Case No. D35/12

Salaries tax – appeal out of time – tenancy with mother as landlord – whether rental refund – sections 8, 9, 66 and 68(4) of the Inland Revenue Ordinance ('the IRO').

Panel: Chow Wai Shun (chairman), Chan Yue Chow and Ha Suk Ling Shirley.

Date of hearing: 16 August 2012.
Date of decision: 5 November 2012.

The preliminary issue

The Appellant was 20 days late in lodging her appeal. The preliminary issue is whether time should be extended for this appeal.

The substantive issue

For the years of assessment 2001/02 to 2006/07, six tenancy agreements were entered into between her mother as landlord and the Appellant as tenant. The Appellant paid 'rent' to the landlord, her mother.

The Assessor disputed the landlord and tenant relationship between the Appellant and her mother in that the Appellant was not provided with a place of residence by way of rental refunds. Additional salaries tax assessments were raised on the Appellant for the years of assessment 2001/02 to 2006/07.

The Appellant objected.

Held:

The preliminary issue

1. The Appellant was not prevented by illness or absence from Hong Kong and there has been no reasonable cause for the Board's discretion in favour of the Appellant to extend the time period.

The substantive issue (should extension of time be granted)

2. To succeed in this appeal, the Appellant must show that:

2.1 She had made payments as rent before she could have received any part of the Sums from her employers.

2.2 The necessary intent of both herself and her employer at the relevant time when any part of the Sums was paid to her.

3. The Board are not convinced that the Appellant had paid the rent. Any sum that had been paid by her to her mother could well be something else such as maintenance contribution, household expenses and/or mortgage repayment in respect of the Property.

4. Even if the Appellant had paid the rent to her mother, the Appellant fails to show that her employers intended at the time of payment, paid any part of the Sums as rental refund to her as:

4.1 From the terms of the Appellant's employment with her various employers, the Appellant was entitled to receive, and her employers were obliged to pay, the Sums irrespective of how much rent she had actually paid or even whether she had paid any rent at all.

4.2 The employers did intend to pay the Sums as either cash allowances or part of her salaries at the time of payments.

Appeal dismissed.

Cases referred to:

D41/05, (2005-06) IRBRD, vol 20, 590
Chan Chun Chuen v Commissioner of Inland Revenue, CACV 113/2011
D2/04, IRBRD, vol 19, 76
Chow Kwong Fai, Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D11/89, IRBRD, vol 4, 230
D3/91, IRBRD, vol 5, 537
D19/01, IRBRD, vol 16, 183
D33/07, (2007-08) IRBRD, vol 22, 791
D41/07, (2007-08) IRBRD, vol 22, 1023
D55/09, (2009-10) IRBRD, vol 24, 993
D33/97, IRBRD, vol 12, 228
D56/00, IRBRD, vol 15, 563
CIR v Peter Leslie Page [2002] 5 HKTC 683
Cheung Wah Keung v CIR [2002] 3 HKLRD 773
D77/99, IRBRD, vol 14, 528
D16/05, (2005-06) IRBRD, vol 20, 310

Taxpayer in person.
Ong Wai Man Michelle and Chan Siu Ying Shirley for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 19 August 2011 ('the Determination'). The notice of appeal of the Appellant dated 10 October 2011 was received by the Office of the Clerk to this Board on 20 October 2011. The Appellant stated in her notice and statement of the grounds of appeal that she would like to apply for the extension of the appeal period on the ground that she was in Hong Kong when the Determination was sent to her residence in Country A and she did not have access to it until she got back home towards the end of August.

The preliminary issue

2. The preliminary issue for this appeal is, therefore, whether the Appellant's patently late appeal could and should be entertained. This depends on whether the time period should be extended as permissible under the legislation. The Appellant gave oral evidence at the hearing.

Facts

3. The Appellant raised no dispute on the following facts and we find them as facts relevant to the preliminary issue of this case:

(a) The Appellant in her email sent on 18 March 2011 informed the Inland Revenue Department ('the IRD') to change her correspondence address to her residence in Country A ('the Postal Address').

(b) The Determination was sent to the Appellant under cover of a letter dated 19 August 2011 (referred to below as 'the Determination' and 'the Letter' respectively and 'the Packet' collectively). The Letter, in addition to enclosing the full text of the relevant provision of the Inland Revenue Ordinance ('the IRO') on lodging an appeal against the Determination, set out in detail the procedure and the time limit in so doing.

(c) The Packet was sent to the Appellant at the Postal Address by registered post on 19 August 2011 and was acknowledged receipt by the Appellant personally on 31 August 2011.

(d) On 20 October 2011, the Office of the Clerk to this Board received the Appellant's notice and statement of grounds of appeal dated 10 October 2011.

The statutory provisions

4. We find section 66 of the IRO relevant to the preliminary issue of this appeal which provides:

'*(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –*

(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts; or

(b) such further period as the Board may allow under subsection (1A),

either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.

(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1)....'

The Appellant's evidence

5. In her evidence, the Appellant said that she moved with her family first to Country B in 2007 and to Country A in late 2010. Because of her objection against the relevant assessments having been dragged on for quite some time and the last correspondence from the IRD was received during the first half of 2010, she did call the IRD for a reply after she emailed to change her correspondence address to the Postal Address in March 2011. She did so also particularly because she would be leaving her home in Country A from time to time during April to June 2011 and spending the summer holiday with her seven-year old child in Hong Kong.

