Case No. D3/06

Salaries tax – refund of rent or financial assistance – intention of making payment – Inland Revenue Ordinance ('IRO') sections 9(1)(a) and 9(1A)(ii).

Panel: Andrew J Halkyard (chairman), Robin M Bridge and Kumar Ramanathan.

Dates of hearing: 28 September 2005 and 10 March 2006.
Date of decision: 7 April 2006.

At all relevant times, the appellant was employed by Company B as an aircrew officer. He received refunds of rent from his employer for the mortgage payments for the purchase of a boat through a private company owned by him and his wife. On 19 March 2001, Company B unilaterally changed the conditions of employment relating to the appellant's entitlement to housing benefit, essentially on a take it or leave it basis. On that date, Company B notified relevant employees including the appellant that they could not claim rental assistance but financial assistance in respect of leased property owned by a company in which they had an interest from the year of assessment 2001/02 onwards.

The issue is whether the sums paid by Company B to the appellant for the years of assessment 2001/02 and 2002/03 are allowances chargeable to salaries tax under section 9(1)(a) or refunds of rent under section 9(1A)(a)(ii) and assessed only on the rental value.

Held:

1. The test to determine whether a payment was a rental refund is to ascertain the intention of the parties as at the time of the payment by the employer. (CIR v Page) It is clear that Company B's intention was to pay the sums in dispute not as rent refunds but as financial assistance to subsidise the mortgage payments for purchase of the boat through a private company.

2. The Board found the sums in dispute are not exempt from salaries tax under section 9(1A)(a).

Appeal dismissed.

Cases referred to:

CIR v Page (2002) 5 HKTC 683
D30/92, IRBRD, vol 7, 299
D62/92, IRBRD, vol 8, 85
D34/96, IRBRD, vol 11, 497
D33/97, IRBRD, vol 12, 228
D18/99, IRBRD, vol 14, 204
D28/00, IRBRD, vol 15, 330
D140/00, IRBRD, vol 16, 29
D144/01, IRBRD, vol 17, 62
D38/04, IRBRD, vol 19, 304
D8/82, IRBRD, vol 2, 8
D19/95, IRBRD, vol 10, 157
D23/05, IRBRD, vol 20, 358

Taxpayer in person.
Wong Kai Cheong and Lai Wing Man for the Commissioner of Inland Revenue.

Decision:

1. The following facts, which we so find, were agreed by the parties.

(1) Mr A ['the Appellant'] has objected to the salaries tax assessments for the years of assessment 2001/02 and 2002/03 raised on him. The Appellant claims that certain sums received from his employer are refunds of rent which should be assessable in accordance with sections 9(1A)(a) and 9(2) of the Inland Revenue Ordinance ['IRO'].

(2) At all relevant times, the Appellant was employed by Company B as an aircrew officer. According to the 'Conditions of Service (1999)' effective from 1 July 1999 ['COS'] applicable to aircrew officers employed by Company B, the Appellant was entitled to, among others, the following benefit:

'**41. ACCOMMODATION AND RENTAL ASSISTANCE - EXPATRIATE OFFICERS**

41.1 [Company B] will provide Accommodation and Rental Assistance to Expatriate Officers. This is designed to assist Officers in renting suitable accommodation in Hong Kong.

41.2 …

41.3 …

41.4 Expatriate Officers will be provided with Accommodation and Rental Assistance in accordance with Company Policy.'

(3) On 2 July 1999, the Hong Kong Aircrew Officers' Association, on behalf of its members, entered into an 'Accommodation & Rental Assistance Policy Agreement' ['the Agreement'] with Company B which was attached to and formed part of the Appellant's conditions of service with Company B. The Agreement contained, among others, the following clauses:

'**1. LEGAL STATUS**

1.1 The parties hereto agree that this Agreement is intended to create a legal relationship and to be legally enforceable between the parties.

2. PERIOD OF VALIDITY

2.1 The Period of Validity of this Agreement is from 1 July 1999 to 30 June 2002.

...

4. RENTAL ASSISTANCE - EXPATRIATE JUNIOR FIRST OFFICER AND ABOVE

4.1 Accommodation and Rental Assistance levels are determined using a formula based on existing leases held by Expatriate staff employed by [Company B]. [Company B] reviews Accommodation and Rental Assistance levels biannually with changes becoming effective on 1 May and 1 November.

4.2 Officers may choose from the following levels:

a. Base Rate Level

i. The Base Rate Level effective 1 May 1999 is HK$24,000 per month.

ii. Officers receiving the Base Rate Allowance are not required to produce evidence of the type of accommodation rented. Should an Officer wish to declare a lease for taxation purposes, evidence of a

lease at or below the Base Rate Level will be required.

b. Rent Free Zone

i. The Rent Free Zone effective 1 May 1999 is HK$39,500 per month.

ii. The Rent Free Zone is calculated as the weighted average of eligible districts, less eight percent (8%) as an employee contribution, rounded up to the nearest HK$500. Leases held by Company Expatriate Staff with a commencement date of between eighteen (18) months prior to, and six (6) months after, the review date are considered provided that there is a minimum of eight (8) leases in a district. Leases with total rental above and below the Base Rate Level are included.

iii. [Company B] will pay the actual cost of accommodation for Officers whose rental is above the Base Rate Level but at or less than the Rent Free Zone.

