

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/00

Salaries tax – whether housing allowance or rent refund – whether transaction artificial or fictitious – Inland Revenue Ordinance (‘IRO’) sections 8(1), 9(1A) and 61.

Panel: Anna Chow Suk Han (chairman), Winnie Kong Lai Wan and Kenneth Graeme Morrison.

Date of hearing: 10 May 2000.

Date of decision: 11 September 2000.

The taxpayer was employed by Company B for the years of assessment 1996/97 and 1997/98. Madam D is the taxpayer’s wife and she let a property to the taxpayer at \$30,000 per month by two tenancy agreements for the two years. Company B refunded the rent to the taxpayer in accordance with the employment contract.

The taxpayer appealed against an assessment to salaries tax for the year of assessment 1996/97 and an assessment to additional salaries tax for the year of assessment 1997/98 raised on him as the housing allowances should not be included as part of his assessable income and represented rental refunds which were only subject to tax at a beneficial rate.

Held:

1. The Board found the taxpayer and Madam D did not intend to create legally binding agreements between them in respect of the property nor did they intend to discharge their respective legal obligations under the two written agreements. There was no landlord - and - tenant relationship existed between the taxpayer and Madam D.
2. Even accepting that there was a landlord - and - tenant relationship and there were payments of rent, the payment of housing allowance by Company B to the taxpayer was not refund of rent but was payment of cash allowance because there were no provisions in the letter of appointment that the housing allowance was refundable or that it was not payable, if housing expenses were not incurred by the taxpayer.

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Obiter:

The two tenancy agreements were artificial and fictitious as it had no basis in ordinary family affairs and the taxpayer and Madam D never intended that the agreements should be carried out.

Appeal dismissed.

Cases referred to:

CIR v Douglas Henry Howe [1997] HKLR 436
D8/82, IRBRD, vol 2, 8
D62/92, IRBRD, vol 8, 85
D19/95, IRBRD, vol 10, 157
D92/95, IRBRD, vol 11, 173
D33/97, IRBRD, vol 12, 228
D18/99, IRBRD, vol 14, 204
D44/92, IRBRD, vol 7, 324

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Mr A (‘ the Taxpayer’) against an assessment to salaries tax for the year of assessment 1996/97 and an assessment to additional salaries tax for the year of assessment 1997/98 raised on him. He claims that the housing allowances of \$324,000 and \$332,100 should not be included as part of his assessable income under section 8(1)(a) and section 9(1)(a) of the IRO in that they represented rental refunds which were subject to tax at a beneficial rate.

The background

2. The Taxpayer was an employee of Company B during the two years of assessment 1996/97 and 1997/98.

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3. Company B furnished the Revenue employer's returns of remuneration and pensions for the years ended 31 March 1997 and 31 March 1998, in respect of the Taxpayer. The returns showed, inter alia, the following particulars:

Year ended	:	31 March 1997	31 March 1998
Capacity in which employed	:	S. Manager-Proj. (PRC)	S. Manager-Proj. (PRC)
Period of employment	:	1-4-1996 – 31.3.1997	4-4-1997 – 31-3-1998
Income		\$	\$
Salary	:	1,004,250	737,850
Bonus	:	105,440	171,310
Allowances or Perquisites	:	<u>36,000</u>	<u>36,000</u>
Total	:	<u><u>1,145,690</u></u>	<u><u>945,160</u></u>
Quarters provided		Not provided	Provided
Address	:	---	a flat in District C (' Property 1')
Rent paid to landlord by employee	:	---	\$360,000
Rent refunded to employee	:	---	\$332,100

4. In his tax return – individuals for the year of assessment 1996/97, the taxpayer declared the followings:

(a) Income from Company B was \$777,474.

(b) Quarters

Address of quarters	:	Property 1
Nature	:	Flat
Name of employer providing quarters	:	Company B
Period	:	1-4-1996 to 31-3-1997
Rent refunded to employed	:	\$360,000

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by employer

5. The Taxpayer provided the following documents in support of his returns:
 - (a) Company B office memorandum dated 9 July 1986 stating its policy on payment of housing allowance.
 - (b) Letter of appointment dated 17 February 1995 from Company B to the Taxpayer (‘ Letter of Appointment’).
 - (c) Tenancy agreement dated 15 April 1995 (‘ the 1995 Tenancy Agreement’).
 - (d) Tenancy agreement dated 16 May 1996 (‘ the 1996 Tenancy Agreement’).
 - (e) Copies of receipts for rental payments of Property 1 during the year ended 31 March 1997.