6. The Appellant said that the first week of September 2011 was particularly hectic to her because she had to settle down and put her home back to the normal routine

after a long vacation while her son just started his new school term. Because the subject matter of this appeal touched upon several years of assessment and the Appellant had moved twice during the course it took her much time to review her papers and correspondence with the IRD.

7. In reply to questions posed by us, the Appellant said that the school hours of her son ran from 8:30a.m. to 3:20p.m.. They travelled to and back from school by car and each trip took roughly 30 minutes. She also informed us that in between the school hours she went to a few supermarkets for daily food and other household items. The Appellant also confirmed that she has a computer at home with internet access.

The Appellant's submission

8. In sum, the Appellant submitted that it had not been practicably possible for her to lodge her appeal in time because of her domestic circumstances. She even told this Board that she was hesitant whether she should persist on pursuing her case when the deadline for appeal was approaching. She pled that the delay was just for 10 days while her objection had been dragged on for years.

The Respondent's submission

9. The Respondent submitted that the time for lodging this appeal commenced to run on 1 September 2011. Relying on D41/05, (2005-06) IRBRD, vol 20, 590, the Respondent submitted that because the Office of the Clerk to this Board did not receive the Appellant's notice and statement of grounds of appeal until 20 October 2011, the appeal was late by 20 days. It is also the Respondent's submission that leave should not be granted to extend the time because (a) the Appellant made no claim of prevention by illness; (b) although the Appellant was not in Hong Kong during the appeal period she was not so prevented from lodging her appeal in time; (c) the Appellant should have attended to her tax matter with the same attention wherever she stayed and her own negligence of letting the time to overrun falls short of 'other reasonable cause'.

10. In the Respondent's submission, in addition to D41/05, the following cases were referred to us:

(a) Chan Chun Chuen v Commissioner of Inland Revenue, CACV 113/2011;

(b) D2/04, IRBRD, vol 19, 76;

(c) Chow Kwong Fai, Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687;

(d) D11/89, IRBRD, vol 4, 230;

(e) D3/91, IRBRD, vol 5, 537;

(f) D19/01, IRBRD, vol 16, 183;

(g) D33/07, (2007-08) IRBRD, vol 22, 791;

(h) D41/07, (2007-08) IRBRD, vol 22, 1023;

(i) D55/09, (2009-10) IRBRD, vol 24, 993.

Our Analysis

11. The Respondent's submission that the statutory time limit started to run on 1 September 2012 was unchallenged. We also agree with the Respondent's submission that the Appellant was 20 days late in lodging her appeal. The issue for us is whether time allowed should be extended for this appeal to at least 20 October 2011.

12. Under such circumstances, we find the following authorities cited by the Respondent relevant:

(a) In D3/91, this Board dismissed the appeal even though the delay was only one day. This Board said:

‘ *The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time.*'

(b) In Chow Kwong Fai v Commissioner of Inland Revenue, the taxpayer alleged that his lateness in filing an appeal to the Board was due to his misunderstanding of section 66(1) of the IRO. The Court of Appeal held:

i. that the word ‘prevented' is best understood to bear the meaning of the term in the Chinese language version of the subsection which means ‘unable to' and although providing a less stringent test than the word ‘prevent' imposes a higher threshold than a mere excuse;

ii. that ‘reasonable cause' cannot possibly be extended to cover unilateral mistakes made by a taxpayer. A unilateral mistake on the taxpayer's part cannot be properly described as a reasonable cause which prevented him from lodging a timely notice of appeal; and

iii. that if there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement of the IRO section 66(1A).

(c) In D11/89, this Board commented:

'*… The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed within the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.*

Furthermore, even if he had been prevented, he had no reasonable excuse because he had had more than sufficient time to put his house in order.'

(d) In D33/07, the taxpayer explained that his appeal was late because of his travelling for various reasons and that his household and personal effects were in storage. Rejecting the taxpayer's application, this Board said:

'*The Court of Appeal [in Chow Kwong Fai, Edward v Commissioner of Inland Revenue] held that section 66(1)(a) imposes a high threshold which is more than an excuse and as such the reasonable cause cannot possibly be extended to cover unilateral mistake made by the Taxpayer. We are of the view that time limits that are imposed must be observed. The authorities are clear in that various principles that have been laid down, clearly show that the mere fact that one is travelling or one's tax affairs are complex cannot be said to prevent a timely appeal being lodged within the normal one-month period. Again, the mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one-month period …*'

(e) In D41/07, this Board stressed:

'*The Taxpayer should have attended to her tax matter with the same attention whether she was residing inside or outside of Hong Kong.*

Soonest upon receipt of the Determination, she could have consulted her tax adviser. She could have also enquired the Clerk to the Board by telephone, facsimile or email. She should have sent in her notice of appeal with all specified accompanying documents to reach the Board within the one month time limit. Indeed, the Determination was

dispatched to the Taxpayer under cover of a detailed note explaining how to apply for an appeal with a full reprint of the relevant Section 66 of the IRO.'