...

5. HOME & BOAT OWNER/OCCUPIERS - EXPATRIATE JUNIOR FIRST OFFICER AND ABOVE

5.1 [Company B] will provide Officers with assistance to acquire a house or boat in Hong Kong for the sole purpose of use as their family residence.

5.2 The assistance, in the form of a cash allowance, is based on the actual monthly mortgage payment of the house or boat. The maximum amount available is equivalent to the Rent Free Zone in 4.2.b. The allowance so determined will remain unchanged for a period of two (2) years.

5.3 At the end of the two (2) year period, the allowance payable will be reviewed according to the mortgage payment prevailing at the time; subject to the limit of the applicable Rent Free Zone. In the same manner, the reviewed allowance will remain unchanged for the next two (2) years.

5.4 The monthly rental assistance will not be less than the Base Rate Level in 4.2.a even when the monthly mortgage payment is less than this amount.

5.5 At the end of the mortgage term, or a cumulative total of fifteen (15) years as an owner occupier, whichever is sooner, Officers will receive a fixed rental assistance equal to the Base Rate Level prevailing at the time. The 15 year period will count from the date that the Officer first became an owner occupier.

5.6 Officers are obliged to inform Housing Services Section immediately should there be any change in ownership of the house or boat.

5.7 A receipt for the actual purchase price of the house/boat will be produced at the time of joining the scheme. Should the house/boat be purchased through a service company, proof of ownership of the company must be produced at the same time. In addition, financing arrangements and any other relevant documents, as required by [Company B], must be produced at the start of the scheme and at review periods.

5.8 Application forms to join the scheme are available at the Benefits Services Centre and should be submitted to the Housing Services Manager.

...'

(4) The COS, the Agreement and the 'Housing Policy Handbook' issued by Company B in April 1998 set out in detail the terms and conditions of the Appellant's entitlement to housing benefits which may be amended from time to time.

(5) (a) Company C was a private company incorporated in Hong Kong on 5 August 1988. At all relevant times, the Appellant and his spouse, Ms D, were its only shareholders and directors, each holding one share of $1 each.

(b) On 28 October 1999, Company C purchased a vessel called Vessel E ['the Boat'] at a consideration of $2,200,000. At the material times, the Boat was registered with the Marine Department in the name of Company C as its owner and the Appellant was nominated as its 'licensed owner'.

(6) By an application dated 28 October 1999, the Appellant applied for housing assistance from Company B. The Appellant also requested Company B to deposit the 'rent' into the bank account of Company C. The application form showed that the Boat's address was Address F.

(7) (a) On 19 March 2001, following an internal review, Company B informed all its non-local employees in receipt of housing assistance the following background and changes in tax reporting for owner occupiers:

(i) '**Taxation Implications - Non-local Employees in Receipt of Housing Assistance**

In light of the recent Inland Revenue Board of Review case concerning payment of housing assistance, [Company B's] current practices and procedures for reporting to the Inland Revenue Department on employee housing reimbursement claims has been reviewed. As a result, some changes will be made to the taxation reporting in respect of the housing assistance paid to Lease Holders and Owner Occupiers.'

(ii) '**Owner Occupier (applicable to Expatriate Ground Staff and Cockpit Crew only)**

Background

The [Company B] Owner Occupier scheme provides for Housing Assistance payments based on the actual monthly mortgage payment for the house or boat up to the applicable Rent Free Zone (RFZ) allowance. Such Housing Assistance will be paid for a cumulative period of 15 years or until the end of the mortgage term, whichever is sooner, after which the amount of Housing Assistance reduces to the 'basic' allowance applicable at the time.

The IRD requires that all such applications need to be properly declared.'

(iii) '**The Changes in Tax Reporting by [Company B]**

In summary, in order to comply with IRD requirements, with effect from 1st April 2001, the housing allowance payable to employees who are Owner Occupiers, irrespective of whether they have service companies or not, will be reported by the company as a 'cash' allowance and will therefore be fully taxable.

These changes apply equally to Owner Occupiers who are receiving a monthly benefit based on actual mortgage payments and those Owner Occupiers receiving the "basic" allowance.'

(iv) '**Lease Holders (including Non-local Cabin Crew)**

Background

The rental assistance provided by [Company B] is based on the prevailing market rent of unfurnished accommodation up to the applicable Rent Free Zone (RFZ) or Rental Ceilings. For employees paying rent below the "basic" allowance, whether covered by a lease or not, the full amount of the 'basic' allowance is taxable.

