INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/92

Salaries tax – government servant – provision of quarters – whether value of quarters should be assessed to salaries tax – section 9 of the Inland Revenue Ordinance.

Panel: Robert Wei Wen Nam QC (chairman), William Chan Wai Leung and Lester Kwok Chi Hang.

Dates of hearing: 9 December 1992 and 7 January 1993.
Date of decision: 24 February 1993.

The taxpayer was employed as an estate assistant in the housing department of the Hong Kong Government. He was required to live in departmental quarters which were supplied to him by his employer. He occupied the quarters with his wife and two children. The taxpayer argued, inter alia, that he was required to occupy the quarters by his employer for the purpose of performing his duties. The quarters provided by his employer were not a place of residence. The quarters were in effect a hostel. The taxpayer raised a number of further grounds of appeal which were based on alleged similar situations relating to other government servants and/or the value of the premises, etc.

Held:

The taxpayer occupied quarters provided by his employer which were liable to be assessed to salaries tax in accordance with section 9 of the Inland Revenue Ordinance.

Appeal dismissed.

Case referred to:

D46/89, IRBRD, vol 2, 447

May Chan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by an individual (the Taxpayer) against the salaries tax assessment raised on him for the year of assessment 1990/91 as revised by the

Commissioner of Inland Revenue in his determination dated 22 August 1992. He claims that he is not liable to pay salaries tax on the excess of the rental value of the quarters provided to him by his employer, the Hong Kong Government, over the rent at which the quarters were so provided and that in any event the rental value as calculated by the assessor was excessive.

2. At all relevant times the Taxpayer was employed by the Hong Kong Government as an estate assistant in the Housing Department. In 1977 he started working as an estate caretaker at the L Estate, but he continued to live in a public housing unit (on a tenancy for which he had applied as a member of the public) until 1979 when, as required by the Director of Housing, he vacated that unit and moved into departmental quarters. In December 1986, he was posted to work at the K Estate, and, as directed by the Director of Housing, moved into quarters at that estate (the K quarters). The K quarters consisted of two adjoining units and were at all relevant times occupied by the Taxpayer, his wife and two children. The subject of this appeal is the K quarters.

3. The Taxpayer's employment as an estate caretaker was, among other things, on terms that he was 'required to wear uniform, live in departmental quarters, work shifts and be on call outside working hours, and live and work in any part of Hong Kong as directed'.

4. This paragraph contains relevant provision of the Inland Revenue Ordinance and the Civil Service Regulations. Section 8(1) of the Ordinance provides:

> '8(1) Salaries tax shall, subject to the provision 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 …'

Section 9 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 …
>
> …
>
> (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 …
>
> …

(2) The rental value of any place of residence provided by the employer or an associated 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 …

Provided that:

(a) if such place of residence be a hotel, hostel or boarding house the rental value shall be deemed to be 8% of the income aforesaid where the accommodation consists of not more than 2 rooms and 4% where the accommodation consists of not more than one room;

(b) if such place of residence be other than a hotel, hostel or boarding house any person may elect to have …

…

(ii) in respect of the years of assessment commencing on or after 1 April 1983, the rateable value included in the valuation list prepared under section 12 of the Rating Ordinance (Cap 116) or, if the place of residence is not so included, the rateable value ascertained in accordance with part III of that Ordinance, substituted for rental value at 10% as aforesaid.

…

(6) For the purposes of this section:

…

'place of residence' includes a residence provided by an employer or an associated corporation notwithstanding that the employee is required to occupy that place of residence by or under his terms of employment and whether or not by doing so he can better perform his duties.'

The Taxpayer's employment was subject to the Civil Service Regulations (CSR). CSR 871(2) provides:

> ' A married officer directed to occupy an operational departmental quarter will pay no rent if:
>
> …
>
> (b) he or his spouse occupies a Local Officers' Co-operative Building Society flat as a member, or a Local Officers' Government Built Housing Scheme flat as an underlessee, or a public rental housing flat as a registered tenant ...'

5. The rental value of the K quarters for the year of assessment 1990/91 was calculated by the assessor at $8,687, being 10% of the excess of $87,870, the Taxpayer's income, over $1,000, his deductible outgoings. Rent paid by the Taxpayer for the K quarters for that year was $2,940.