(f) In D55/09, the Taxpayer contended at the hearing that he was fully aware as to the time period for appeal but felt entitled to sort out certain issues and receive clarification from the IRD to enable him to consider his response and file the notice of appeal. This Board held, among other things, that there is a difference between lodging an appeal and preparing for an appeal, and that the Taxpayer was fully aware as to the various issues set out in the Determination.

13. This Board is given by the IRO a power to extend the appeal period under section 66(1A) of the IRO. The provision is clear and restrictive. We can extend the time limit if we are satisfied that the Appellant was prevented by illness or absence from Hong Kong or other reasonable cause to have lodged the appeal in time.

14. We find no fact to support any proposition that the Appellant was ill. Although the Appellant was absent from Hong Kong during the appeal period, we do not find that she was so prevented from giving the notice of appeal within time. Indeed she has been residing outside Hong Kong for some time and she has left with the IRD the Postal Address, a correspondence address outside Hong Kong, for dealing with her tax matters.

15. Was the Appellant prevented by other reasonable cause? We can understand the time taken and the possible tension and stress that the Appellant might be facing on her return to Country A and preparation for the new school term for her son. However, even taking the first week of September 2012 out from calculating the statutory time limit, the Appellant was still at least 3 days late if she lodged her appeal to the Office of the Clerk to this Board by email on 10 October, the date of her notice of appeal.

16. The Appellant's another reason that it also took time for her to review the papers before she could prepare the notice does not help advance her case either. As suggested in D55/09, there is a difference between lodging an appeal and preparing for an appeal. The Appellant could and should have, as suggested in D41/07, enquired the Clerk to the Board by telephone, facsimile or email and by then sent in her notice of appeal with all specified accompanying documents to reach this Board within the one month time limit. In fact, as correctly pointed out by the Respondent's representative, there is not much difference between the Appellant's statement of grounds of appeal and the arguments raised during her objection. It should not have taken so much time as alleged by the Appellant to lodge her appeal. To us, the Appellant was well aware of the deadline but had not paid the attention she should have paid to this matter and so allowed the statutory time limit to have lapsed. If the Appellant may have any concern over the conduct of the Respondent in relation to the time of delivering the Determination, she will have to resort to another forum but not this Board.

Conclusion

17. We find no reasonable cause for exercising our discretion in favour of the Appellant to extend the time period. This could have put this case to its end. However, just in case we have erred in our decision above, the outcome of this appeal would have been the same as below.

The substantive issue

18. The Appellant raised two substantive matters in her notice and statement of the grounds of appeal: (a) additional dependant parent allowance ('ADPA'); and (b) rental value. In relation to her claim for ADPA, however, she stated that she did not object to the withdrawal of the allowance but she saw the basis for granting the ADPA generally unfair. She therefore made an appeal for the review of the provision. We confirmed with the Appellant during the hearing that she would not pursue the issue any further. We also explained to her that it is not within the jurisdiction of this Board to review and amend the law. As such, we dealt with the issue on rental value only.

Facts

19. The Appellant raised no dispute on the following facts and we find them as facts relevant to the substantive issue of this case:

(a) The Appellant objected to the additional assessments for the years of assessment 2001/02 to 2006/07 raised on her.

(b) By a letter dated 19 August 1997, Employer C employed the Appellant as Assistant Manager with monthly salary of $35,000. By a letter dated 22 March 2000, Employer C notified the Appellant promotion to Manager effective from 1 April 2000, and her monthly cash package increased to $45,500 which comprised salary, rental reimbursement and holiday allowance and she would be eligible for the tax effective scheme as detailed in section 4-5 of the Human Resources Manual with regard to Employer C's remuneration, rental and holiday passage reimbursement scheme.

(c) The relevant version of the Manual specified, among others, the following:

i. The cash package of employees who are eligible for the reimbursement scheme would comprise salary, rental and holiday passage reimbursement as follows:

Components of cash package	Percentage of monthly cash package
Salary	Minimum 50%
Rental & holiday passage reimbursement	Maximum 50%

ii. If the total rental and holiday passage reimbursement is less than the designated 50 per cent of the cash passage, the balance will be paid as a cash allowance and subject to salaries tax in the normal way.

iii. Clause 3.1 of the Manual provided that employees who wished to participate in the scheme should submit a copy of the stamped tenancy agreement upon participation or any change of tenancy agreement.

(d) For the year of assessment 2001/02 during which the Appellant was under employment with Employer C, she received $192,000 as 'rental'.