Employees paying rent above the 'basic' allowance are accountable for the rental amount and are required to:

(1) Provide to [Company B] a copy of the properly signed and stamped Lease Agreement to substantiate their application for rental reimbursement within a period of 3 months from the commencement of the tenancy and inform [Company B] any subsequent changes in accommodation or rental payments within 30 days of such changes.

(2) Be responsible for ensuring the original lease agreement and rental receipts are ready for inspection by Hong Kong Inland Revenue Department and/or [Company B] at any time.'

(b) In its 'Housing Benefit Policy – Clarification' dated 19 March 2001 which was distributed to the employees concerned, Company B explained, among other things, that:

(i) 'Housing benefits will be paid by [Company B] to its employees, subject to eligibility and in accordance with [Company B's] policy and/or [COS] as appropriate. All forms of housing benefits provided by [Company B] to eligible employees are governed by the principle of reimbursement for actual rental paid or mortgage payments made, up to allowable limits, and the live-in requirement as set out below, except for employees who

do not submit a valid lease agreement and only claim the 'basic' allowance.'

(ii) '"Housing Benefits" refer to benefits of any nature which assist an employee or eligible spouse in renting accommodation or acquiring property. They include cash allowances with a housing element or which are paid in lieu of housing benefits, irrespective of whether the benefits are accountable or non-accountable, taxable or non-taxable.'

(iii) 'An employee may not claim rental assistance (as opposed to financial assistance if the employee is a house/boat Owner Occupier) in respect of leased accommodation owned by himself, his spouse and/or a relative of either himself or his spouse, or in which he, his spouse or any relative of himself for his spouse has an interest. … An "interest" is defined as (a) a beneficial interest under a trust; or (b) a direct or indirect interest in; or (c) being a director or shareholder of a company (other than a company the shares of which are quoted at The Hong Kong Stock Exchange) which (i) is the registered proprietor of the leased accommodation; …'

(iv) '[Company B] shall have the right and discretion to :-

(a) request and receive all relevant information and documents from the employee;

(b) recover any allowance overpaid to the employee from the employee's salary or any monies due for whatever reason to the employee or his estate from [Company B] in accordance with the Employment Ordinance;

(c) give exceptional approval;

(d) attach such conditions, if deemed necessary, while giving exceptional approval;

(e) amend, apply and interpret [Company B's] Housing Benefits policy as appropriate except where specific conditions apply in [COS].'

(8) In the 2001/02 Employer's Return filed in respect of the Appellant, Company B declared the following particulars of the Appellant's income:

Salary	$1,471,483
Education benefits	129,326
Allowance	521,823
	$2,122,632

(9) In his Tax Return for the year 2001/02, the Appellant declared that the rent paid by him in respect of the Boat was $660,000 while the amount of rent refunded to him by Company B was $466,354.84. The Appellant and his wife also elected joint assessment in the Tax Return.

(10) The Assessor raised on the Appellant the following salaries tax assessment for the year of assessment 2001/02:

Income per fact (8)	$2,122,632
Wife's income	102,728
	2,225,360
Less: Outgoings and expenses	2,750
Married person's allowance	216,000
Child allowance	90,000
Net chargeable income	$1,916,610
Tax payable thereon	$315,323

Note: The tax payable thereon was subsequently reduced to $312,323 after giving effect to the Tax Exemption (2001 Tax Year) Order.

(11) By letter dated 6 November 2002, the Appellant objected to the above assessment in the following terms:

(a) '… it appears that the rental reimbursement given by [Company B] to my Landlord has been charged as full Taxable Income, and not at the 10% of rental value as has always been the past. I am not aware of any changes to Inland Revenue department tax laws, and therefore consider [Company B] to be reporting my Income in a wholly unjust manner …'

(b) 'During the past years that I have been filing taxes in Hong Kong, the 10% of rental value method has been applied. This year there appears to be a different reporting method used by [Company B]. The previous years they have reported the housing allowance as "Rental Subsidy" on my pay slip, the tax year in question as "Housing Assistance", and yet on the Remuneration Return to your office they report it as "Other Allowance" and include it as taxable earnings. Either way you look at

the semantics of the wording, this "Other allowance" is actually Rental Subsidy and has always been so. It has not changed, and since the Taxation laws have not changed, this would appear to be unjust …'

(c) '[Company B] are still paying my Landlord the full rental of HK$55,000 and reimbursing me HK$38,000 as housing assistance …'

(12) In response to the Assessor's enquiries, Company B, by letter dated 3 December 2002, stated that it no longer required the Appellant to provide tenancy agreement and rental receipts for scrutiny before allowing him to receive the sum in question.

