INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D21/98

Salaries tax – allowable deductions– whether housing allowance was deductible – meaning of the word "refund" under section 9(1A)(a)(ii) of the Inland Revenue Ordinance – whether entrance fee was deductible – section 12(1)(a) of the Inland Revenue Ordinance – whether medical expenses was deductible – discretion to order to pay cost – section 68(9) of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Colin Cohen and Duncan A Graham.

Date of hearing: 3 April 1998.
Date of decision: 30 April 1998.

From 1 April 1995 to 17 November 1995, the taxpayer was employed as a senior engineer by a company in the private sector and the taxpayer received $18,000 per month from his employer as housing allowance. The taxpayer disputes the determination of the Commissioner relating to the salaries tax assessment. The taxpayer argues that housing allowance, and entry registration fee to the Institution of Civil Engineers and medical expenses are deductible allowance.

Held:

1. Since there is no allegation that any rent had been paid by the employer of the taxpayer, section 9(1A)(a)(ii) of the Inland Revenue Ordinance is not applicable.

2. The word "refund" under section 9(1A)(a)(ii) of the Inland Revenue Ordinance according to the Concise Oxford Dictionary means – "pay back (money or expenses)' or "reimburse". Since there is no allegation that the employer of the taxpayer concerned or exercised any control over the way or ways in which the amounts paid to the taxpayer for housing was spent, sections 9(1A)(a)(ii) of the Inland Revenue Ordinance is not applicable (D62/92, IRBRD, vol 8, 85; D19/95, IRBRD, vol 10, 157 and D33/97, IRBRD, vol 12, 228 followed).

3. The entrance fee to the Institution of Civil Engineers is not deductible because it is not incurred "in the production of it" within the meaning of section 12(1)(a) of the Inland Revenue Ordinance (BR 19/73, IRBRD, vol 1, 121; D72/90, IRBRD, vol 5, 303; D17/91, IRBRD, vol 6, 33 and CIR v Sin

Chun Wah, 2 HKTC 364 followed). Medical expense is not allowed as a deductible income (D33/94, IRBRD, vol 9, 201 followed).

4. The discretion of the Board under section 68(9) of the Inland Revenue Ordinance to order an unsuccessful taxpayer to pay costs is not expressed to be restricted to appeals which are obviously unsustainable. The taxpayer is ordered to pay the sum of $5,000 as costs of the Board because this appeal is frivolous and vexatious and an abuse of the process. The sum of $5,000 shall be added to the tax charged and recovered therewith.

Appeal dismissed and a cost of $5,000 charged.

Cases referred to:

D62/92, IRBRD, vol 8, 85
D19/95, IRBRD, vol 10, 157
D33/97, IRBRD, vol 12, 228
BR 19/73, IRBRD, vol 1, 121
D72/90, IRBRD, vol 5, 503
D17/91, IRBRD, vol 6, 33
CIR v Sin Chun Wah, 2 HKTC 364
D33/94, IRBRD, vol 9, 201

So Chau Chuen for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination dated 28 November 1997 by Commissioner of Inland Revenue, rejecting the Taxpayers' objection against the salaries tax assessment for the year of assessment 1995/96 ('the Relevant Year of Assessment') dated 23 October 1996 showing net chargeable income of $491,374 with tax payable thereon of $90,474, but reducing the net chargeable income to $490,062, with tax payable thereon of $90,212.

2. In this appeal, the Taxpayer contended that 3 items should be excluded, or allowed as a deduction, from his income. These items were (a) housing, (b) 'entry registration fee' to the Institution of Civil Engineers ('ICE'), and (c) medical expenses.

3. From 1 April 1995 to 17 November 1995, the Taxpayer was employed as a senior engineer by a company in the private sector. Out of the total income of $482,724 which the Taxpayer received from his private sector employer, $100,200 was paid to him as 'housing allowance' for the period from 1 June 1995 to 17 November 1995.

4. From 20 November 1995 to 31 March 1996, the Taxpayer was employed as an engineer by the Government, receiving $166,850 as salary for the period.

5. In his tax return for the Relevant Year of Assessment, the Taxpayer declared the income which he received from the Government but not the income from his private sector employer. We are not concerned with and have not concerned ourselves with the declaration of income by the Taxpayer. In the salaries tax assessment issued by the assessor, the assessor included the sum of $482,724 which the Taxpayer received from his private sector employer.