(e) By a letter dated 15 February 2002, Employer D (known as Company D at the date of the Determination) ('Employer D') employed the Appellant as Senior Manager of the Corporate Finance Department commencing from 15 May 2002 at a salary of $660,000 per annum plus bonus. Declaration of Liability made by the Appellant to Employer D on 25 March 2003 together with Claim for Housing Benefits in respect of the Property in which the following was declared:

'Relation with Landlord: Daughter of Landlord
Amount paid to Landlord
Rent, rates and management fee… Period in which payable
From 15 May 2002 to 31 March 2003 = HK$ 178,531.5*
……'

* Rent (inclusive of rates) = HK$16,000 per month of 10.5 months
* Management Fees – HK$1,003 per month of 10.5

(f) By employment agreement dated 10 June 2003, Employer E employed the Appellant as Director of Corporate Communication Department and Company Secretary (策劃傳訊部總監兼公司秘書) commencing from 10 June 2003 with remuneration including monthly salary of $34,000, monthly rental allowance at the maximum limit of $16,000 and double pay. It was also stated that if the actual rent paid was less than the maximum limit, the balance would be treated as the Appellant's salary. For the four years of assessment from 2003/04 to 2006/07 during which the Appellant was under employment with Employer E, she received $144,000, $192,000, $192,000 and $151,741 respectively as 'rental'.

(g) Various employers' returns and notifications received in respect of the Appellant for the relevant years of assessment reported that they provided the Appellant Flat F ('the Property') as her place of residence by way of whole refund of rent paid by the Appellant to her landlord.

(h) The Assessor raised the following assessments for the relevant years of assessment on the Appellant:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07
	$	$	$	$	$	$
Income						
Employer C	434,536	153,478	-			
Employer D	-	475,685	220,295	-	-	-
Employer E	-	-	1,574,582	2,423,875	557,800	8,517,783
Employer G	-	10,000	10,000	22,580	-	-
	434,536	639,163	1,804,877	2,446,455	557,800	8,517,783
Rental value [1]	43,273	47,375	34,474	47,500	55,480	-
Assessable Income	477,809	686,538	1,839,351	2,493,955	613,280	8,517,783
Less: Deductions	57,600	40,850	49,270	59,640	54,975	80,720
Net Assessable Income	420,209	645,688	1,790,081[3]	2,434,315[3]	558,308	8,437,063[3]
Less:						
Basic Allowance	108,000	108,000			100,000	
Dependant parent Allowance	30,000	30,000			60,000	
ADPA	30,000	30,000			60,000	
Net Chargeable Income	252,209	477,688			338,305	
Tax Payable thereon	32,375[2]	70,706	277,462[3]	389,490[3]	56,861	1,334,930[3]
	========	======	========	=========	======	=========

Notes

1. 2001/02: [$434,536 - $1,800 (outgoing and expenses)] x 10%; 2002/03: [$475,685 - $1,932 (outgoing and expenses)] x 10%;
   2003/04: [$372,082 - $2,270 (outgoing and expenses)] x 10%; 2004/05: [$478,000 - $3,000 (outgoing and expenses)] x 10%;
   2005/06: [$557,800 - $3,000 (outgoing and expenses)] x 10%
2. Pursuant to the Tax Exemption (2001 Tax Year) Order, the tax payable was subsequently reduced by $3,000 to $29,375.
3. Tax assessed at standard rate without allowances.

The Appellant did not object to the assessments.

(i) In 2008, the Assessor conducted a review on, inter alia, the Appellant's claim of the place of residence provided to her by her employers.

(j) The Appellant had resided with her parents, not in the Property, after getting married until April 2003 due to the outbreak of SARS.

(k) i. The Property was acquired by the Appellant's mother, Ms H, in her sole name on 15 May 2000 at a consideration of $2,780,000.

ii. The acquisition of the Property was financed partly by a mortgage loan of $1,946,000 obtained from Bank J payable by 360 monthly instalments of $14,963.06 each. The Appellant acted as borrower in the loans. In the mortgage, her mother was the mortgagor. Both

the Appellant and her mother were principals indicating their joint and several liability to Bank J.

iii. In the mortgage loan application signed by the Appellant and her mother on 8 January 2000, the usage of the Property was stated as 'owner occupied'. In the mortgage, the Appellant's mother agreed not to cause or permit any lease tenancy to be effected on the Property without the prior consent of Bank J.

iv. The mortgage loan was fully settled on 18 February 2006.

(l) Six tenancy agreements were entered into between her mother as landlord and the Appellant as tenant which showed, amongst others, the following:

Date of Agreement	Date of Stamping	Terms	Monthly Rental [1]	Management Fees	Deposit
08-04-2002 ('Tenancy I') [2]	09-04-2002	01-04-2001 – 31-03-2002	$16,000	-	-
22-03-2003 ('Tenancy II')	24-03-2003	15-05-2002 – 31-03-2003	$16,000	$1,003	$32,000
Undated ('Tenancy III') [3,4]	unstamped	01-07-2003 – 31-03-2004	$16,000	-	[blank]
21-12-2005 ('Tenancy IV') [2]	21-12-2005	01-04-2004 – 31-03-2005	$16,000	-	$16,000
21-12-2005 ('Tenancy V') [2]	21-12-2005	01-04-2005 – 31-03-2006	$16,000	-	$16,000
19-12-2006 ('Tenancy VI') [2]	19-12-2006	01-04-2006 – 15-01-2007	$16,000	-	$16,000

Notes

1. It was provided in Tenancies I to VI that monthly rent was payable in advance on the first day of each month.
2. The parties agreed that the landlord was responsible for payment of rates, government rent, management fee and all utilities charges including water and electricity.
3. The parties agreed that the landlord was responsible for payment of rates and government rent whereas the tenant was responsible for payment of lift service fees, water and electricity charges, cleaning fee and management fee.
4. The landlord provided the tenant with two water heaters and three air conditioners.