(13) By letter dated 6 March 2003, the Assessor wrote to the Appellant to state, among other things, the following:

' According to the information supplied by your employer, [Company B], you were not required to provide a tenancy agreement and rental receipts to [Company B] for scrutiny before the rental assistance were allowed to you. Thus, the monthly rental assistance amounted to $39,500 (from 1 April 2001 to 30 September 2001), $39,354.84 for the month of October 2001 and $38,000 (from 1 November 2001 to 31 March 2002) was given to you without any control and you were free to spend as cash allowance. Therefore, I am of the opinion that the rental assistance was an allowance within the meaning of income as defined in Section 9(1)(a) of the Ordinance and not a refund of rent for the purpose of Section 9(1A)(a) of the Ordinance…'

(14) By letter dated 24 March 2003, the Appellant put forward the following contentions:

(a) '[Company B] specifically required me to submit a tenancy agreement in order to receive the housing allowance in the first instance. This tenancy agreement was presented to them in November 1999, and is valid for 5 years until 27 October 2004. The agreement is a legal document, was specifically required and scrutinized by [Company B] for me to receive the allowance, and has been scrutinized and adjudicated by your own offices (Asst Collector of Taxes on 15 Nov 1999). Your very own offices have agreed the document concerned. … Since the tenancy agreement is still in force, and [Company B] still pays the housing allowance directly into the Landlord's Company, the original requirement to submit a tenancy agreement is still valid since it has not yet expired. [Company B] has not terminated this agreement and continues to honour it in its entirety.'

(b) '[Company B] housing regulations are quite explicit and are strictly controlled. I am not free to spend the housing allowance as I see fit at all. As I have already explained, the housing allowance is deducted at source and paid direct to the Landlord's account by [Company B]. [Company B] is therefore the one who controls both the payment amount, and the Landlord to whom it is paid. Should I terminate the current Rental Agreement, and/or move my place of dwelling in Hong Kong, [Company B] will withdraw the allowance. Should I decide to spend the allowance in ANY WAY other than direct to [Company C] for rental purposes, the allowance will be withdrawn, and I will be re-assessed. Should I not fulfill the Company requirements in any way, the allowance will be withdrawn. This is because the Rental Allowance is paid specifically to me for the sole purpose of the rental of one property only and that property is detailed in the legal document in the form of a Rental Agreement. I am therefore NOT free to spend this housing allowance as I see fit.'

(15) In the 2002/03 Employer's Return filed in respect of the Appellant, Company B declared the following particulars of the Appellant's income:

Salary	$1,606,455
Education benefits	267,299
Allowance	673,725
	$2,547,479

(16) In his tax return - Individuals for the year of assessment 2002/03, the Appellant declared that the rent paid by him in respect of the Boat was $522,000 while the amount of rent refunded to him by Company B was $456,000.

(17) The Assessor raised on the Appellant the following salaries tax assessment for the year of assessment 2002/03:

Income per fact (15)		$2,547,479
Less:	Charitable donations	100
	Outgoings and expenses	2,650
Net chargeable income		$2,544,729
Tax payable thereon		$381,709

(18) The Appellant objected against the above assessment. He submitted, through Messrs G, a copy of an agreement signed with Company C as the landlord for the letting of the Boat from 28 October 1999 to 27 October 2004.

(19) On divers dates, correspondence was exchanged amongst the Assessor, the Appellant and Company B in the determination of the nature of the housing assistance drawn by the Appellant.

(20) The Appellant's monthly payroll advice issued by Company B for the years of assessment 2001/02 and 2002/03 have the following descriptions:

(a) Year of Assessment 2001/02

Month / Year	'Rental Subsidy'	'Housing Assistance'	'Advance Rent Deduction'
	$	$	$
04/2001	39,500	-	55,000
05/2001	39,500	-	55,000
06/2001	-	39,500	55,000
07/2001	-	39,500	55,000
08/2001	-	39,500	55,000
09/2001	-	39,500	55,000
10/2001	-	39,354[(1)]	55,000
11/2001	-	38,000	55,000
12/2001	-	38,000	55,000
01/2002	-	38,000	55,000
02/2002	-	38,000	55,000
03/2002	-	38,000	55,000
	79,000[(2)]	387,354[(2)]	660,000

[(1)] : Rounded down from $39,354.84
[(2)] : $79,000 + $387,354 = $466,354

(b) Year of assessment 2002/03

Month / Year	'Housing Assistance'	'Advance Rent Deduction'
	$	$
04/2002	38,000	55,000
05/2002	38,000	55,000
06/2002	38,000	55,000
07/2002	38,000	55,000
08/2002	38,000	55,000
09/2002	38,000	55,000
10/2002	38,000	55,000
11/2002	38,000	55,000
12/2002	38,000	55,000
01/2003	38,000	55,000

02/2003	38,000	55,000
03/2003	38,000	55,000
	456,000	660,000

(21) On 17 December 2004, a determination pursuant to section 64(4) of the Ordinance was issued to the Appellant to confirm the 2001/02 and 2002/03 salaries tax assessments. The reasons for the determination were given as follows:

' (1) The issue for my determination is whether the amounts of $466,354 for the year 2001/02 and $456,000 for the year 2002/03 ["the Sums"] which were described by [the Appellant] as refunds of rent [Facts (9) and (16)] should be fully chargeable to Salaries Tax.

