INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D28/00

Salaries tax – rent paid by employer as part of salary – accessibility – sections 8(1), 9(1)(a) and 61 of the Inland Revenue Ordinance (' IRO'), Chapter 112.

Panel: Andrew Halkyard (chairman), John Peter Victor Challen and Herbert Tsoi Hak Kong.

Date of hearing: 7 June 2000.
Date of decision: 22 June 2000.

The taxpayer appealed against the Commissioner' s determination of his salaries tax assessment for the year of assessment 1995/96. He claims that he has been incorrectly charged tax on rent received from the employer in respect of the property he jointly owned with his wife.

Held:

1. The taxpayer' s contract of employment initially provided for the payment of ' salary' of $62,500 per month. The taxpayer was paid on that basis. The taxpayer claims that that amount was subsequently varied, retrospectively with effect from 1 August 1995, to include a rent payment of $26,000 per month. But the earliest date on which any such variation occurred was 31 March 1996. The taxpayer and the employer cannot for taxation purposes retrospectively alter the nature of income accrued by, and paid to, the taxpayer from salary to a reduced salary plus rent.

2. In any event, the so-called tenancy agreement was in terms of section 61 ' artificial' . (Seramco Ltd Superannuating Fund Trustees v ITC [1976] 2 WLR 987 considered and applied.)

Appeal dismissed.

Case referred to:

Seramco Ltd Superannuation Fund Trustees v ITC [1976] 2 WLR 987

Leung Wing Chi for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. The Taxpayer has appealed against the Commissioner' s determination of his salaries tax assessment for the year of assessment 1995/96. He claims that he has been incorrectly charged tax on rent received from the Employer in respect of the Property he jointly owned with his wife.

The facts

2. The basic facts, which we so find, are not in dispute. They are set out at the Commissioner' s determination. During the course of the hearing, the Taxpayer gave sworn evidence before us. On the basis of that evidence and the documents placed before us by the parties, we find the following facts.

1. The Taxpayer purchased the Property in November 1994.

2. He commenced employment with the Employer on 15 August 1995. The employment letter setting out the terms and conditions of his employment was dated 23 August 1995.

3. In that employment letter, which evidenced a six-month contract effective from 15 August 1995, the Taxpayer' s ' salary' was stated to be $62,500 per month.

4. The Taxpayer agreed that fact 3 represented an original term of his contract of employment. He stated: ' At the beginning, the initial contract showed that the salary was $62,500 per month. But [the Employer] had a tax planning for its managerial staff, so that the contract was later amended to make it salary plus rent.'

5. In response to the question: ' When did the amendment occur?' the Taxpayer stated: ' Each year, when [the Employer] was waiting to complete its employer' s return [for the Inland Revenue Department], [the Employer] amended the contract. This took place sometime [the Taxpayer could not precisely remember when] between 31 March and early May 1996.'

6. The document headed ' tenancy agreement' entered into between the Taxpayer and the Employer relating to the Property was signed and dated 31 March 1996. It purported to have retrospective effect from 1 August 1995 until 31 March 1996.

7. The terms of the ' tenancy agreement' were agreed sometime between 31 March and early May 1996 (compare fact 5 above). In the Taxpayer' s words: ' All the changes [relating to his contract of employment] took place at the same time' .

The Taxpayer' s contentions

3. In essence, the Taxpayer repeated his grounds of appeal and argued that:

1. He did not make any artificial or fictitious transactions to reduce the amount of tax payable. The agreements made with the Employer as to the terms of his employment and the tenancy were made by both parties and were binding on both parties.

2. He received from the Employer a total payment of $62,500 per month, of which $26,000 was rent. The amount of $208,000 ($26,000 x 8 months: from August 1995 to March 1996) considered by the Commissioner to be salary was in fact rent paid to him by the Employer. This was evidenced by the tenancy agreement and the rental receipt produced in evidence. The Employer did not pay him any housing ' allowance' ; nor did the Employer ' refund' or ' reimburse' any rent paid by him.

3. The agreement made with the Employer as to housing benefit was not simply a transaction devised for him alone. The Employer offered ' tax efficient planning' (presumably taking the form of a tax-advantaged rental benefit) for its entire managerial staff, of which the Taxpayer was one.

The Commissioner' s contentions

4. In essence, the Commissioner' s representative argued upon the lines of the Commissioner' s determination. She stressed that the so-called ' tenancy agreement' entered into between the Taxpayer and the Employer relating to the Property was artificial and could be disregarded under section 61 of the IRO.

Decision and reasons

5. On the basis of the evidence given by the Taxpayer and the facts we have found it is not necessary to analyse the competing arguments of the parties. The reason for this is that the Taxpayer' s contract of employment initially provided for the payment of ' salary' of $62,500 per month. The Taxpayer was paid on this basis. However, the Taxpayer claims that this amount was subsequently varied, retrospectively with effect from 1 August 1995, to include a rent payment of

$26,000 per month. But the earliest date on which any such variation occurred was 31 March 1996 (facts 5 and 7 above). On this date, all the relevant income from employment (which until then was agreed by both the Taxpayer and the Employer to be salary) had been accrued by, and paid to, the Taxpayer.

6. We know of no authority, and none was given to us, that allows the Taxpayer and the Employer for taxation purposes to retrospectively alter the nature of the income accrued by, and paid to, the Taxpayer from salary to a reduced salary plus rent. Such a change could, at best in our view, only take place prospectively. This is sufficient for us to dismiss the appeal.

7. If necessary, we would go further and also conclude that, on the basis of the Commissioner' s arguments before us, the so-called tenancy agreement was in terms of section 61 ' artificial' (as that term has been interpreted by the Privy Council in Seramco Ltd Superannuation Fund Trustees v ITC [1976] 2 WLR 987 at 994).

8. In either event, the amount in dispute of $208,000 is not rent, but salary, that is taxable in full under sections 8(1) and 9(1)(a) of the IRO.

9. The appeal is hereby dismissed.

PostScript : On 14 June 2000, one week after hearing this appeal, the Taxpayer sent an additional document to this Board showing that, effective 1 November 1995, his employment with the Employer was converted from a six month contract to a full-time permanent employment. Although technically we were not obliged to look at this document, we note that it is totally consistent with our decision. It states, amongst other things, that the Taxpayer' s ' monthly salary will [remain] $62,500 . . [and that the Taxpayer] will be eligible for a performance and compensation review on 1 April 1996.' This accords with our finding that the earliest date on which any variation of the Taxpayer salary could have taken place (we remind the Taxpayer that we have made no finding on whether such variation took place) was 31 March 1996, a date after the Taxpayer had derived and was paid all the salary income in dispute.