(m) The Appellant paid 'rent' to the landlord, her mother, as follows:

Month	Cheque No.	Month	Cheque No.	Month	Cheque No.	Month	Cheque No.	Month	Cheque No.
2002		**2003**		**2004**		**2005**		**2006**	
Apr	225262	Apr	225291	Apr	102528	Apr	102547	Apr	CASH
May	225265	May	225292	May	102529	May	102548	May	990465
Jun	225267	Jun	102512	Jun	102530	Jun	102552	Jun	990470
Jul	225270	Jul	102514	Jul	102531	Jul	102553	Jul	CASH
Aug	225272	Aug	CASH	Aug	102533	Aug	102554	Aug	CASH

Month	Cheque No.	Month	Cheque No.	Month	Cheque No.	Month	Cheque No.	Month	Cheque No.
Sep	225277	Sep	CASH	Sep	102534	Sep	102557	Sep	CASH
Oct	225280	Oct	102516	Oct	102536	Oct	102558	Oct	990475
Nov	225281	Nov	102518	Nov	102537	Nov	990444	Nov	990476
Dec	225282	Dec	102519	Dec	102538	Dec	990446	Dec	990482
2003		2004		2005		2006		2007	
Jan	225283	Jan	102521	Jan	102541	Jan	990449	Jan	990488
Feb	225285	Feb	102523	Feb	102544	Feb	990454		
Mar	225288	Mar	102527	Mar	102545	Mar	990461		

(n) Bank K copies of some of the cheques mentioned above and noted the amounts and dates stated on those cheques:

Cheque No.	Purported month of rent	Amount ($)	Date
225262	2002 Apr	33,000	25-04-2002
225277	Sep	33,000	23-09-2002
225288	2003 Mar	33,000	19-03-2003
225292	May	33,000	23-05-2003
102514	Jul	33,000	23-07-2003
102516	Oct	29,000	02-10-2003
102521	2004 Jan	35,000	05-01-2004
102530	Jun	33,000	06-06-2004
102533	Aug	33,000	03-08-2004
102544	2005 Feb	25,000	11-02-2005
102557	Sep	15,000	02-09-2005
990446	Dec	25,800	06-12-2005
990449	2006 Jan	25,000	15-01-2006
990470	Jun	16,200	06-07-2006
990475	Oct	16,200	06-10-2006
990488	2007 Jan	26,576	05-01-2007

(o) 57 rent receipts were issued by the Appellant's mother covering the periods from April 2001 to March 2002 and 15 May 2002 to 15 January 2007 which showed, amongst others, the following:

Date	Period covered	Rent ($)	Date	Period covered	Rent ($)	Management fees ($)
	2001			2002		
01-04-2001	Apr	16,000				
01-05-2001	May	16,000	15-05-2002	15-05 – 31-05	8,000	1,003
01-06-2001	Jun	16,000	01-06-2002	Jun	16,000	1,003
01-07-2001	Jul	16,000	01-07-2002	Jul	16,000	1,003
01-08-2001	Aug	16,000	01-08-2002	Aug	16,000	1,003

Date	Period covered	Rent ($)	Date	Period covered	Rent ($)	Management fees ($)
01-09-2001	Sep	16,000	01.09.2002	Sep	16,000	1,003
01-10-2001	Oct	16,000	01-10-2002	Oct	16,000	1,003
01-11-2001	Nov	16,000	01-11-2002	Nov	16,000	1,003
01-12-2001	Dec	16,000	01-12-2002	Dec	16,000	1,003
	2002			2003		
01-01-2002	Jan	16,000	01-01-2003	Jan	16,000	1,003
01-02-2002	Feb	16,000	01-02-2003	Feb	16,000	1,003
01-03-2002	Mar	16,000	01-03-2003	Mar	16,000	1,003
Total		192,000			168,000	11,033

Date	Period covered	Rent $	Date	Period covered	Rent $	Date	Period covered	Rent $
	2004			2005			2006	
30-04-2004	Apr	16,000	30-04-2005	Apr	16,000	01-04-2006	Apr	16,000
31-05-2004	May	16,000	31-05-2005	May	16,000	01-05-2006	May	16,000
30-06-2004	Jun	16,000	30-06-2005	Jun	16,000	01-06-2006	Jun	16,000
31-07-2004	Jul	16,000	31-07-2005	Jul	16,000	01-07-2006	Jul	16,000
31-08-2004	Aug	16,000	31-08-2005	Aug	16,000	01-08-2006	Aug	16,000
30-09-2004	Sep	16,000	30-09-2005	Sep	16,000	01-09-2006	Sep	16,000
31-10-2004	Oct	16,000	31-10-2005	Oct	16,000	01-10-2006	Oct	16,000
30-11-2004	Nov	16,000	30-11-2005	Nov	16,000	01-11-2006	Nov	16,000
31-12-2004	Dec	16,000	31-12-2005	Dec	16,000	01-12-2006	Dec	16,000
	2005			2006			2007	
31-01-2005	Jan	16,000	31-01-2006	Jan	16,000	01-01-2007	01-01 – 15-01	8,000
28-02-2005	Feb	16,000	28-02-2006	Feb	16,000			
31-03-2005	Mar	16,000	31-03-2006	Mar	16,000			
Total		192,000			192,000			132,000

(p) The rateable values of the Property at the relevant times were as follow:

Effective Date	Rateable Value ($)
01-04-2001	97,320
01-04-2002	94,320
01-04-2003	80,880
01-04-2004	72,000
01-04-2005	80,520
01-04-2006	86,880
01-04-2007	86,880

(q) The Assessor was of the view that, inter alia, the Appellant was not provided with a place of residence by way of rental refunds for the years of assessment 2001/02 to 2006/07 and accordingly raised on the Appellant additional salaries tax assessments for those years of assessment.

