INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D156/01

Salaries tax – housing allowance – whether remuneration.

Panel: Ronny Wong Fook Hum SC (chairman), Francis Lui Yiu Tung and Daisy Tong Yeung Wai Lan.

Date of hearing: 6 December 2001.
Date of decision: 20 February 2002.

At all relevant times, the appellant received a monthly salary including housing allowance from her employer.

The appellant contended that the housing allowance was not part of her remuneration.

Held:

The Board held that there was no clear evidence that the housing allowance was a refund. Indeed, the housing allowance was part of the appellant's remuneration (D8/82, D19/95 and D33/97 considered).

Appeal dismissed.

Cases referred to:

D8/82, IRBRD, vol 2, 8
D19/95, IRBRD, vol 10, 157
D33/97, IRBRD, vol 12, 228
D77/99, IRBRD, vol 14, 528

Chan Tak Hong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. The Appellant and Mr A are husband and wife.

2. On 25 November 1991, Mr A purchased in his own name a flat at Housing Estate B ('Property 1').

3. According to the Appellant's return for the year of assessment 1991/92 dated 1 August 1992, she was then working as a shipping clerk with Company C and was residing at Property 1.

4. By a tenancy agreement dated 1 January 1993 between the Appellant and Mr A ('the First Tenancy'), Mr A let a sitting room and a bedroom in Property 1 to the Appellant for a period of two years from 1 January 1993 at a rental of $6,000 per month. There is in evidence before us a bundle of rental receipts for the period between 1 January 1993 and 1 September 1993 and between 1 January 1994 and 1 March 1994 whereby Mr A acknowledged payment of rental from the Appellant.

5. By letter dated 1 February 1993 from Company D to the Appellant, Company D confirmed the appointment of the Appellant as a clerk at a monthly salary of $12,000 '(including housing allowance)'. By cheques dated 27 March 1993, 26 April 1993 and 21 May 1993, Company D paid the Appellant $12,000 in each of those months.

6. In her return for the year of assessment 1993/94 dated 31 May 1994, the Appellant reported to the Revenue her employment with Company D earning therefrom $72,000 by way of salary and $72,000 by way of housing subsidy. Property 1 was identified as the quarters provided. The amount of rent paid by her to the landlord was said to be $72,000. She did not specify any rent refunded to her by her employer. Her returns for the years of assessment 1994/95 and 1995/96 dated 30 May 1995 and 28 May 1996 contained like particulars save that the amount of rent which she paid to her landlord was said to be $76,800.

7. By another tenancy agreement dated 30 March 1996 ('the Second Tenancy'), Mr A let Property 1 to the Appellant at a rental of $6,600 per month. The Second Tenancy was for a fixed term of one year with an option to renew for an additional term of another year. By a receipt dated 31 October 1996, the Appellant acknowledged payment of $33,000 from Mr A as compensation for early termination of the Second Tenancy. On 15 November 1996, Mr A sold Property 1.

8. By a tenancy agreement dated 16 October 1996, the Appellant rented another flat at Housing Estate B ('Property 2') from Madam E for two years from 1 November 1996 at a rental of $6,800 per month.

9. By an agreement dated 31 January 1997, the Appellant and Mr A jointly purchased a flat at Housing Estate F ('Property 3') for $2,660,000.

10. The Appellant submitted her return for the year of assessment 1996/97 on 1 May 1997. She did not report any income within that year.

11. Disputes arose between Mr A and the Revenue in relation to his tax liability for the year of assessment 1996/97:

(a) On 1 May 1997, the Revenue sent to Mr A a return for the year of assessment 1996/97. Upon Mr A's failure to submit this return, the Revenue issued an estimated property tax assessment for $19,926 on 16 September 1997 payable by 20 November 1997.

(b) Mr A did not pay the property tax as demanded. The Revenue imposed a 5% surcharge on 5 December 1997.

(c) Mr A continued in his default. The Revenue instituted proceedings in the District Court on 27 February 1998 for recovery.

(d) Mr A objected to the estimated assessment on 4 March 1998 and submitted for the first time his return for the year of assessment 1996/97. The Revenue accepted Mr A's belated objection.

(e) Mr A rejected the Revenue's proposal to compromise the pending action before the District Court.

(f) By order dated 15 May 1998, Judge C B Chan ordered that judgment be entered in favour of the Revenue for $10,129 with costs. On the same day, Mr A lodged a complaint against the Revenue.

12. On 20 June 1998, the Appellant submitted her return for the year of assessment 1997/98. She informed the Revenue that she received income in the sum of $160,400 from Company D for working as a shipping clerk for the period between 1 April 1997 and 31 March 1998. Company D allegedly provided her with quarters at Property 2 and she paid rent totaling $47,600 to the landlord.

13. By notices of additional assessment dated 1 December 1998, the Appellant was

additionally assessed by inclusion of her housing allowance for the years of assessment 1992/93 to 1997/98. By letter dated 14 December 1998, the Appellant objected against the additional assessment. She pointed out that Company D always required tenancy agreement and rental receipt for claim of housing subsidy. She denied the Revenue's contention that Company D paid no attention to these issues.

14. By his determination dated 12 April 2001, the Commissioner confirmed the additional assessments. The determination was sent to the Appellant at Property 3. According to the Hongkong Post Mail Tracing Office, this determination was delivered to the Appellant on 13 April 2001.

