that the Property was wholly used by the owners for residential purposes, the Taxpayer said that the declaration was a mistake.

31. The Taxpayer called Mr E who is a director of Company B and also the Taxpayer' s brother, to give evidence on his behalf. Mr E confirmed that he knew the terms of the Taxpayer' s employment contract with Company B which provided the Taxpayer with a monthly salary of $25,000 and a free quarter commencing on 1 July 1995 and it was just about before the summer break 1995 that Company B agreed to provide a rent free quarter to the Taxpayer. He said that the amount of the Taxpayer' s salary prior to the employment contract was $25,000 but without any free quarters. He agreed that that was a substantial increase but said that this increase was because of the ' efforts of the Taxpayer' . This, we pause to observe, is in stark contrast with the Taxpayer' s evidence summarized at paragraph 30 above. He explained that it was for that reason Company B rented the Property from the Taxpayer and his wife. He admitted that he did not sign a tenancy agreement but he knew about the tenancy. He told the Board that he too lived at District

F and was familiar with the rental market there. He said he also made an enquiry with an estate agent in District F and was told that the rents of the flats there should be about $30,000 per month but since the Property had a garden of about 2,000 square feet, he thought the rent of the Property at a figure between $40,000 and $45,000 would be appropriate.

Our decision

32. The law is that income from any office or employment is taxable and the rental value of any place of residence provided by the employer shall be deemed to be 10% of the income derived from the employer for the period during which a place of residence is provided.

33. It is the Taxpayer' s contention that Company B agreed to provide him with a rent-free quarter, and as a result Company B rented the Property from him and his wife and that the amounts of $360,000 and $60,000 paid to him by Company B were respectively the rents of the Property and reimbursement of utilities charges which were wrongly assessed as his income. He claimed that they should be assessed as provided under section 9(2) of the IRO, at the rate of 10% of his salary of $225,000 for the year of assessment under review.

34. In support of his contention, the Taxpayer asserted that he had (a) an employment contract with Company B whereby Company B agreed to provide him with a rent-free accommodation, (b) a tenancy agreement between him and his wife as the landlord and Company B as the tenant in respect of the Property and (c) rent receipts in respect of the Property. The documents which he relied on are the copy documents supplied to the assessor on 8 October 1997, mentioned in paragraph 8 above.

35. The Respondent disagreed that the sum of $360,000 represented the rent in respect of the Property in that there was no evidence that the parties intended to enter into a landlord and tenant relationship, nor it represented a refund of rent or a housing allowance to the Taxpayer. As to the amount of $60,000, the Respondent contended that even if it did represent a reimbursement of utilities charges, it would still be taxable as a perquisite under section 9(1)(a).

36. The Respondent also contended that the alleged letting of the Property by the Taxpayer and his wife to Company B was artificial and fictitious within the terms of section 61 of the IRO.

37. Thus, the question before the Board is whether there was a landlord and tenant relationship between the Taxpayer and his wife as the landlord and Company B as the tenant in respect of the Property, and if there was a tenancy agreement between them, whether the agreement was artificial or fictitious within the terms of section 61 of the IRO. The burden is on the Taxpayer to show that the determination was wrong.

38. Having carefully considered all the documents and material before us and the sworn evidence adduced by and on behalf of the Taxpayer, we reach the conclusion that the Taxpayer has failed to discharge the burden of proving that a landlord and tenant relationship existed between the Taxpayer and his wife as the landlord and Company B as the tenant in respect of the Property. Our conclusion is supported by the following facts.

39. Firstly, we do not accept that the letter from the Taxpayer to Company B dated 26 June 1995 referred to in paragraph 8(b) above, constituted a tenancy agreement between the parties. It is a document which lacks the usual flavour of a genuine tenancy agreement. It does not stipulate when the rent was payable by the tenant nor the parties' rights and obligations under the tenancy. It was only signed by one party and only one copy of the document was signed as opposed to two. It had not been produced for stamping. Thus, we do not accept that this document constituted a tenancy agreement. Even if it were a tenancy agreement which we do not accept, since it has not been stamped, it is inadmissible as evidence for the purpose of this proceeding.

40. The Taxpayer contended that in view of the provisions of section 6 of the Conveyancing and Property Ordinance, a tenancy agreement for a term not exceeding three years, even if it was not in writing, would still be legally valid. We would accept that there was a tenancy agreement if there is sufficient evidence to substantiate the existence of a landlord and tenant relationship between the parties.

41. In the present case, the Taxpayer on behalf of the landlord and Mr E on behalf of the tenant, confirmed the existence of a tenancy agreement between the Taxpayer and his wife and Company B in respect of the Property. The statements by the Taxpayer and his brother were self-serving and cannot be relied upon. In order to ascertain the true picture, we need to look into the surrounding facts and evidence.