6. The Taxpayer conducted the appeal in person. At the outset, the Taxpayer applied for an adjournment on the grounds that a document in the bundle of documents prepared by Miss Chan, the Commissioner's representative, for use in the appeal did not have a Chinese translation and that there were discrepancies between some other documents in the bundle and the Chinese translations. Miss Chan then stated that she was not going to rely on those other documents. The document without a translation, being page 001 of the bundle, was a memorandum dated 18 September 1986 from the Senior Housing Manager to the Housing Manager at the K Estate, notifying the latter that approval had been given for the allocation of the K quarters to the Taxpayer and that the allocation of the Taxpayer's previous quarters was cancelled. The memorandum had these enclosures: a form of undertaking in triplicate and a document entitled 'Estate Caretakers' Quarters – Notice and Conditions of Allocation. Copies of the enclosures were included in the bundle. The Taxpayer indentified his signature on the undertaking and agreed that he had received the Notice and Conditions. The chairman of the Board then announced the Board's decision to refuse the Taxpayer's application for an adjournment because (l) Miss Chan was not using any of the documents which he claimed were in some place not correctly or accurately translated, and (2) the untranslated memorandum was a relatively simple document which the chairman would explain to him. The Taxpayer dealt with his ground of appeal, and Miss Chan made a reply. The alleged translation discrepancies never became relevant; the parties used the bundle as an agreed bundle to which they freely referred in the course of their submissions. In addition to the grounds raised in his correspondence with the Commissioner of Inland Revenue and those contained in his notice of appeal dated 19 September 1992, the Taxpayer produced at the hearing two lists of further grounds and points. Barring repetitions, all those grounds and points may be reduced to the following arguments:

6.1 Argument 1 The Taxpayer was directed to occupy the K quarters; he had no choice in the matter. By reason of the compulsory nature of the occupation, the K quarters were not a place of residence provided by an employer within the meaning of section 9(l)(c). Furthermore, quarters were not provided unless they were better than the previous accommodation.

6.2 Argument 2 The main purpose in requiring the Taxpayer to occupy the K quarters was to facilitate the performance of his duties at the K Estate and not to confer a benefit on him. For this reason also, section 9(1)(c) did not apply to the occupation of the K quarters.

6.3 Argument 3 Normally the Taxpayer's residence was at another place where his mother lived as he had to look after her regularly. The K quarters were therefore not a place of residence within the meaning of section 9(1)(c).

6.4 Argument 4 The K quarters were not self-contained: the toilet was detached from the quarters which were just a room. The K quarters should therefore be treated as hostel accommodation under section 9(2)(a).

6.5 Argument 5 In 1979 when he was an estate caretaker at the L Estate, he was required by the Director of Housing to vacate the public housing unit and move into departmental quarters. Had he retained the public housing unit, he and his family would still have resided there when he was directed to occupy the K quarters in 1986, and CSR 871(2)(b) (see 4 above) would have applied to him as a registered tenant of a public rental housing flat, and he would have been exempted from paying rent for the K quarters and also from being assessed on their rental value.

6.6 Argument 6 The K quarters were of the third or fourth type of public housing flat and were considerably lower in grade than the standard quarters, but the Revenue treated the K quarters as if they were in the same grade as quarters for directors of departments by computing rental value at 10% of the income; that was unfair; the K quarters' value should be assessed by the Rating and Valuation Department, and not simply at 10% of the salary.

6.7 Argument 7 In his memorandum dated 30 November 1992 to the Commissioner of Inland Revenue, the Director of Housing stated that if the K quarters had been let to the public, monthly rental would have been charged as follows:

(1)	1-4-90 to 30-11-90	$418
(2)	1-12-90 to 31-3-91	$520

Thus the annual rental would have been $5,424 ($4l8 x 8 + $520 x 4); the Inland Revenue Department was wrong in computing the rental value at $8,687.

6.8 Argument 8 Tenants who lived in the same type of units as the K quarters only paid an annual rent of $6,228, but the Inland Revenue Department computed the rental value at $8,687.

6.9 Argument 9 A colleague and his family lived in departmental quarters in the K Estate; he was exempted from paying rent and from being assessed on the rental value.

6.10 Argument 10 If a postman uses government transport in performing his duties, is such use of the transport to be regarded as a benefit so that he has to pay for its hire and use?

7. We shall deal with the Taxpayer's arguments in the same order as they were set forth above, taking into account Miss Chan's submissions as we do so.

7.1 Argument 1 is precisely the opposite of section 9(6) which provides in effect that quarters are nevertheless a place of residence provided by an employer even though the employee is required (or directed) to occupy the quarters under his terms of employment and whether or not by doing so he can better perform his duties (see 4 above). Argument 1 therefore cannot succeed. Furthermore, we do not agree that quarters cannot be said to be provided unless they are better than previous accommodation; in our view, the quality of the quarters is irrelevant to the question whether they are provided within the meaning of section 9(1)(c).

7.2 Miss Chan's reply to Argument 2 may be summarised as follows: it is not a condition precedent to the application of section 9(1)(c) that the provision of quarters should confer a benefit on the employee (in fact the Taxpayer benefitted by occupying the K quarters as residence for himself and his family at a reduced rent (see 7.7 below)); further, section 9(6) makes it irrelevant whether or not by occupying the quarters the employee can better perform his duties (see 4 above). We accept her submissions.