The statutory provisions

20. We agree with the Respondent that the following provisions of the IRO are relevant to the substantive issue of this appeal.

(a) Section 8 provides:

‘ *(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –*

(a) any office or employment of profit ……’

(b) Section 9 provides:

‘*(1) Income from any office or employment includes –*

(a) ……

(b) the rental value of any place of residence provided rent-free by the employer or associated corporation;

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

……

(1A) (a) 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;

(b) a place of residence in respect of which an employer or associated corporation has paid or refunded all the rent therefor shall be deemed for the purposes of subsection (1) to be provided rent free by the employer or associated corporation;

(c) a place of residence in respect of which an employer or associated corporation has paid or refunded part of the rent therefor shall be deemed for the purpose of subsection (1) to be provided by the employer or associated corporation 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 or associated corporation.

(2) The rental value of any place of residence provided by the employer or an associate corporation shall be deemed to be 10% of the income as described in subsection (1)(a) derived from the employer for the period during which a place of residence is provided after deducting the outgoings, expenses and allowances provided for in section 12(1)(a) and (b) to the extent to which they are incurred during the period for which the place of residence is provided…..'

(c) Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

21. In addition, section 15(1) of the Stamp Duty Ordinance ('SDO') provides that no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except criminal proceedings and civil proceedings by the Collector to recover stamp duty or any penalty payable under the SDO, or be available for any other purposes whatsoever, unless such instrument is duly stamped.

The Appellant's grounds of appeal and submission

22. As we understand from her grounds of appeal, the Appellant relied on the existence of a genuine landlord and tenant relationship between her and her mother. Specifically, she contended that:

(a) Tenancies I, II, IV and V were prepared and stamped. Tenancy III was mistakenly not stamped as she was then in business travelling to the Mainland.

(b) Her employers refrained from providing rental refunds after she had tendered her resignation. She continued to occupy the Property and paid rent to her mother in April 2002 and May 2003 even though there was no refund from her employers.

(c) There was a high degree of trust between the Appellant and her mother. Before the Appellant got married in March 2003, she paid the rent shortly after her payroll, around the 25th day of each calendar month. At

some point after her marriage, the Appellant paid rent in the early days of the month when her employer paid her payroll in the first week of the month.

(d) When exactly the rent was paid, who was going to pay the management fee and when the rental receipts were issued were trivial. The Appellant advocated that the tenancy relationship had been prejudiced at the very first place when there was kinship between the landlord and the tenant. There was, however, no such restriction in the relevant tax law.

(e) The Appellant's rental reimbursement package was bound by the limit set in the scheme offered by the employers. Throughout the years, she had earned more and the rent became relatively small amount as compared to her income.

23. In her reply, the Appellant repeated that the landlord and tenant relationship is real and genuine, not fictitious. She insisted that the amount she paid represented the market rent at the relevant times except for the year affected by SARS. She claimed that the rateable value as assessed by the Rating and Valuation Department has always been on the low side. She also alleged, without forwarding any proof, that her mother had the ability to pay off the mortgage without any assistance of the Appellant. The Appellant also said that she believed that an oral agreement was binding and a lease for not more than one year needed not be stamped. Furthermore, the Appellant alleged that it should have been the employers' obligation to have a control or supervisory mechanism in place to avoid retrospective or untimely refund to satisfy the requirement of the IRD and thus the employee should not be blamed for the absence of such mechanism.

The Appellant's oral evidence

24. The Appellant gave oral evidence at the hearing and was subject to cross-examination. We consider the following evidence relevant:

(a) In some instances, because she was not sure if the employer might provide rental refund, she only prepared the relevant tenancy agreement when such a confirmation of refund was obtained.

(b) She did not consider any circumstances which might have led to any possible request for change in 'rent'. In contrast, the Appellant said that at some time her mother raised to her to reduce her contribution to household expenses.

(c) At one point, the Appellant said that she was not required to pay any deposit for the tenancies but subsequently she said that she could not recall. As to refund of deposit, she said that was done by cash.

(d) When she was asked why the tenancy falling within the SARS period contained less favourable terms to her, the Appellant replied that it was because of change in circumstances which led to different terms.

(e) As to other related expenses such as management fees, the Appellant could not recall who actually paid for what.

(f) Regarding dates of payment and dates of receipts, the Appellant said that she paid when she received the payroll from her employer and the receipt was dated when her mother, the landlord, issued it.

