

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D19/95

Salaries tax – whether payment made to employee was a rent refund or an allowance.

Panel: Andrew J Halkyard (chairman), William Chan Wai Leung and Kenneth Ting Woo Shou.

Date of hearing: 3 April 1995.

Date of decision: 17 May 1995.

The taxpayer received certain sums of money from his employer which the assessor assessed to tax as being an allowance. The taxpayer submitted that it was not taxable and was a refund for rent.

Held:

The sums paid to the taxpayer were cash allowances placed generally at the disposal of the taxpayer by the employer. Accordingly the payments were simply allowances subject to assessment to salaries tax.

Appeal dismissed

Cases referred to:

D8/82, IRBRD, vol 2, 8
D62/92, IRBRD, vol 8, 85

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer has appealed against a determination of the Commissioner of Inland Revenue which confirmed the additional salaries tax assessments for the years of assessment 1986/87, 1987/88, 1988/89 and 1989/90 raised on him. The Taxpayer claims that his assessable income should not include sums paid to him for the provision of housing.

During the course of the Board hearing the Taxpayer gave oral evidence. He presented his evidence in a forthright and candid manner. Except to the limited extent indicated below, we fully accept the Taxpayer's testimony as fact. On the basis of that testimony and various documents produced before the Board, we find the following facts.

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The facts

1. At all relevant times, the Taxpayer was employed in Hong Kong by Company A ('the Employer'). His letter of appointment stated that: 'Your salary will be US\$50,000 per year, which includes housing.'
2. From 1 April 1986 to 31 August 1986 the Taxpayer resided in a hotel in Hong Kong. During this period he paid approximately \$2,000 per week to the hotel for occupancy of a room.
3. From 1 September 1986 to 31 August 1988 the Taxpayer resided in a flat ('Property J'). During this period, the Taxpayer was the legal owner of Property J.
4. From 1 September 1988 to 31 March 1990 the Taxpayer resided a flat ('Property K'). During this period, the Taxpayer paid rent of \$9,000 per month to the owner of Property K under a lease commencing on 1 September 1988.
5. During the period 1 April 1986 to 31 March 1988 the Taxpayer received \$10,000 per month from the Employer towards the cost of his housing. This amount was increased to \$10,000 per month for the period 1 April 1988 to 31 March 1990.
6. Before commencing his employment with the Employer the Taxpayer was fully aware of the cost of housing in Hong Kong. The initial amount of \$10,000 per month (fact 5 refers) was agreed between the Employer and the Taxpayer as representing the market value of a flat required to accommodate the Taxpayer's family. A verbal agreement was reached between the Employer and the Taxpayer that if his accommodation expenses exceeded this initial amount of \$10,000 per month, the Taxpayer would pay the difference.
7. At all relevant times, the Employer did not exercise any control over the way in which the amounts paid to the Taxpayer for housing were spent. The Taxpayer was not required to, and did not, submit a copy of the lease of Property K to the Employer at any time prior to 31 March 1990. However, in May 1990 when the Taxpayer left Hong Kong upon being transferred to the United States, he showed a copy of the lease of Property K to the Employer. Around this time the Employer agreed with the Taxpayer that it would become liable for the rent of Property K when the Taxpayer left Hong Kong until 31 August 1990, the date of expiry of the lease.
8. In its communications with the Inland Revenue Department, the Employer has described the payments set out in fact 5 in contradictory terms. In its employer's returns for each of the years of assessment relevant to this appeal, it has described the payments in dispute under the headings 'rent-paid to landlord by employee' and 'rent-refunded to employee'. However, in response to the

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assessor's specific enquiries as to the nature of these payments, the Employer has stated that they were 'housing allowance per the employment contract'.

9. In his salaries tax returns for each of the years of assessment relevant to this appeal, the Taxpayer has described the payments under the headings 'rent-paid to landlord by me' and 'rent-refunded by employer'. Under each heading, the payments were in the same amounts as those set out in fact 5.

The course of the Board hearing

During the course of the Board hearing, the Taxpayer made one claim which the Board has been unable to accept as proved. The Taxpayer stated, in relation to the rent of Property K: 'I remember that the monthly rent was \$10,000. But I do not have any documentation [to support this statement].' The landlord of Property K has, however, clearly stated to the Revenue that the monthly rent amounted to \$9,000. The Taxpayer could not provide any explanation concerning this discrepancy. Furthermore, during the period in which the Taxpayer leased Property K he could not explain the difference between the payment made to him by the Employer, \$11,000 per month, and the claimed rent of \$10,000 per month other than to say: 'The difference [related to] management fees and service charges.' The Taxpayer could not remember, let alone provide evidence of, the level of these fees and services.

