

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D115/97

**Salaries tax** – housing benefit – rental value calculation – whether gratuity should be totally excluded from the rental value calculation – whether gratuity can be restricted to a period in computing rental value – whether rental value can be aggregated – sections 9(1)(c) and 9(2) of the Inland Revenue Ordinance.

Panel: Andrew Halkyard (chairman), Michael Choy Wah Ying and Herbert Tsoi Hak Kong.

Date of hearing: 5 February 1998.

Date of decision: 3 March 1998.

On 1 August 1993, the taxpayer was employed by a government authority ('the Authority') with the terms of employment included a provision that, after the completion of each successive period of 24 months of employment, the taxpayer would be granted a gratuity equal to 25% of all salary and bonus payment paid to the taxpayer during that period. The taxpayer resigned from the Authority on 25 July 1995 and his last working day for the Authority was 24 October 1995. On 2 October 1995, the taxpayer commenced employment with Company X. With both the Authority and Company X, the taxpayer was provided with a housing benefit in the form of a rental refund by each employer.

The taxpayer disputes the Commissioner's determination relating to the assessment of rental value of the housing benefit provided to him during the year of assessment 1995/96 by both the Authority and Company X. The taxpayer argues that the gratuity should be entirely excluded from the assessment of rental value under section 9(2) of the Inland Revenue Ordinance. Alternatively the taxpayer argues that the total gratuity should be restricted to the period 1 April to 31 July 1995. In any event, the taxpayer further argues that the rental value of both quarters provided by different employers in the same year of assessment should be aggregated.

Held:

- (1) The gratuity in the present case was granted and payable to the taxpayer before that contract was terminated. It must follow that the gratuity cannot be excluded when computing the taxpayer's rental value under section 9(2) of the Inland Revenue Ordinance (D14/86, IRBRD, vol 2, 250 considered).
- (2) There is no provision in the Inland Revenue Ordinance to allow the gratuity to be apportioned for rental value purposes. In accordance with sections

## INLAND REVENUE BOARD OF REVIEW DECISIONS

9(1)(c) and 9(2), the full amount of the gratuity must be included as income for the purpose of calculating rental value.

- (3) The structure of Part III of the Inland Revenue Ordinance proceeds on the basis that rental value should be calculated and assessed by reference to each individual housing benefit provided by each employer. A rental benefit is assessed upon each place of residence provided by the employer. Sections 9(1) and (2) do not allow a 'negative' rental value figure calculated by reference to one form of housing benefit to be offset against a 'positive' rental value figure referable to another form of housing benefit.

### **Appeal dismissed.**

Case referred to:

D14/86, IRBRD, vol 2, 250

Chiu Kwok Kit for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

The facts relating to this appeal are agreed by both parties. They are fully set out in the determination of the Commissioner. A summary of those facts, supplemented by certain documents placed before us by the parties, is as follows.

1. On 1 August 1993 the Taxpayer commenced employment with a government authority ('the Authority'). The terms of employment included a provision that, after the successful completion of each successive period of twenty-four months of employment, the Taxpayer would be granted a gratuity of twenty-five per cent of all salary and bonuses paid to him by the Authority during that period. Specifically, the contract stated:

#### **'Contract Period**

This will be a rolling contract of employment and will continue in effect [from 1 August 1993] until either (i) the date on which a new contract of employment is entered into between you and the Authority; or (ii) termination by not less than two months' written notice being given by you or by the Authority to the other ...'

#### **'Gratuity**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

(a) Following the satisfactory completion of each successive period of 24 months of your employment under this contract (each such period being the "Relevant Period"), you will be paid a gratuity equal to 25% of all salary paid to you ... and bonus payment to you ... during the last completed Relevant Period.

(b) If your employment is terminated within any Relevant Period, you shall not be entitled to receive any gratuity which may otherwise have accrued up to the date of termination, except when the Authority terminates your employment ... in which case the payment of any gratuity will be entirely at the discretion of the Authority.'

2. After completing twenty-four months' service with the Authority ending on 31 July 1995, the Taxpayer was paid a gratuity of \$161,560. This amount was equal to 25 per cent of all his salary and bonus payments paid to him during the period 1 August 1993 to 31 July 1995. Apart from a sum of \$4,450 (which related to the pro-rated annual bonus for the period 1 January 1995 to 31 July 1995), the gratuity was credited to the Taxpayer's bank account on 31 July 1995.

3. The Taxpayer tendered his notice of resignation to the Authority on 25 July 1995, giving three months' notice. His last working day for the Authority was 24 October 1995.

4. On 2 October 1995, the Taxpayer commenced employment with Company X.

5. In accordance with his respective contractual arrangements with both the Authority and Company X, the Taxpayer was provided with a housing benefit (in the form of a rental refund) by each employer. Full details are set out at Fact 4 of the Commissioner's determination. They are condensed as follows:

	<b>The Authority</b>	<b>Company X</b>
Period of provision of housing	1-4-1995 to 24-10-1995	1-12-1995 to 31-3-1996
Rent paid by Taxpayer to landlord:	\$135,483	\$104,331
Rent refunded to Taxpayer by employer:	\$133,018	\$93,021
Rent paid by Taxpayer to employer:	-	\$12,336

## INLAND REVENUE BOARD OF REVIEW DECISIONS

6. In this appeal the Taxpayer disputes the Commissioner's determination relating to the assessment of rental value of the housing benefit provided to him during the year of assessment 1995/96 by both the Authority and Company X. Specifically, the Taxpayer claims that:

- (a) The gratuity (Facts 1 and 2 refer) should be entirely excluded from the assessment of rental value for the reason that section 9(2) of the Inland Revenue Ordinance (the IRO) excludes any lump sum payment or gratuity paid or granted upon the retirement or termination of employment of the employee;
- (b) In any event, only that part of the gratuity referable to the year of assessment 1995/96, namely, twenty-five per cent of the salary and bonus earned for the period 1 April 1995 to 31 July 1995, should be included in the assessment of rental value; and
- (c) In any event, in accordance with section 9(2) the rental value of quarters provided by different employers in the same year of assessment should be added together regardless of whether they are positive or negative to give a total rental value, which should then be treated as assessable income.