6. According to Company B’ s Letter of Appointment, the Taxpayer was entitled to a housing allowance of \$27,000 per month and a utilities allowance of \$3,000 per month.

7. Madam D is the Taxpayer’ s wife. By an agreement for sale and purchase dated 28 March 1995, Madam D acquired Property 1 at a consideration of \$5,830,000. Property 1 was subsequently assigned to Madam D on 6 July 1995.

8.
 - (a) The 1995 Tenancy Agreement has shown that Property 1 was let by Madam D as landlord to the Taxpayer as tenant for the period from 24 April 1995 to 15 May 1996 at a rent of \$30,000 per calendar month.
 - (b) The 1995 Tenancy Agreement was also stamped on 7 June 1996.

9.
 - (a) The 1996 Tenancy Agreement has shown that Property 1 was let by Madam D as landlord to the Taxpayer as tenancy for the period from 16 May 1996 to 15 May 1998 at a rent of \$30,000 per calendar month. The rent was to be paid in advance without any deduction whatsoever on the sixteenth day of each and every calendar month first of such payments to be paid on the signing of the Tenancy Agreement.
 - (b) The 1996 Tenancy Agreement was stamped on 7 June 1996.

10. The Taxpayer produced copies of receipts showing the dates and mode of payment of rent for Property 1 during the year ended 31 March 1997. According to those receipts, the payments were made in cash with the following particulars:

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Receipt no	Date	Amount \$
004/96	1-4-1996	30,000
005/96	1-5-1996	30,000
006/96	1-6-1996	30,000
007/96	1-7-1996	30,000
008/96	1-8-1996	30,000
009/96	1-9-1996	30,000
010/96	1-10-1996	30,000
011/96	1-11-1996	30,000
012/96	1-12-1996	30,000
001/97	21-2-1997	90,000
		(being rental payment for 1-1-1997 to 31-3-1997)

11. The assessor raised on the Taxpayer the following salaries tax assessment:

Year of assessment 1996/97

	\$
Assessable income	1,145,690
Tax payable thereon*	171,853

* Tax assessed to standard rate

12. The Taxpayer objected to the salaries tax assessment for year of assessment 1996/97 on the grounds that his assessable income should only be \$777,474 after deducting the housing allowances of \$360,000.

13. In his tax return – individuals for the year of assessment 1997/98, the Taxpayer declared the following:

(a) Income

Income	\$
Salary	737,850
Bonus	171,310
Utility allowance	<u>36,000</u>
Total	<u>945,160</u>

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(b) Quarters

Address of quarters : Property 1
 Nature : Quarter
 Name of employer providing quarters : Company B
 Period : 1-4-1997 to 31-3-1998
 Rent refunded to employee by employer : \$332,100

14. (a) The assessor raised on the Taxpayer the following salaries tax assessment:

Year of assessment 1997/98

	\$
Income	945,160
Quarters value	<u>66,616</u>
Total assessable income	<u>1,011,776</u>
 Tax payable thereon*	 <u>151,766</u>

The Taxpayer did not object to this assessment and the assessment became final and conclusive in terms of section 70 of the IRO.

(b) Upon further enquires, the assessor was of the opinion that the 1996 Tenancy Agreement should be disregarded and the housing allowances received by the Taxpayer from Company B should be treated as cash allowances and assessed in full. He raised on the Taxpayer the following additional salaries tax assessment for year of assessment 1997/98:

	\$
Assessable income**	1,277,260
 Tax payable thereon*	 191,589
<u>Less : Tax previously assessed</u>	<u>151,766</u>
Additional tax payable	<u>39,823</u>

* Tax assessed at standard rate

	\$
** Income	945,160
Rent refunded to employee	<u>332,100</u>

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Assessable income 1,277,260

15. The Taxpayer objected to the additional salaries tax assessment for year of assessment 1997/98. He objected to the assessment on the ground that the assessor did not accept the quarters arrangement.

16. In reply to the assessor's enquiries, the Taxpayer provided copies of receipts for rental payments of Property 1 during the year ended 31 March 1998. Those receipts all bearing the same number showed that the payments were made in cash. They also showed the following particulars:

Date	Amount (\$)
1-4-1997	30,000
1-5-1997	30,000
1-6-1997	30,000
4-7-1997	30,000
1-8-1997	30,000
1-8-1997	30,000 (rental payment for September 1997)
1-10-1997	30,000
1-11-1997	30,000
1-12-1997	30,000
1-1-1998	30,000
6-2-1998	30,000
6-3-1998	30,000

17. In response to the assessor's enquiries as to the documents in support of the payments, the Taxpayer provided copies of a bank passbook. The following transactions were highlighted by the Taxpayer in support of the payments:

