Case No. D27/06

Salaries tax – whether cash allowance or rental refund

Panel: Andrew J Halkyard (chairman), Paul Chan Mo Po and James Smith Thomson.

Date of hearing: 8 May 2006.
Date of decision: 13 June 2006.

The appellant was paid by his employer $8,000 monthly as allowance. The appellant contended it was a rent refund. The appellant claimed that he rented part of his sister's flat for $8,000 monthly. However, the appellant received the same allowance before he started to rent any accommodation. The employer stated that it would pay the allowance to the appellant in any event notwithstanding whether he rented any place of residence.

Held:

1. The employer's unequivocal conduct showed that the amount of $8,000 per month was not intended as rental refund but cash allowance regardless of whether it was spent on rent at all. (CIR v Page applied)

Appeal dismissed.

Case referred to:

CIR v Page (2002) 5 HKTC 683

Taxpayer in person.
Tsui Siu Fong and Lau Wai Sum for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the additional salaries tax assessment raised on the Appellant for the year of assessment 2002/03. The only issue before us is whether the sum of $74,814 paid

by Company A ('the Employer') to the Appellant is salary or cash allowance wholly chargeable to salaries tax under section 9(1)(a), or a rental refund chargeable under section 9(1A)(a) and (2) of the Inland Revenue Ordinance ('IRO').

2. The basic facts relevant to this appeal, which we so find, are set out in the Deputy Commissioner's determination dated 23 January 2006. These have been supplemented by the unchallenged documents produced to us at the hearing (see Bundles R1 and R2 and Exhibits IRD-1 and IRD-2).

3. In the hearing before us, the Appellant and his sister, Ms B, gave sworn evidence. We found them both to be competent witnesses. Amongst other things, they stated that under an oral lease the Appellant rented part of Ms B's flat at Property C for a rent of $8,000 per month throughout the period April 2002 to January 2003. The Appellant paid Ms B the amount of $8,000 per month in weekly instalments of $2,000. These payments were usually in cash, but sometimes made by way of bank transfer.

4. Before moving into Ms B's flat, the Appellant told us that he spent two or three weeks in February 2002 on holiday [overseas] and, upon coming back to Hong Kong around the end of February, he lived with his girlfriend for some two weeks. During this period, he rented no accommodation and thus paid no rent. However, the Employer continued to pay to him his monthly remuneration (which did not vary from February 2002 to January 2003) of $29,500 (after deducting his MPF mandatory contribution of $1,000 per month).

5. The Commissioner's representative, Ms Tsui Siu-fong, challenged whether there was indeed a valid lease entered into between the Appellant and Ms B. Ms Tsui then argued that the Appellant had simply attempted to split his remuneration from the Employer by labelling the sum of $8,000 as housing allowance / refund of rent and designating the balance as salary. It is not, however, necessary for us to determine these issues since the agreed facts and documents, as well as the Appellant's evidence before us, allow us simply to decide this appeal on the basis of the leading – and binding – case of CIR v Page (2002) 5 HKTC 683.

6. In Page's case, Recorder Edward Chan, SC stated:

> *'First, on the taxpayer's own admission, the arrangement between him and the employer was such that he was entitled to the same housing benefit even if he did not rent any property or rented at a rent lower than the amount of housing benefit . . . This would effectively mean that he would be entitled to be paid the same sum of money even though he had not made any payment of rent himself. In such circumstances it would be difficult to see how the housing benefit*

> *received by him could be a rental refund because the arrangement could be that there was nothing in respect to which there could be a refund.'*

7. This is exactly what happened in the Appellant's case. During a period in February to March 2002, the Appellant continued to receive the same remuneration from the Employer regardless of the fact that he paid no rent. In addition, the Employer in its communications with the assessor stated specifically that it would pay the full monthly remuneration to the Appellant in any event and notwithstanding whether he rented any place of residence (R1, page 131 and 132).

8. Furthermore, again as found in Page's case, (1) the Employer's policy was such that it did not require the Appellant to be accountable for the monthly allowance of $8,000, (2) the allowance was paid as a cash allowance over which the Appellant was free to spend, (3) the Appellant was not required to produce documentary evidence to claim the allowance, and (4) the Employer did not request a copy of the tenancy agreement for the year of assessment.

9. In relation to items (3) and (4) set out in the previous paragraph, the Appellant argued that he did not produce any rental receipts or other evidence of the existence of his lease with Ms B because he had provided similar documentation in the earlier (2001/02) year of assessment (when he was residing in Property D). The Appellant told us that the Employer then said it was useless for him to continue doing so since it did not know what to do with the documentation. We do not think that this contention assists the Appellant. On the contrary, it shows that, like Page's case, whatever arrangement the Appellant had entered into with the Employer in the past concerning the payment of any housing benefit, the Employer's unequivocal conduct at least from February 2002 onwards showed that the amount of $8,000 per month was not intended to be paid as rental refund. Instead, the Employer considered that the Appellant was entitled to be paid, and indeed was paid, the full amount of his remuneration ($29,500 net of MPF contribution) regardless of whether he spent any sum on rent at all.

10. Following the binding authority of Page's case (which we note was factually much stronger for the taxpayer than the facts of this appeal), on the basis of the facts found and the evidence placed before us we conclude that the amount in dispute of $74,814 was not paid to the Appellant by way of refund of rent. This was a cash allowance which the Appellant could spend in whatever way he wished. It follows that this appeal must be dismissed.