The Respondent's submission

25. It was the Respondent's submission that the issue for us is whether the sums set out in paragraphs 19(d), (e) and (f) (collectively 'the Sums') are rental refunds in which case only the rental value was chargeable to salaries tax or they are income from employment which will be fully chargeable.

26. Specifically, the Respondent disagreed that the Sums are rental refund for the purpose of section 9(1A)(a)(ii) of the IRO. The Respondent disputed the landlord and tenant relationship between the Appellant and her mother. It was the Respondent's case that the parties did not intend to create any legally binding relationship or to discharge their respective legal obligations under the purported tenancies. The Respondent also argued that the purported tenancies contain features which would normally not be found under arm's length agreements. It was also the Respondent's submission that the alleged tenancies would have been in contravention of a clause under the mortgage unless the mother had obtained the consent of Bank J for leasing, for which no evidence was produced. In these regards, the Respondent cited in support D33/97, IRBRD, vol 12, 228 and D56/00, IRBRD, vol 15, 563.

27. It was also the Respondent's case that there had not been any payment of rent to the Appellant's mother, primarily because not all evidence match and thus corroborate. Further or alternatively, the Respondent submitted that the money paid by the employers was not intended as rental refund at the time of payment. In these instances, the Respondent relied on CIR v Peter Leslie Page [2002] 5 HKTC 683.

28. Lastly, the Respondent submitted that the purported leasing transactions were fictitious and should be discarded under section 61 of the IRO. On this point, the Respondent referred us to Cheung Wah Keung v CIR [2002] 3 HKLRD 773, D77/99, IRBRD, vol 14, 528 and D16/05, (2005-06) IRBRD, vol 20, 310.

Our analysis

29. In Peter Leslie Page, Mr Recorder Chan SC rejected the taxpayer's claim that his housing benefit provided by his employer was a refund of rent even though the taxpayer

had rented a property and incurred rental expenses. Specifically, he said:

> ‘ 17 … I agree with the notion that refund should mean “pay back” or “reimbursement”. Hence unless the taxpayer had made a payment as rent, there could be no question of his receiving any refund of rent from his employer. Likewise, if the employer merely made a payment to the employee without regard or reference as to whether the employee had made any payment of rent or not, it would be difficult to see how it could be said that the payment made by the employer could amount to a refund of rent paid by the employee. ... A “refund” of rent would connote that the person receiving the “refund” has already spent his own money to pay rent. …
>
> 18 …. While I agree that the terms of the contract is a very useful starting point and is 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.
>
> …
>
> 20 … 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 a property at a rent lower than the amount of housing benefit stated in the appendix. 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. …’

30. Thus, to succeed in this appeal, the Appellant must show to our satisfaction that she had made payments as rent before she could have received any part of the Sums from her employers. In other words, if what she had paid is not rent, the Sums will not qualify as refund. Even if what she had paid is rent, the Sums may still not qualify as refund unless the parties intended to be so at the time of payment. As such, the Appellant must also show to our satisfaction the necessary intent of both herself and her employer at the relevant time when any part of the Sums was paid to her. In circumstances where she was entitled to be paid any part of the Sums even though she had not made any payment of rent herself, it would be difficult to see how that part of the Sums could be a rental refund because there could be nothing in respect of which there could be a refund.

31. Had the Appellant paid rent? Rent is the consideration payable for and under a tenancy. All six purported written tenancies are not contemporaneously made (paragraph 19(l)). Except Tenancy III which was undated and unstamped (which according to section 15 of the SDO is inadmissible evidence), all were entered into after the tenancy terms had started. Tenancies I and IV were entered into even after the tenancy terms had expired while the rest shortly before the expiry of the terms. While a short-term tenancy of not more than three years needs not be in writing, proof of the existence of an oral tenancy will have to be supported by other evidence.

32. Would the cheques issued by the Appellant which were purported to be rental payments and/or the receipts issued by her mother support the existence of those tenancies albeit they were only reduced into writing at later dates?

(a) All the purported tenancies provided that the monthly rent would be paid in advance on the first day of each calendar month (paragraph 19(l), Note 1). However, the dates of the Appellant's cheques varied, some as late as towards the end of a month and in one occasion even in the following month (paragraphs 19(m) and (n)). Despite explanation given by the Appellant (paragraph 22(c)), we find it not unreasonable to hold that the parties' oral tenancies are not supported by the subsequent written records.

(b) Further or alternatively, none of the cheques was in the exact amount of the purported rent (paragraphs 19(n)). The Appellant claimed that her monthly payments to her mother also included her monthly maintenance contribution of either $17,000 or $9,000. However, she paid her mother the same sum of $33,000 in April 2002 and May 2003 notwithstanding that these periods were not covered by any written tenancy. The amount remained at $33,000 in September 2002 and March 2003 despite that under Tenancy II the Appellant was obliged to pay also the management fee of $1,003 per month. In fact, the amounts did vary; in two instances it was just $16,200 and in one occasion it was even as low as $15,000.

(c) The rental receipts are not contemporaneous records of rental payment (paragraphs 19(n) and (o)). Some of those receipts were issued even prior to the payment of the alleged rent. Tenancies I, IV, V and VI required the landlord to bear the water, electricity and miscellaneous charges but as found in one of the Appendices to the Determination the receipts covering the periods from 1 April 2001 to 31 March 2002 and 1 April 2004 to 15 January 2007 stipulated that water, electricity and cleaning expenses were borne by the tenant.