Date	Withdrawal amount	In payment for
	\$	
29-3-1996	71,000	Rent for April 1996
26-4-1996	82,400	Rent for May 1996
31-5-1996	85,500	Rent for June 1996
27-6-1996	27,000 (plus cash in hand)	Rent for July 1996
27-7-1996	65,000	Rent for August 1996
29-8-1996	75,500	Rent for September 1996
27-9-1996	81,000	Rent for October 1996
28-10-1997	68,000	Rent for November 1996
28-11-1996	82,500	Rent for December 1996
14-2-1997	180,000	Rent for January 1997 to March 1997

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26-3-1997	75,000	Rent for April 1997
26-4-1997	76,920	Rent for May 1997
28-5-1997	60,000	Rent for June 1997
4-7-1997	80,000	Rent for July 1997
1-8-1997	105,611.65	Rent for August 1997 and September 1997
29-9-1997	120,000	Rent for October 1997
30-10-1997	57,000	Rent for November 1997
28-11-1997	30,000	Rent for December 1997
29-12-1997	28,000 (plus cash in hand)	Rent for January 1998
2 & 6-2-1998	18,000 & 20,000	Rent for February 1998
6-3-1998	40,000	Rent for March 1998

18. In correspondence with the assessor, Company B provided the following information:

Year of assessment 1996/97

(a) The income reported in paragraph 3 above was made up of the following:

	\$
Basic salary	
1-4-1996 – 31-12-1996 : \$55,440 x 9 =	498,960
1-1-1997 – 31-3-1997 : \$30,430 x 3 =	181,290
Housing allowances	
1-4-1996 – 31-3-1997 : \$27,000 x 12 =	<u>324,000</u>
Total	<u><u>1,004,250</u></u>

(b) The amount of allowance or perquisites of \$36,000 reported in paragraph 3 above was utilities allowance which was at \$3,000 per month.

(c) The office memorandum dated 9 July 1986 has stated Company B' s policy on payment of housing allowance.

(d) The Taxpayer did not submit any documents to Company B in respect of the housing allowance.

Year of assessment 1997/98

(e) The income reported in paragraph 3 above was made up of the following:

	\$
Basic salary	

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1-4-1997 – 31-12-1997	: \$60,430 x 9	=	543,870
1-1-1998 – 31-3-1998	: \$64,660 x 3	=	<u>193,980</u>
Total			<u><u>737,850</u></u>

Refunds of rent

1-4-1997 – 31-12-1997	: \$27,000 x 9	=	243,000
1-1-1998 – 31-3-1998	: \$29,700 x 3	=	<u>89,100</u>
Total			<u><u>332,100</u></u>

- (f) In respect of the housing allowances, the Taxpayer submitted the 1996 Tenancy Agreement to Company B for inspection.
- (g) It was the practice of Company B to request employees who expended the full amount of the housing allowances in rental to submit the original stamped tenancy agreement for inspection before 15 March of each fiscal year. In the Taxpayer's case, upon checking the original stamped tenancy agreement submitted by him and having decided that the Taxpayer would be eligible for rental reimbursement claim, Company B kept one copy of the tenancy agreement for recording purpose.
- (h) Company B would only ask for rental receipts when in doubt. Upon enquiry by the assessor on 20 August 1999, the Taxpayer was requested to submit rental receipts for inspection.

19. In the tax returns – individuals for the years of assessment 1996/97 and 1997/98 filed by Madam D, she declared the following:

Year of assessment 1996/97

- (a) Property 1 was for her own use and not for letting.
- (b) Rental income of \$165,000 was received from a property ('Property 2'). A property tax assessment was raised on Madam D based on the rental income declared by her.

Year of assessment 1997/98

- (c) Property 1 was her residential address.
- (d) Property 1 was let for the period from 1 April 1997 to 31 March 1998 at a total rental of \$360,000 and there were bank mortgage interest payments of

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\$263,200. A property tax assessment was raised on Madam D based on the rental income declared by her.

The Taxpayer's contentions

20. The Taxpayer's contention was essentially based upon his claim that there were two legally binding tenancy agreements made between his wife, Madam D, as landlord, and himself, as tenant, in respect of Property 1 and that the rents payable under the two tenancy agreements were duly paid by him. He also contended that it was a tax arrangement that he entered into the tenancy agreements with his wife and that this tax arrangement was permissible under the law.

The Respondent's contentions

21. The Respondent was not satisfied that there was a landlord and tenant relationship between the Taxpayer and his wife, Madam D, in relation to Property 1, nor was it satisfied that rents were in fact paid by the Taxpayer to Madam D. Thus, the Respondent did not accept that the housing allowances were reimbursements of rents.