(2) Section 8 of [the Ordinance] provides that Salaries Tax shall be charged on income from employment. Section 9 of the Ordinance further provides that income from employment includes any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance. If the Sums are refunds of rent, section 9 (1A)(a) of the Ordinance deems such refunds not to be income. [The Appellant] would then be assessed to Salaries Tax in respect of the excess of the rental value of the Boat over the net amount of rent paid by him in accordance with sections 9(1)(b), 9(1A)(b) and 9(2) of the Ordinance. If the Sums are not refunds of rent but financial assistance to help [the Appellant] to acquire a residence, the full amount should be assessable to Salaries Tax by virtue of sections 8 and 9 of the Ordinance.

(3) On the facts before me, I am of the view that the Sums are not refunds of rent at the time of payment. Rather, they are financial assistances for acquiring a residence. In reaching these conclusions, I have had regard to the following :

(a) It is clear that the aim of the housing assistance provided by [Company B] to [the Appellant] is to help him to acquire a boat in Hong Kong for use as his residence, through a service company or otherwise [Fact (3)], rather than leasing a residence. The scheme enabled [the Appellant] to become an owner occupier. Subject to a limit known as Rent Free Zone, the assistance is initially based on the actual monthly mortgage payment [Fact (3)] rather than the rent purportedly payable by [the Appellant].

(b) [Company B] had categorically stated on 19 March 2001 that an employee could not claim rental assistance (as opposed to financial assistance if he was an owner occupier of the residence) in respect of a leased accommodation if he was a director or shareholder of the company which was the registered owner of the residence [Fact (7)(b)(iii)].

(c) [The Appellant] was not required to submit a copy of lease agreement or rental receipts for the years in question before obtaining the assistance [Fact (12)].'

(22) By a letter dated 17 January 2005, the Appellant appealed to the Board of Review against the determination pursuant to section 66(1) of the IRO.

2. To provide evidence of these facts, and to support their respective arguments, the parties also produced to us an agreed bundle ['AB', pp 1 – 211]. In addition, the Appellant produced a supplementary bundle ['RB', pp 1 – 30] and a single page document ['RB-2'].

The Representatives

3. At the hearing before us the Appellant was represented by his colleague, Mr H. The Commissioner was represented by Mr Wong Kai-cheong.

Statutory Provisions and Authorities

4. The parties referred us to the following provisions of the IRO: sections 8(1), 9(1), 9(1A), 9(2) and 68(4).

5. Section 8(1), the basic charging section for salaries tax, provides that salaries tax shall be charged on income from employment. Income from employment is defined in section 9(1). The definition, which is not exhaustive, provides:

'9(1) Income from any office or employment includes –

(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others,

(b) the rental value of any place of residence provided rent-free by the employer ….

(c) where a place of residence is provided by an employer … at a rent less than the rental value, the excess of rental value over such

rent …'

6. A place of residence shall be deemed to be provided by the employer for a rent equal to the difference between the rent payable or paid by the employee and the part thereof paid or refunded by the employer and such payment or refund shall be deemed not to be income. Specifically, section 9(1A) stipulates that:

> *'(a) Notwithstanding subsection (1)(a), where an employer …*
>
> *(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;*
>
> …
>
> *(c) a place of residence in respect of which an employer … has paid or refunded part of the rent therefor shall be deemed for the purposes of subsection (1) to be provided by the employer … for a rent equal to the difference between the rent payable or paid by the employee and the part thereof paid or refunded by the employer …'*

7. Section 9(2) provides that the rental value of any place of residence shall be deemed to be 10% of the income as described in section 9(1)(a) after deducting certain outgoings and expenses.

8. Both parties referred us to the following case and accepted the following proposition therefrom:

> CIR v Page (2002) 5 HKTC 683: the real test to determine whether a payment was a rental refund is to ascertain the intention of the parties as at the time of the payment by the employer.

