

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D40/02

Salaries tax – section 9(1A)(a) of the Inland Revenue Ordinance ('IRO') – whether or not the sums in question were 'refunds' – whether or not the housing allowance is chargeable for tax.

Panel: Ronny Wong Fook Hum SC (chairman), Vincent Lo Wing Sang and Lily Yew.

Date of hearing: 26 March 2002.

Date of decision: 25 July 2002.

The appellant was employed by Company A at a monthly salary plus housing allowance payable in arrears in each month. The appellant asserted that Company A provided her with accommodation in Property 1 and she and Company A paid the registered owner of Property 1 in respect of the period between 1 June 1999 and 31 March 2000. The appellant submitted to the Revenue an alleged tenancy agreement between herself and Madam C in respect of Property 1 and a bundle of rental receipts. Madam C is the appellant's mother-in-law. The monthly rent was paid in cash.

The sole issue is whether the appellant is chargeable for tax in respect of the housing allowance provided in her favour under the employment contract.

Held:

The Board was not persuaded by the evidence adduced on behalf of the appellant that a tenancy in respect of Property 1 subsisted in fact between Madam C and the appellant. The Board was of the view that the sums in question were not 'refunds' under section 9(1A)(a) of the IRO (D8/82, IRBRD, vol 2, 8 and D19/95, IRBRD, vol 10, 157 considered).

Appeal dismissed.

Cases referred to:

D8/82, IRBRD, vol 2, 8

D19/95, IRBRD, vol 10, 157

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Fung Chi Keung for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

Background

1. By an employment contract dated 15 May 1999 ('the Employment Contract'), the Appellant was employed by Company A as its merchandise manager at a monthly salary of \$24,000 plus 'housing allowance' of \$10,000 payable in arrears in each calendar month.

2. By a return dated 10 May 2000, Company A reported to the Revenue the earnings of the Appellant for the period between 1 June 1999 and 31 March 2000 comprising of \$353,591 by way of 'Salary/wages' and \$38,696 by way of 'Bonus' making a total of \$392,287.

3. By her return dated 15 June 2000, the Appellant reported to the Revenue that her earnings from Company A for the period between 1 June 1999 and 31 March 2000 amounted in total to \$292,287. She asserted that Company A provided her with accommodation at Street B ('Property 1'). She further asserted that she and Company A paid the registered owner of Property 1 \$100,000 in respect of the period between 1 June 1999 and 31 March 2000.

4. In correspondence between the Revenue and Company A, Company A informed the Revenue that:

- (a) 'The coverage period [for the provision of quarter] is commenced from 1st April 1999 to present' and the rental in respect of Property 1 was paid by the Appellant (per letter dated 17 August 2000);
- (b) the housing allowance for the Appellant was \$10,000 per month and the Appellant 'had to submit the tenancy agreement and monthly rental receipt to the Company for verification purposes' (per letter dated 18 July 2001).

Company A did not respond to the Revenue's request dated 18 January 2002 for copies of all tenancy agreement(s) and monthly rental receipts submitted by the Appellant to them for the period from June 1999 to March 2001.

5. In response to inquiries from the Revenue, the Appellant:

- (a) submitted to the Revenue an alleged tenancy agreement dated 1 April 1999 ('the Alleged Agreement') between the Appellant and one Madam C in

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respect of Property 1. The Alleged Agreement was for a period of one year from 1 April 1999 to 30 March 2000 at a rental of \$10,000 per month.

- (b) informed the Revenue that Madam C is her mother-in-law and the monthly rent was paid to Madam C in cash (per letter dated 29 January 2001).
- (c) sent to the Revenue a bundle of rental receipts (per letter dated 15 August 2001). In her notice of appeal dated 15 December 2001, the Appellant asserted that 'Since [Madam C] in [*sic*] age 65, she requested someone to write out all 24 receipts in advance for her convenience. She would then give me the appropriate receipt when I gave her the rent. This was done purely for convenience and a mistake was made in the dates'.

6. Madam C and her husband purchased Property 1 as joint tenants on 24 April 1973 for \$70,000. They further purchased a flat at Street B ('Property 2') on 29 August 1989 for \$205,000. The Appellant married their son ('Mr D') in June 1997. Mr D holds another flat at Street B ('Property 3') which he purchased on 9 May 1988 for \$268,000.