The issue in dispute

The issue for decision by the Board has been considered by a previous Board of Review in D8/92, IRBRD, vol 2, 8 at page 10 where it was stated:

'If a place of residence is not provided by the employer or an associated company, 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), (1)(b) or (c) of the Inland Revenue Ordinance (the IRO).'

Thus, the sole matter for decision by the Board is whether the payments set out at fact 5 constitute refunds of rent within section 9(1A)(a).

The Taxpayer's contentions

The Taxpayer argued that if he had known the legal distinction between a rent refund and an allowance, and had appreciated that distinction from a taxation perspective, he could have ensured that the amounts in dispute would have been structured as refunds. In his event these amounts would not have been included in his income. The Taxpayer pointed out that for the period 1 September 1988 to 31 March 1990 the Revenue did not dispute that he paid rent to the owner of Property K. He also states that now he has left Hong Kong it is unfair for the Revenue to require him to produce evidence of all the relevant documents, such as the lease agreement, supporting his claim.

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During the course of the hearing it became apparent that the Taxpayer was relying on the substance rather than the form of his contractual and compensation arrangements with the Employer. Put rhetorically, the Taxpayer contends: what difference should it make for taxation purposes if he received amounts from the Employer for housing provided he actually spent those amounts on the provision of housing.

Analysis

The simple answer to the Taxpayer's contentions is that, from a legal perspective, the distinction does matter. In this regard, the Board of Review decision D62/92, IRBRD, vol 8, 85 at page 87 stated:

'It is well known that there is no equity in taxation matters. ... In the present case the Taxpayer has negotiated with his employer that the employer would remunerate him with a package of benefits or emoluments which included a rental allowance of \$7,000 per month. In fact the Taxpayer only incurred \$4,500 per month by way of rent. It is clear that the housing allowance was no more and no less than what it was stated to be. It was a sum of money paid to the Taxpayer as a housing allowance but which the Taxpayer could spend as he wished. ... It is of no assistance to the Taxpayer that he could have negotiated a different agreement with his employer which would have given him a more beneficial tax treatment.'

Although the facts of the present case are different from those in D62/92, the approach adopted by the Board in that case is of assistance to us. We also note that the ordinary meaning of 'refund' connotes a repayment or reimbursement (the Concise Oxford Dictionary), not mere payment.

In the present case, we conclude that the amounts in dispute represented taxable allowances rather than rent refunds. We are fortified in this conclusion by the following facts:

- (1) The express acknowledgement by the Employer, following a specific enquiry by the Revenue, that the payments represented 'housing allowances' (fact 8 refers).
- (2) For the period 1 September 1986 to 31 August 1988 payments claimed to be rent refunds were made by the Employer to the Taxpayer in respect of Property J which was owned by the Taxpayer (facts 3 and 5 refer). It was never explained by the Taxpayer how the Employer could 'refund' amounts of rent paid by the Taxpayer to himself.
- (3) The amount of the payment in dispute was increased from \$10,000 per month to \$11,000 per month with effect from 1 April 1988 (fact 5 refers). Yet the tenancy of Property K only commenced on 1 September 1988 (fact 4 refers). It is thus apparent that the Employer increased the monthly payment irrespective of where the Taxpayer chose to live and regardless of whether the Taxpayer was liable to pay rent.

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- (4) Even if we were to confine ourselves to considering the lease of Property K, there was no correlation between the monthly rent of \$9,000 (fact 4 refers) and the claimed rent refund of \$11,000 (fact 5 refers). As indicated above, we were not persuaded by the Taxpayer's contention that the difference is solely explicable by reference to the payment of unsubstantiated management fees and service charges.
- (5) The Taxpayer was not required to, and did not, produce the lease of Property K to the Employer during the period 1 September 1988 to 31 March 1990 (fact 7 refers).
- (6) At all relevant times the Employer had no regulations or controls for verifying actual expenditure on housing by the Taxpayer (fact 8 refers).

The totality of these factors indicates that the sums in dispute were cash allowances 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 fact that some amount of the payments for part of the period was used by the Taxpayer to occupy a hotel room and later to rent Property K is of no assistance to him. This cannot of itself convert a payment into a refund. We therefore conclude that the payments made to the Taxpayer were simply allowances which were properly subject to tax under section 9(1)(a).

The Taxpayer's appeal is hereby dismissed.