9. Mr H also drew our attention to the following Board of Review decisions:

> D30/92, IRBRD, vol 7, 299
> D62/92, IRBRD, vol 8, 85
> D34/96, IRBRD, vol 11, 497
> D33/97, IRBRD, vol 12, 228
> D18/99, IRBRD, vol 14, 204

D28/00, IRBRD, vol 15, 330
D140/00, IRBRD, vol 16, 29
D144/01, IRBRD, vol 17, 62 [this was the Board of Review decision in Page's case]
D38/04, IRBRD, vol 19, 304

10. Mr Wong drew our attention to the following Board of Review decisions:

D8/82, IRBRD, vol 2, 8
D19/95, IRBRD, vol 10, 157
D23/05, IRBRD, vol 20, 358

The case for the Appellant

11. At the hearing before us, Mr H accepted that the Agreement (fact 3 refers) was legally binding on both the Appellant and Company B. By way of contrast, Mr H contended that Company B's memorandum dated 19 March 2001 and Company B's handbook headed 'Housing Benefit Policy – Clarification' (fact 7 refers), simply reflected unilateral decisions of Company B pertaining to taxation reporting and document procedures. Mr H queried the validity of these changes. He stated that the Appellant had not consented thereto, and noted that the COS and the Agreement had not been altered. In his concluding remarks, Mr H argued that Company B's changes to the COS in 1999 and the resultant repercussions should not be viewed as agreed by the Appellant; rather, they should be viewed as changes forced upon the Appellant.

12. Mr H noted that the Appellant's arrangements with Company B as well as the internal documentation the Appellant provided to Company B pursuant to its accommodation and rental assistance scheme had remained unchanged at all times. On this basis Mr H distinguished the previous case D23/05, IRBRD, vol 20, 358 relied upon by the Commissioner (where Company B was also the employer). Mr H stated that at no time during the years in dispute was the Appellant required to make any resubmission or further application to Company B for rental assistance under the scheme.

13. Mr H directed our attention to the fact that the Agreement distinguished between two groups, namely, leaseholders and owner occupiers. Within this distinction Mr H noted that there was another important dichotomy, namely, those receiving assistance that provided Company B with documentation and those receiving assistance that did not provide Company B with documentation. Where a leaseholder or owner occupier provided no documentation, that employee would only be entitled to a monthly base allowance of $24,000. Mr H accepted that an employee in this category simply received a cash allowance that was taxable since its use was uncontrolled. However, where a leaseholder or owner occupier provided documentation to Company B, the scheme provided for a payment of no less than the monthly base rate of $24,000 up to a maximum specified amount. This category applied to the Appellant, who received rental

refund or reimbursement, as distinct from a cash allowance, since its use was obviously controlled because it was paid upon the production of documents.

14. Mr H stressed that at all relevant times, and in accordance with Company B's accommodation and rental assistance scheme, the Appellant had leased the Boat from Company C and had sent to Company B at the commencement of the lease a properly executed lease adjudicated by the Stamp Office. Mr H reminded us that, again at all relevant times, the Appellant had a liability to pay rent to Company C and that Company B had directly handled the payments of rent made to Company C. This was evidenced by the Appellant's payroll slips which showed payments of 'Advance Rent Deduction' in the amount of $55,000 per month.

15. In this regard, Mr H pointed out that despite Company B's categorisation of the Appellant as an 'owner occupier' and receiving 'financial assistance' and not 'rental assistance' under the scheme, on the 26th of each month Company B deducted in advance an amount from his salary equal to the amount of his liability for rent under the declared lease provided to Company B. Company B then held these funds until the 1st day of the following month when it actioned the payment for rent in advance to Company C's nominated bank account. On the next payday, Company B then refunded in arrears an amount equal to the limit of the Appellant's assistance under the scheme. Mr H thus submitted that there was a direct relation between the amount paid by Company B under the scheme and the amount spent by the Appellant on housing.

16. From 28 October 1999 (the date of commencement of the lease) to 31 March 2003 (the end date of the year of assessment 2002/03), the documentation provided by the Appellant to Company B remained the same (in particular, the adjudicated lease submitted to Company B covered all this period). Mr H contended that the only thing that changed during the years in dispute was Company B's categorisation of the Appellant as an 'owner occupier' with a declared interest in the rented accommodation and its subsequent reporting to the Inland Revenue Department of the assistance as a cash allowance rather than as 'quarters provided' or 'rental assistance'. In Mr H's view, this change was simply one of form, not substance, and he urged us to respect the reality of the situation and reject the labelling. According to Mr H, the reality was that the assistance was administered, recorded and refunded in such a manner as to clearly be 'rental assistance'. In short, Mr H contended that, regardless of the label, the Appellant had a liability for rent (which he paid), and a contract of employment detailing an entitlement to reimbursement for rent (which Company B duly reimbursed and which was recorded as a rental refund).

17. Finally, Mr H argued that, at all relevant times, Company B's intent was to reimburse the Appellant for his rental liability to Company C and this was evidenced by robust controls and record-keeping requirements adhered to by Company B in its establishment and administration of the scheme and that Company B administered the Appellant's case as one of 'rental assistance'.

18. In summary, Mr H contended that:

1. The Appellant had managed his salaries tax liability prior to the years in dispute using the lawful means available to him in Hong Kong and that this had been accepted both by Company B and the Inland Revenue Department.