42. The Taxpayer claimed that he did not have the letter referred to in paragraph 8(b) above stamped because of the special relationship between the parties and that the chances of there being a dispute between them over the tenancy and the same being required to be brought before the court were remote. The Taxpayer knew well that a tenancy agreement should be stamped in order that the respective rights and obligations of the landlord and the tenant thereunder could be enforced in the court of Hong Kong. Notwithstanding this the Taxpayer chose not to stamp the purported tenancy agreement. This strongly suggests the fact that there was never any intent on the part of the parties to enter into a legally binding relationship. Our view is further fortified by the fact that despite the Taxpayer's claim that Company B was responsible for the payment of the outgoings of the Property, this term was not stipulated in the alleged tenancy agreement; the outgoings were nonetheless settled by the Taxpayer's; and the alleged reimbursement was only a 'round sum estimate'. For present purposes, it suffices for us to find that the Taxpayer has not proved the intent on the part of the parties to enter into a legally binding landlord and tenant relationship.

43. The Taxpayer has also failed to prove that rents in respect of the Property had in fact been paid by Company B to him and his wife. The Taxpayer produced a few purported rent receipts which borne no detail of the Property in respect of which they were supposed to relate. Also, these receipts were prepared and signed by the Taxpayer and are self-serving. Thus, we are unable to accept that on the basis of these purported receipts rents had indeed been paid. Company B through its Representatives informed the assessor that the rents to the Taxpayer were paid by way of cheques. Upon request by the assessor for proof of such cheque payments, the company had failed to provide any but then informed the assessor that the payment of salary and rent to the Taxpayer was recorded under the Taxpayer' s current account with the company. Upon request for record of the Taxpayer' s current account with the company, again the information requested for was not forthcoming. The inconsistency in the information given and the lack of documentary proof of the alleged rent payment, poorly reflect the Taxpayer' s case.

44. An equal inference that no landlord and tenant relationship existed, can be drawn from the property tax return for the year of assessment 1995/96 filed by the Taxpayer in respect of the Property on 7 May 1996. He declared that the Property was self-occupied. Though this statement was subsequently corrected by the Taxpayer' s Representatives, the subsequent correction being not contemporaneous, carries little weight in favour of the Taxpayer.

45. More glaringly, the alleged tenancy of the Property was not shown in Company B' s financial statements ended 31 March 1996. By contrast, in those financial statements, Company B reported the rent paid by the company to its other director, Mr C, but no rent was reported as paid to the Taxpayer and his wife. As to the amount of $282,586 recorded as the ' Rent, rates and management fee' paid by the company, this amount could not possibly represent the rent of $360,000 and refund of the utilities charges of $60,000 allegedly paid to the Taxpayer.

46. It is also important to note that in response to a question from the Board at the hearing, the Taxpayer with the assistance Mr Yeung, explained that the amount of rent paid by Company B in respect of the Property, was included in the item of ' Salaries' under the profit and loss account.

47. The credibility of the Taxpayer' s case is not helped by the discrepancy between his and his brother' s evidence as to how the revision came about, as pointed out in paragraphs 30 and 31 above. We therefore find that the Taxpayer has failed to discharge his burden. In fact we would even say that there is overwhelming evidence that no legal relationship of landlord and tenant was ever created between the Taxpayer and Company B. It must therefore follow that the amount of $360,000 in dispute cannot be classified as ' rent' paid by Company B nor a refund of ' rent' nor a housing benefit and the amount of $60,000 in dispute cannot be reimbursement of the payments of outgoings of the Property under a tenancy agreement which did not exist. Thus the two amounts are assessable as income of the Taxpayer from Company B.

48. Perhaps, it is appropriate for us at this juncture to quote what the Board says in a Board of Review Decision in D33/97, IRBRD, vol 12, 239

> ' *... it is relevant to note that salaries tax advantages of housing assistance being assessed under these provisions is well known. Equally well known is the commissioner' s pragmatic policy in administering these provisions (see D92/95, IRBRD, vol 11, 173). But, in order to achieve the desired benefit, it must be clear to both employers and employees alike that simply designating an allowance as a rental benefit will not necessarily achieve that objective.'*

49. It is not enough simply to rely on (as in this case) a purported employment contract, a purported tenancy agreement and a few rental receipts.

50. Having dismissed the appeal as aforesaid, it is not necessary for us to consider whether the letting of the Property by the Taxpayer and his wife to Company B amounted to a transaction which was fictitious or artificial within the terms of section 61 of the IRO. Had it been necessary for us to do so, we would conclude that, on the basis of the evidence before us, the tenancy agreement or the letting was fictitious because the parties did not intend to be bound by the terms thereof.

51. The appeal is obviously unsustainable and bound to fail. The Taxpayer has failed poorly to discharged the burden of proof placed upon him to prove that the amounts in dispute was assessed wrongly as his income. Pursuing an obviously hopeless appeal is a waste of the Board' s time and resources and an abuse of the process of the Board. In the circumstances, we feel that this is a case where an order of costs against the Taxpayer should be made. Accordingly, we dismiss this appeal and order the Taxpayer to pay the costs of this proceedings in the sum of $3,000, which the Taxpayer ought to know, only represents a small portion of the costs involved.