33. We further agree with the Respondent's submission that there are other dubious circumstances which cast doubt on the existence of a genuine landlord and tenant relationship between the Appellant and her mother.

(a) Tenancy I did not require the payment of rental deposit. Even though payment of rental deposit was required under other purported tenancies (excluding Tenancy III), there was no evidence to show that the Appellant had actually paid those deposits and/or her mother had refunded the same at the expiry of at least the last tenancy. The Appellant's assertion that such deposits were paid and refunded in cash cannot, in our view, address this query satisfactorily.

(b) Tenancy II commenced on 15 May 2002 when the Appellant commenced her employment with Employer D whereas Tenancy VI came to its end on 15 January 2007 when her employment with Employer E was terminated.

34. Given all these, we are not convinced that the Appellant had paid the rent. Any sum that had been paid by her to her mother, as the Respondent submitted, could well be something else such as maintenance contribution, household expenses and/or mortgage repayment in respect of the Property.

35. Even if we were wrong so that the Appellant had paid the rent, was there the required intent at the time of payment that the Sums were rental refund?

(a) The Appellant submitted Tenancy I to Employer C to support her claim of the purported rental refund of $192,000 for the year of assessment 2001/02. Tenancy I, however, was entered on 8 April 2002 after the expiry of the terms of the tenancy and was stamped on 9 April 2002. There was no evidence that the Appellant had submitted Tenancy I to Employer C upon her participation in the scheme or change of tenancy agreement (as stipulated in Clause 3.1 of the Manual of Employer C) prior to or on 1 April 2001. There was also no evidence to suggest that Employer C made the monthly payment (which was paid to the Appellant together with her salary on the same day of each month and the same happened in the cases of other employers below) on the basis of the rental receipts. As such, there was no basis at the time of payment of that part of the Sums on which Employer C could have made the payment as rental refund.

(b) On 25 March 2003, the Appellant submitted Tenancy II to Employer D for a similar claim covering the period from 15 May 2002 (which was also the date of commencement of her employment with Employer D) to 31 March 2003. Tenancy II, however, was entered on 23 March 2003 and stamped on the following day. The same analysis as above applies.

(c) Because of the inadmissibility of Tenancy III, the Appellant had to have showed to our satisfaction that Employer E, her employer during the year

of assessment 2003/04, made the monthly payment on the basis of the rental receipts. However, she had not done so.

(d) Tenancies IV and V were entered into and stamped on 21 December 2005 but the former covered the period of the year of assessment 2004/05 and the latter the following year of assessment 2005/06. However, Employer E, the Appellant's employer during the relevant period, reported the alleged housing allowance as rental refund in the employer's returns filed in respect of the Appellant for the year of assessment 2004/05 (that is, for Tenancy IV) on 27 April 2005. For Tenancy V, the same analysis as in sub-paragraph (a) applies.

(e) Tenancy VI was entered into and stamped on 19 December 2006 but covered the period from 1 April 2006 to 15 January 2007 (when her employment with Employer E came to its end). The same analysis as above applies.

36. In sum, the Appellant fails to show to our satisfaction that her employers intended at the time of payment paid any part of the Sums as rental refund.

37. In coming to this, we also find support from the terms of the Appellant's employment with her various employers.

(a) Under her employment with Employer C, the Appellant's monthly cash package comprised salary, rental reimbursement and holiday allowance. Section 4 to 5 of its Manual provided that Employer C would reimburse employees for payments made by them in respect of rental and holiday passage expenses up to a maximum of 50 per cent of their monthly cash package. If the total rental and holiday passage reimbursement were less than 50 per cent of the cash package, the balance would be paid as a cash allowance.

(b) Under her employment with Employer D, the Appellant's commencing salary was $600,000 per annum without any reference to housing benefits. Employer D stated in response to the enquiry from an assessor that at the time of employment, the Appellant had been told that she could claim housing allowance from her total remuneration.

(c) Under her employment with Employer E, the Appellant was entitled to housing allowance up to a maximum limit of $16,000 (which happened also to be the amount of the alleged rent). If the actual rent paid was less than this limit, the balance would be treated as the Appellant's salary.

In short, the Appellant was entitled to receive, and her employers were obliged to pay, the Sums irrespective of how much rent she had actually paid or even whether she had paid any

rent at all. It supports the Respondent's submission that the employers intended to pay the Sums as either cash allowances or part of her salaries at the time of payments.

38. Further, from the facts and evidence shown to us, it does not appear that the employers had ever carried into effect any sort of system or control to ensure that the Sums were in fact in the nature of a refund of rent paid by the Appellant. The Appellant's case is not, in our view, to any degree stronger than Peter Leslie Page even if she had paid rent under a tenancy. As such, we do not find it necessary to address any further the Respondent's submission on section 61 of the IRO.

Conclusion

39. On the basis of the above, we would find that the Sums were not rental refund for the purposes of sections 9(1) of the IRO and dismiss the appeal even if we extended the time for lodging this appeal.