2. Action by Company B, in 1999, early 2001 and afterwards, relating to the Appellant's contractually entitled assistance, elicited a particular treatment of the assistance for taxation purposes, which disadvantaged the Appellant.

3. The Appellant was entitled to manage his tax affairs at his discretion within the boundaries set by the IRO, and should not be limited by Company B's imposed interpretation of that IRO.

4. Company B was not the final arbiter of the Appellant's lawful arrangements to manage his liability for salaries tax in relation to the assistance he received for accommodation and housing.

5. Company B's housing and accommodation scheme defined the minimum administrative requirements for assistance and reporting, and that scheme was therefore 'not limiting' of more extensive individual arrangements that a taxpayer may operate.

6. The Appellant was entitled to manage his taxation affairs relating to Company B's housing and accommodation scheme with arrangements of greater personal administrative burden, meeting the prerequisite requirements to have his assistance assessed as rent refund under sections 9(1A) and 9(2) of the IRO.

The case for the Commissioner

19. Mr Wong's basic argument was simply put – at the time of the payment of the amounts in dispute Company B's intention was not to pay a rental refund to the Appellant. Instead, Company B's intention at the time was to pay the Appellant, an owner occupier, financial assistance to subsidize his mortgage payments. In Mr Wong's submission, the payments in dispute were cash allowances fully taxable under section 9(1)(a).

Analysis

20. The issue for our decision is whether the sums of $466,354 and $456,000 paid by Company B to the Appellant respectively for the years of assessment 2001/02 and 2002/03 are allowances chargeable to salaries tax in terms of section 9(1)(a) or refunds of rent within the meaning of section 9(1A)(a)(ii). In the former case, the sums should be assessed in full. In the latter

case, the Appellant should be assessed only on the rental value of the place of residence provided to him by Company B in accordance with sections 9(1)(c), 9(1A)(c) and 9(2).

21. In Page's case, a decision of the Court of First Instance binding upon us, it was held that the test to determine whether a payment was a rental refund is to ascertain the intention of the parties as at the time of the payment by the employer. Specifically, in this case Recorder Edward Chan, SC held:

> '*7. The crucial question is what is the nature of the payment of the sum of $410,040. This is a question of fact. The starting point is of course the contract between the taxpayer and the employer. If by the terms of the contract, the payment was to be in the nature of rental refund, then plainly due weight must be given to the contractual provisions. However in my view, although the terms of the contract are an important and weighty factor, this is not the sole factor. This is because (a) the parties may by their conducts vary the terms of the contract; or (b) even if the conducts do not amount to a variation of the terms of the contract, the parties' conducts may be such that the payment is not made in strict accordance with the terms of the contract and so the payment may be of a nature different from what is provided for in the contract.*
>
> …
>
> *18. On the facts of the present case, the majority of the Board found that the payment of $410,040 by the employer was rent refund. The majority took the view that "the real test was the nature of the payment itself and this in turn depends on the intention of the parties at the time they entered into the contract of employment". While I agree that the terms of the contract is a very useful starting point and is a very weighty factor in deciding the nature of the payment, I think it would be wrong to say that the terms of the contract would be the sole test. Again while I agree that the intention of the parties is the real test, the relevant point of time is the time of the payment of the money by the employer and not the point of time when the parties entered into the contract of employment.*'

22. In his submission, Mr H drew our attention to the documents extracted at fact 7. He submitted that the general principle underlying Company B's accommodation and rental assistance scheme was encapsulated in the following statement:

> ' All forms of housing benefits provided by [Company B] to eligible employees are governed by the principal of reimbursement for actual rent paid or mortgage payments made, up to allowable limits, and the live-in requirement as set out below,

> except for employees who do not submit a valid lease agreement and only claim the "basic" allowance.'

23. Similarly, under the Agreement (fact 3 refers) Company B's policy was to provide a housing benefit to eligible employees by way of refunding amounts paid by them for accommodation. Such assistance could be by way of refund of rent or by way of refund of mortgage payments (and even, in this latter case, if a house or boat were purchased through a private company owned and controlled by the employee), in both cases capped at a maximum monthly amount. Thus, the question for our decision is – were the sums in dispute rental assistance in the form of rental refund or payments to assist in financing a mortgage to acquire a boat for use as a family residence?

24. It is common ground, as Mr H stated in his submission, that: '[Company B] had full control of the Scheme. The Appellant had no input to the daily running of the Scheme, its interpretation, or his classification within the Scheme.' Similarly, in an interview the Appellant attended with Company B's Employee Services Manager, Mr H told us the Appellant was informed that he was denied 'Rental Assistance … and insofar as [Company B] were concerned, the Appellant was unable to effect any change to the situation or circumstances'. Mr H also stated that during subsequent negotiations between Company B and the Hong Kong Aircrew Officers Association (of which the Appellant was a member), '[Company B] refused to discuss any review of its requirement to impose changes in Scheme categorization or reporting'.