7. The sole issue before us is whether the Appellant is chargeable for tax in respect of the housing allowance provided in her favour under the Employment Contract.

Evidence of the Appellant

8. She commenced renting Property 1 prior to her marriage.

9. She first rented Property 2. After her marriage she moved to Property 1 in 1999. Madam C and her husband remained in Property 2. Property 3 was used by Mr D's brother and his family.

10. She did not have the Alleged Agreement stamped as she thought such step was unnecessary in the absence of any dispute.

11. She submitted the Alleged Agreement and a rental receipt for April 1999 for Company A's consideration when she discussed the terms of her employment.

12. Madam C asked a friend to write out 24 rental receipts for her. As a matter of convenience, those receipts were prepared at one go. She did not pay Madam C rental on the dates depicted on those receipts. She would pay either by withdrawals from her bank account or by cash which she had with her.

13. The Revenue relied on an assessment of market rental prepared by the Commissioner of Rating and Valuation ('CRV') on 31 October 2001. The CRV expressed the view that the

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market rental for Property 1 as at 1 April 1999 was \$4,300 per month. The Appellant explained that she was prepared to pay \$10,000 per month as Property 1 was renovated for her use. Company A had provided her with housing allowance at the rate of \$10,000 per month. She was prepared to pay the same amount to Madam C as her mother-in-law.

The law

14. Section 9(1)(a) of the IRO provides that income from any office or employment includes any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance.

15. Section 9(1A)(a) of the IRO provides that 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’ .

16. In D8/82, IRBRD, vol 2, 8, the Board of Review pointed out that:

‘ To label a payment in addition to salary as a “housing allowance” or to split a taxpayer’s remuneration into two parts and call one part a “housing allowance” would not necessarily render that portion so described as exempt income. It is quite capable of falling into the category of a perquisite or allowance so as to be taxable by virtue of section 9(1) of the Inland Revenue Ordinance.

If a place of residence is not provided by the employer ... the taxpayer must be able to show that the sum he has received and claimed by him as a “housing allowance” is a rental refund, either wholly or in part, which would entitle him to such tax relief as mentioned in section 9(1A)(a), (b) or (c) of the Inland Revenue Ordinance’ .

17. In D19/95, IRBRD, vol 10, 157, the Board of Review observed that:

‘ the totality of [facts] indicates that the sums in dispute were cash allowances which were placed generally at the disposal of the Taxpayer by the Employer. The Employer was not concerned whether the payments were actually spent by the Taxpayer on housing. The fact that some amount of the payments for part of the period was used by the Taxpayer to occupy a hotel room and later to rent Property K is of no assistance to him. This cannot of itself convert a

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payment into a refund. We therefore conclude that the payments made to the Taxpayer were simply allowances which were properly subject to tax under section 9(1)(a)'.

Our decision

18. We are not persuaded by the evidence adduced on behalf of the Appellant that a tenancy in respect of Property 1 subsisted in fact between Madam C and the Appellant. Quite apart from the inadmissibility of the Alleged Agreement due to lack of proper stamping, the Appellant's case rests on self-serving documents without any independent proof. Given the circumstances whereby the alleged rental receipts came into existence, we place no weight on those documents bearing in mind the lack of any evidence such as bank statements evidencing regular withdrawals by the Appellant and regular deposits by Madam C of the alleged rental in question. We also accept the assessment by the CRV as to the market rental of Property 1 as at 1 April 1999. The alleged payment \$10,000 over and above the market rental of \$4,300 per month is no more than a fictitious and dishonest device to reduce the tax liability of the Appellant.

19. Even if we be wrong on our findings outlined in paragraph 18 above, we are of the view that the Appellant is not within the exception envisaged by section 9(1A)(a) of the IRO. Company A's correspondence with the Revenue indicates that Company A paid scant regard to the manner whereby the Appellant defrayed her housing allowance of \$10,000 per month. They erroneously asserted that such allowance commenced on 1 April 1999 when the employment did not start until 1 June 1999. Had the Appellant submitted tenancy agreement and rental receipt for their verification, Company A would have no difficulty in responding to the Revenue's letter of 18 January 2002. The Appellant asserted in her return dated 22 June 2000 that Company A paid the registered owner rental of \$100,000 which is manifestly untrue. For these reasons, we are not satisfied that the sums in question were 'refunds' under section 9(1A)(a).

20. For these reasons, we dismiss the Appellant's appeal.