6. The Taxpayer objected and claimed various deductions. The assessor explained in correspondence with the Taxpayer that the various expenses were not allowance under the Inland Revenue Ordinance, Chapter 112, ('the IRO') as they were private in nature; that the housing allowance was a cash allowance and had been correctly assessed; and that as a concession the assessor was prepared to allow the annual subscription fee to ICE if membership of the institution was a pre-requisite to the Taxpayer's employment.

7. The Taxpayer did not accept the assessor's explanations.

8. The Commissioner agreed with the concession made by the assessor in accordance with the departmental practice and allowed a deduction of $1,312 as annual subscription to ICE. Apart from adjusting the figures accordingly, the Commissioner rejected the Taxpayer's objection.

9. On the question of housing, the Taxpayer stated categorically in his letter dated 9 August 1997 to the Inland Revenue Department ('IRD') that 'Quarter was not specially provided by [his private sector employer] … The salary was paid monthly by [his private sector employer] directly to [the Taxpayer's] bankbook account number …'.

10. By letter dated 1 June 1995 from his private sector employer to him, the Taxpayer was advised that following review of his 'all-in-salary which will comprise … 1. "Basis Salary" of $45,000 per month; 2. "Housing Allowance" of $18,000 per month.'

11. In a letter to IRD, the Taxpayer claimed that he paid monthly rental of $14,500, rates at $578 per month, and management fee of $640 per month in respect of his residence. These figures add up to $15,718 which is $2,282 less than $18,000. In his letter dated 3 May 1997, the Taxpayer asked IRD to deduct $188,616, that is, on a 12 month basis, notwithstanding the fact that his housing allowance from his private sector employer did not commence until 1 June 1995 and that his employment by that employer ceased on 17 November 1995. The Taxpayer received $100,200 from his private sector employer as housing allowance but claimed a deduction of $188,616!

12. At the hearing of the appeal, the Taxpayer sought to produce (a) his tax return for the year after the Relevant Year of Assessment, and (b) his salaries statement (January

1997) from his employer. The Taxpayer was unable to show that either document was in any way relevant to any issue raised in his grounds of appeal. We also bore in mind that both documents concerned the year following the Relevant Year of Assessment. We did not allow the Taxpayer to produce either document.

13. After the Taxpayer had concluded his arguments, we told Mr So that we did not need to trouble him. We informed the parties that we would give our decision in writing, which we now do.

14. On the question of housing, section 9(1A)(a) of the IRO provides that:

> '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'.

15. There is no allegation that any rent had been paid by the private sector employer and thus (i) is not applicable.

16. On (ii), according to the Concise Oxford Dictionary, 'refund' means 'pay back (money or expenses)' or 'reimburse'. There is no allegation that the employer was in any way concerned whether the payments were actually spent by the Taxpayer on housing. There is no allegation that the employer exercised any control over the way or ways in which the amounts paid to the Taxpayer for housing were spent. In other words, the Taxpayer could spend as he wished and he was under no obligation to spend it on the cost of housing. Furthermore, the amount paid by the employer as 'housing allowance' exceeded the actual amount said to be spent by the Taxpayer on rent, rates and management fee by 2,282 per month.

17. The reliance on 'refund' fails. If authority be required, we would refer to D62/92, IRBRD, vol 8, 85; D19/95, IRBRD, vol 10, 157 and D33/97, IRBRD, vol 12, 228.

18. We turn now to the entrance fee. Even assuming that there is evidence that membership of ICE was a 'pre-requisite' of his employment as asserted by the Taxpayer, the entrance fee was not incurred 'in the production of it' within the meaning of section 12(1)(a) of the IRO and is not deductible. A concession is a matter entirely for IRD. If authority is required for our decision that entrance fee is not deductible, we would refer to BR 19/73, IRBRD, vol 1, 121; D72/90, IRBRD, vol 5, 303; D17/91, IRBRD, vol 6, 33; and CIR v Sin Chun Wah, 2 HKTC 364.

19. Medical expense is by far the most frivolous and vexatious claim for deduction. Our attention has not been drawn to any provision in the IRO which may arguably support the claim for deduction. D33/94, IRBRD, vol 9, 201 is a decision against the Taxpayer.

20. For the reasons given above, we dismiss the appeal and confirm the assessment appealed against.

Order under section 68(9)

21. The discretion of the Board under section 68(9) to order an unsuccessful Taxpayer to pay costs is not expressed to be restricted to appeals which are obviously unsustainable. The maximum sum was increased from $100 to $1,000 in 1985 and further increased to $5,000 in 1993. $5,000 represents only a small fraction of the costs of the Board in disposing of an appeal.

22. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the IRO, we order the Taxpayer to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.