7.3 As for Argument 3, we agree with Miss Chan where she submitted that a place of residence is the dwelling and home where a man is supposed usually to live and sleep, citing D46/89, IRBRD, vol 2, 447. Both the Taxpayer and his wife declared in their salaries tax returns that their residential address was the K quarters; the employers of the wife stated in their employers' returns that her residential address was the K quarters; the Housing Department confirmed by memo to the Commissioner of Inland Revenue that they did not have any record of the Taxpayer maintaining another place of residence. Furthermore, the Taxpayer in his letter dated 9 April 1992 to the Commissioner of Inland Revenue stated that he visited his mother's residence (which was owned by his brother) whenever he was on leave and sometimes stayed for the night. We have no doubt that the Taxpayer usually lived and slept, not in his mother's residence, but in the K quarters.

7.4 Argument 4 turns on the meaning of 'hostel'. Miss Chan submitted that 'hostel' is a building in which certain types of person can live and eat, as for students, young people working away from home, etc, citing the Longman English-Chinese Dictionary of Contemporary English; she also pointed out that there is no landlord and tenant relationship between a hostel and its guests, while the Taxpayer had such a relationship with the Housing Department. We accept her submissions.

7.5 Argument 5 rested on the supposition that the Taxpayer had retained his public housing unit; but, as Miss Chan pointed out, in fact he no longer occupied that unit in 1986 when he was directed to occupy the K quarters; it follows that CSR 871(2)(b) did not apply to his occupation of the K quarters. The Taxpayer complained about being forced to vacate

the public housing unit, and said it was unfair. That is a matter between him and the Housing Department over which we have no jurisdiction; this appeal concerns his tax obligations under section 9(1)(c), and not any rights which he might have had if CSR 871(2)(b) had applied.

7.6 As for Argument 6, our view is that quarters of whatever grade, so long as they are a 'place of residence', are liable to be assessed for rental value in accordance with section 9(1) and (2). This is a matter of interpretation of statutory provision; questions of fairness or otherwise do not arise. In any event, we do not see any unfairness about rental value being related to a stated percentage of income. As for an assessment by the Rating and Valuation Department, section 9(2)(b) provides:

> ' if such place of residence be other than a hotel, hostel, or boarding house any person may elect to have:
>
> …
>
> (ii) ... the rateable value included in the valuation list prepared under section 12 of the Rating Ordinance (Cap 116) or, if the place of residence is not so included, the rateable value ascertained in accordance with part III of that Ordinance, substituted for rental value at 10% as aforesaid.'

There is no right to elect unless there is a rateable value as described in (ii) above. On 5 November 1992, the Commissioner of Inland Revenue wrote to the Commissioner of Rating and Valuation for the rateable value of the K quarters for the year 1 April 1990 to 31 March 1991 under section 12 of the Rating Ordinance or the rateable value ascertained in accordance with part III of that Ordinance. On 10 November 1992, the Commissioner of Rating and Valuation replied: 'There is no rating assessment for the above two units (that is, the K quarters) since they are estate caretakers' quarters. The notional rateable value in respect of each unit for the year of assessment 1990/91 is $9,960.' A question arises as to whether the notional rateable value is the rateable value within the meaning of section 9(2)(b)(ii). If it is, then, as Miss Chan pointed out, it is disadvantageous for the Taxpayer to elect. However, we are inclined to the view that there is no rateable value within the meaning of section 9(2)(b)(ii), and that no election can arise.

7.7 Argument 7 does not demonstrate that the assessor's computation of the rental value was wrong. The rent of $2,940 paid by the Taxpayer for the year in question was considerably lower than the rent which would have been charged had the K quarters been let to the public; as Miss Chan pointed out, the Taxpayer in fact benefitted by the reduced rent.

7.8 As for Argument 8, the alleged annual rent of $6,228 paid by tenants of same type of units as the K quarters was not proved. Even assuming that it is true, it does not show that the assessor's computation was wrong.

7.9 The allegation raised in Argument 9 was not proved. As pointed by Miss Chan, each case must be judged on its own facts. The Taxpayer's colleague's case is of no assistance to this appeal.

7.10 The rhetorical question posed by Argument 10 expects a 'No' answer, but that is of no help to the Taxpayer. The example of the postman is not an apt one: The Taxpayer used the K quarters, not just to facilitate the performance of his duties, but also as a residence for himself and his family. Further, and more importantly, questions of tax liability and computation can only be resolved by applying the relevant tax law.

8. The revised assessment in question was on the basis that a place of residence was provided by the Housing Department, the employer, to the Taxpayer, the employee, during the year of assessment 1990/91 at a rent less than the rental value. It is for the Taxpayer to prove that the revised assessment is incorrect or excessive. On the view we take of his grounds of appeal, he has failed to do so. It follows therefore that this appeal is dismissed and that the revised assessment is hereby confirmed.