25. In our view, Mr H's statements as well as his detailed submissions set out in the first paragraph of 'The Case for the Appellant' (both quoted above), showed the reality of this case very clearly. That is, on 19 March 2001 – a date just prior to the commencement of the year of assessment 2001/02 –Company B unilaterally changed the conditions of employment relating to the Appellant's entitlement to housing benefits, essentially on a take it or leave it basis. On that date, Company B notified relevant employees, including the Appellant, that they could not claim rental assistance in respect of leased property owned by a company in which they had an interest (fact 7 refers). Hence, it is clear that from the year of assessment 2001/02 onwards, Company B's explicit intention was that it would only provide financial assistance and not rental assistance to those employees who occupied a boat or property owned through a company in which they had an interest as director or shareholder. This was a clear change from the previous position and practice adopted by Company B and affected the Appellant's rights in an unambiguous manner.

26. For the sake of completeness we should add, particularly given Mr H's comprehensive submissions to us, that various internal Company B documents relevant to the period under appeal (including some, but not all, of Company B's letters to the Assessor) continued to refer to 'rent', 'lease', 'landlord', 'rental allowance' and 'rent payee' when describing the Appellant's housing benefits (see, for example, AB pp 203 – 210). These do provide support for the Appellant's claims. Other documents however, including the bulk of the Appellant's pay slips, the Appellant's application for 'housing assistance under the Owner Occupiers Housing Assistance Scheme' and Company B's Employer's Returns, point the other way. These referred to 'cash

allowance' and 'housing assistance' as distinct from 'rental assistance'. They do not provide support for the Appellant's claims. Looked at in the round, on the basis of the facts found and the documents produced to us, we find that there is ample evidence to conclude that with effect from 1 April 2001 only those employees who had no relevant interest in his or her corporate landlord were intended and treated by Company B as being entitled to rental assistance. The Appellant did not fall into this rental assistance category.

27. In conclusion, and notwithstanding the detailed and very well crafted submissions urged upon us by Mr H, stripped to its essence the issue before us narrowed to a small compass. Specifically, it is necessary and sufficient to decide this appeal simply by finding the intention of the parties when the amounts in dispute were paid. On the basis of the facts found, it is clear that Company B's intention during the period 1 April 2001 to 31 March 2003 was to pay the sums in dispute not as rent refunds but as financial assistance to subsidize the mortgage payments for purchase of the boat through a private company. The fact that the Appellant continued to pay rent to Company C under a stamped lease produced to Company B does not alter this conclusion. The payment deducted from his salary by Company B during the period in dispute was an application of funds after his entitlement to financial assistance as an owner occupier had been determined and separately paid. Furthermore, the inconsistency in Company B's nomenclature referred to in the previous paragraph does not persuade us to alter our finding that the nature of the amounts in dispute, determined at the time the payments were made, was financial assistance to purchase a boat as distinct from rental refund. This indicates confusion and lack of attention to detail, but is insufficient to justify a conclusion, in accordance with Page's case, that Company B's conduct altered the contractual nature of the payments so manifestly exhibited by the documents excerpted at fact 7.

28. It may not be of great comfort to the Appellant, but when considering our deliberations in this case we record that our sympathies were with him vis-à-vis the nature of his relevant contractual relations with Company B. Company B's 19 March 2001 memorandum and clarification of its housing benefit policy affected the Appellant's (and many of his colleagues') entitlement in a significant and substantive way, and yet he was hardly given any time to consider its implications. As Mr H intimated – it really was a case of 'take it or leave (it)'.

29. It does not matter, in our view, that this communication of Company B's changed conditions of employment took the form of a memorandum and that this was, as Mr H put it, the lowest form of contractual dealings. According to the Appellant's COS (1999), which are agreed to govern the Appellant's terms of service, Company B committed to providing 'Accommodation and Rental Assistance *in accordance with the company policy'* (emphasis added) and this was reflected by the very terms of the documents issued on 19 March 2001 (see particularly fact 7(b)(iv)(e)). In the result, Company B announced and then implemented a clear contractual change affecting the Appellant's entitlement to housing benefits. And, as we have found, that essentially was the end of the matter. At the end of the day it is for the employer to decide how to remunerate its staff and for the employee to decide what to do if he feels that his contractual rights have been

interfered with.

30. Finally, we note that the Appellant specifically disavowed any reliance upon the terms of section 9(1A)(a)(i). Mr H agreed, correctly in our view, that Company B did not want to have any liability to pay the Appellant' s rent and did not do so.

Conclusion and Order

31. On the facts found, and for the reasons expressed above, we conclude that the sums in dispute are not exempt from salaries tax under section 9(1A)(a). The appeal is hereby dismissed.

32. It is left for us to thank Mr H particularly, as well as Mr Wong, for assisting us and conducting this appeal in an exemplary manner.