15. By letter dated 1 May 2001, the Appellant wrote to the Revenue making various challenges against the determination. She did not send to this Board any notice of appeal within the one-month period. The letter accompanying the determination explained to her in clear Chinese terms the applicable procedure. She did not submit a notice to this Board until 26 September 2001.

16. We have to consider two issues:

(a) whether we should allow any extension of the one-month period in favour of the Appellant ('the Extension of Time Point'); and

(b) if so, whether there is any error in the Revenue's additional assessment ('the Merits Point').

The Extension of Time Point

17. The Appellant frankly admitted that she did not read the letter accompanying the determination. She thought that once she sent her objections to the Revenue on 1 May 2001, the Revenue would process the same.

18. Our jurisdiction to extend time is governed by section 66(1A) of the Inland Revenue Ordinance (Chapter 112) ('IRO') which provides that:

> *' If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1) ...'*

19. We are not disposed to grant any extension of time in favour of the Appellant. She paid scant regard to the letter that accompanied the determination. The delay between 12 May

2001 and 24 September 2001 is inordinate. The Revenue took action on 22 June 2001 on the basis of the determination. The Appellant gave us no explanation of her inactivity between 22 June 2001 and 24 September 2001.

The Merits Point

20. Given our refusal to grant any extension of time in favour of the Appellant, it is strictly unnecessary for us to discuss the Merits Point. We have done so as the Appellant and Mr A alleged that the additional assessments were vindictive exercise of the Revenue's powers by virtue of the complaints made by Mr A on 15 May 1998. We wish to ensure that there is no substance in such complaint.

21. We turn first to the applicable principles:

(a) In D8/82, IRBRD, vol 2, 8, the Board of Review pointed out that:

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

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

(b) In D19/95, IRBRD, vol 10, 157, the Board of Review considered the evidence and came to the conclusion that the sums in dispute were cash allowance which were placed generally at the disposal of the taxpayer by the employer. The employer was not concerned whether the payments were actually spent by the taxpayer on housing. The Board of Review pointed out that the fact that some of the payments was used by the taxpayer to occupy a hotel room and later to rent a flat was of no assistance to him as 'This cannot of itself convert a payment into a refund'. The Board concluded that the payments made to the taxpayer were simply allowances which were subject to tax.

(c) In D33/97, IRBRD, vol 12, 228, the taxpayer claimed that sums paid by his employer to him were rental refunds. In support of this contention, he produced unstamped tenancy agreements said to evidence tenancies over premises

owned by his parents and by his mother and the taxpayer himself. The Board of Review found there was no tenancy as the parties had no intention to enter into legal relations. The Board went on to point out that:

' A "refund" of rent connotes a repayment or reimbursement, not mere payment ... This means, in the typical case, that sufficient control must, as a matter of fact (and not just in theory), be exercised by the employer over the payment so that the allowance is effectively a refund of rent and not just an additional emolument to be spent in any way that an employee may desire. Where ... an employee has acted in a way such that the employer's system of control cannot operate in the manner for which it was designed (for example, by the employee's failure to submit to the employer a lease agreement or rental receipts for verification), it ill-behoves the employee to then argue that a payment received from the employer must be a refund simply because rent was, in the event, paid by the employee. Conversely, if no system of employer control exists to verify that a payment made to an employee was a refund of rent, this is simply a cash allowance. In neither case would the payment in law amount to a rental refund for salaries tax purposes.'

22. In relation to section 61 of the IRO:

(a) That section provides that:

' 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.'

(b) In D77/99, IRBRD, vol 14, 528, the Board took the view that:

(i) The words 'artificial' and 'fictitious' are to be given the ordinary meaning.

(ii) 'Artificial' is wider than 'fictitious'. According to the Shorter Oxford Dictionary, 'artificial' means not natural, a substitute for what is natural or real, feigned, fictitious. 'Fictitious' means artificial, counterfeit, sham, not genuine, feigned, assumed, not real, imaginary, of the nature of fiction.

(iii) All the circumstances of the particular transaction have to be examined if it is artificial or fictitious.

(iv) A transaction is not artificial by reason of the fact that it is between related parties.

(v) A transaction is not artificial by reason of the fact that it is intended for tax planning purpose.

(vi) However if there is no commercial sense for the transaction and no purpose for the transaction other than for tax benefit, it may well fit the expression 'artificial'.

23. Had it been necessary for us to consider the Merits Point, we would not have decided the case on the basis of section 61 of the IRO. We would have decided the case against the Appellant on the basis that there is no clear evidence of refund to support the claim of the Appellant. The letter of engagement dated 1 February 1993 made it clear that her 'monthly salary will be HK$12,000.00 (including housing allowance)'. By letter dated 8 September 1997, Company D informed the Revenue that 'Regarding the expending of the "housing allowance", the company will not involving in this Matter. (Over or excess)'. The Appellant made no claim of refund in her returns. The sums paid by Company D were simply part of the Appellant's remuneration.

24. There is correspondence before us indicating that the Revenue was already investigating the Appellant's housing allowance with Company D on 8 September 1997. The Revenue explained to us that they made due adjustments of the property tax liability of Mr A. There was no representation to the Appellant as to prevent the Revenue from assessing her true liability. We have no jurisdiction to deal with the costs ordered by Judge Chan on 15 May 1998. In these circumstances, it suffices for us to say that there is no evidence to suggest abuse of power by the Revenue against the Appellant.