### Analysis

We now deal with the Taxpayer's grounds of appeal in the order set out above.

#### (a) **Should the gratuity be totally excluded from the rental value calculation?**

Section 9(2), in relevant part, states:

'The rental value of any place of residence provided by the employer ... 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 an any **lump sum payment or gratuity paid or granted upon the retirement or termination of employment of the employee ...**' (emphasis added)

On the basis of Facts 1-3 above it is clear that the gratuity was not paid or granted upon retirement or termination of the Taxpayer's employment with the Authority. Rather, it was, in accordance with this contract of employment, granted upon satisfactory completion of twenty-four months' service with the Authority at a time when the Taxpayer was still an employee of the Authority.

During the hearing before us, the Taxpayer acknowledged that his case was even weaker than the previous Board of Review case, D14/86, IRBRD, vol 2, 250, which was relied upon by the Commissioner. In that case the taxpayer had entered into a new

## INLAND REVENUE BOARD OF REVIEW DECISIONS

contract with the employer before the expiry of his original contract so that his overall employment was said to be uninterrupted. A gratuity payable under the first contract was thus held to be properly included when computing the appellant's rental value. In the present case, however, there was only one contract and, as noted above, the gratuity was granted and payable to the Taxpayer before that contract was terminated. It must follow that the gratuity cannot be excluded when computing the Taxpayer's rental value under section 9(2).

We note that in D14/86, the Board stated as 254:

*'The logic of assessing the value of quarters supplied by an employer according to [a taxpayer's] taxable income which includes annual bonuses and in this case periodic gratuities is strange and likewise there appears little justice in the fact that the value of quarters is dependent upon whether or not a person terminates his employment ... or seeks a [contractual] extension. However, it is not for this Tribunal to comment on the logic or justice but only to apply the law as it is.'*

During the Board hearing, we expressed our sympathy to the Taxpayer who was caught in a similar predicament to that described in D14/86. That cannot however, in the face of clear statutory language, alter our decision in favour of the Commissioner.

**(b) In computing rental value should the total gratuity be restricted to that part referable to the period 1 April to 31 July 1995?**

On this matter we agree entirely with the Commissioner. There is no provision in the IRO allowing the gratuity to be apportioned for rental value purposes in the manner contended for by the Taxpayer. Indeed sections 11B and 11D(b), read together, clearly show that the gratuity was properly and fully assessed in the year of assessment 1995/96: it was only in that year that the gratuity was accrued and thus derived within the terms of section 9(1)(a) (which specifically includes a gratuity as forming part of assessable income from employment). It follows that, in accordance with sections 9(1)(c) and 9(2), the full amount of the gratuity must be included as income for the purpose of calculating rental value.

**(c) Should the rental value of both quarters be aggregated regardless of the fact that under the Taxpayer's calculation a negative figure was produced for the housing benefit provided by Company X?**

The key to understanding this ground of appeal is to appreciate that, by virtue of the Taxpayer's relatively smaller salary from Company X vis-a-vis his total unreimbursed rental expenditure during the period of this employment, a negative figure is said to be produced. For this reason, the Taxpayer claims that the total rental value assessed to him in 1995/96 should be reduced by an amount representing the unreimbursed rent paid by him while he was employed by Company X. Essentially the Taxpayer seeks to aggregate ten per cent of his total income from both his employments (less allowable deductions) and

## INLAND REVENUE BOARD OF REVIEW DECISIONS

from this figure deduct the excess of the total rent paid by him during the year over the total amount refunded to him by both employers.

To answer the Taxpayer's contention, our starting point is that the structure of Part III of the IRO (which deals with the assessment to salaries tax) proceeds on the basis that rental value should be calculated and assessed by reference to each individual housing benefit provided by each employer. For instance, where an employer provides that benefit in the form of hostel accommodation consisting of one room, rental value is (ignoring deductions) calculated by reference to four per cent of assessable income derived during the period for which that accommodation was provided. If that benefit is upgraded to a normal place of residence, the rental value is calculated by reference to the normal ten per cent figure. Clearly, therefore, what is envisaged by the IRO is that a rental benefit is assessed upon each place of residence provided by the employer. This conclusion is supported by another part of section 9(2) which grants a deduction from rental value for certain expenses incurred during the period in which the place of residence is provided.

When more than one residence is provided by an employer or employers during a year, each of the rental values, separately calculated, is included in a taxpayer's assessable income for that year. If, as in this case, a calculation produces a negative figure, then no amount is included in the assessable income by virtue of the charging provisions dealing with rental value in sections 9(1) and (2). In short, these provisions enumerate items of assessable income. They do not allow a 'negative' rental value figure calculated by reference to one form of housing benefit to be offset against a 'positive' rental value figure referable to another form of housing benefit. Any contrary notion, although novel, is misconceived and simply not in accordance with the structure of those provisions in Part III of the IRO which deal with assessing rental benefit.

For all the above reasons, we dismiss this appeal. The Commissioner's determination is therefore confirmed.

It is left for us to thank the Taxpayer and the Commissioner's representative for presenting an interesting and well-argued case.