22. The Respondent argued that even if it were to accept that rents were paid by the Taxpayer, there was no evidence that Company B had exercised control on how the Taxpayer spent the housing allowances.

23. The Respondent further argued that under his employment contract with Company B, the Taxpayer was entitled to the payment of housing allowances without any conditions. Thus, the housing allowances were mere cash allowances which were not subject to beneficial tax rate.

24. Finally, the Respondent contended that the alleged letting of Property 1 by Madam D to the Taxpayer was artificial and fictitious within the terms of section 61 of the IRO.

The Taxpayer's evidence

25. The Taxpayer elected to give sworn evidence before the Board and sought to rely on the information and documents supplied by him to the Respondent during the course of investigation, in particular, the two stamped tenancy agreements, the evidence of cash withdrawals from his savings account with Bank E which he claimed were partly utilized for payments of rent and the rental receipts issued by Madam D.

26. Upon cross-examination by the Respondent, the Taxpayer adduced the following evidence.

Downpayment and mortgage repayments

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27. The Taxpayer informed the Board that he did not contribute towards the downpayment of Property 1 in any significant amounts nor contributed towards the mortgage repayments. Madam D had not worked for nine years since the birth of their last child. She liked investing in stocks and shares and had private means. Occasionally, she made contributions towards household expenses. However, the Taxpayer was not prepared to disclose further details on Madam D's financial means.

Tenancy agreements

28. The Taxpayer claimed that the 1995 Tenancy Agreement was prepared by him and Madam D, that they negotiated the terms of the agreement at their parents' home, and that the rent of \$30,000 was a fair market rent of Property 1. When he was questioned on the missing inventory of fixtures and fittings in the 1995 Tenancy Agreement, the Taxpayer admitted that he overlooked the term regarding the inventory. Thus an inventory of fixtures and fittings did not appear in the 1995 Tenancy Agreement. The Respondent reminded the Taxpayer that there was a term under the 1995 Tenancy Agreement that the landlord should give exclusive possession of Property 1 to the tenant and yet, Madam D was living with him at Property 1. The Taxpayer admitted that he also overlooked this provision and stated that he would delete this provision in future.

29. The 1995 Tenancy Agreement was dated 15 April 1995. Clause 5 of the 1995 Tenancy Agreement provided that the security deposit of \$30,000 was payable on or before the signing of the agreement. The receipt for the security deposit was, however, dated 24 April 1995 and not 15 April 1995 or before. The Taxpayer was asked to explain the reason for this discrepancy. The Taxpayer was unable to give an explanation in this regard.

30. In response to the questions from the Board on the payment of outgoings of Property 1, the Taxpayer revealed that notwithstanding the terms of the two tenancy agreement, by mutual agreement between the Taxpayer and Madam D, Madam D usually paid the management fees and the electricity charges of the Property 1. Furthermore, upon being questioned, the Taxpayer admitted that because of their husband-and-wife relationship, Madam D agreed that the rent would remain the same even though the fair market rent of Property 1 would be about 10% to 20% higher at the time of renewal of the 1996 Tenancy Agreement.

Rental payments

31. In response to a question from the Board, the Taxpayer admitted that his savings account with Bank E was previously held by him and Madam D under their joint names. The Taxpayer explained that for the sake of convenience because he was then working in China, the account was changed to his sole name in about April 1996. The Taxpayer also claimed that the two transfer withdrawals, one on 4 July 1997 of \$80,000 and the other on 1 August 1997 of \$105,611.65 were also made for payment of rent to Madam D. However, in connection with these two transfer withdrawals, the Respondent produced a letter from Bank E intimating that the

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transfer withdrawal of \$80,000 was made to a person name ' Ms F' and the other of \$105,611.65 was to the Taxpayer' s credit card account.

32. The Taxpayer claimed that throughout the tenancy, Madam D monthly gave him a rental receipt, refuting the Respondent' s allegation that they were given to him in two batches, the ones from April 1996 to March 1997 at the end of the first year tenancy and the ones from April 1997 to March 1998 at the end of the second year tenancy. The Respondent made the allegation on the basis that one similar signatures appeared on the first batch of the rental receipts while another similar signatures appeared on the second batch of the rental receipts.

33. The Taxpayer gave evidence that irrespective of when he paid the rent, Madam D usually dated a receipt the first day of the month for which the rent was payable. The Taxpayer also admitted that there were occasions when he was late with his rent payments, but because of their husband-and-wife relationship, the time for payment was not so rigidly adhered to. He had never received any formal demand of rent from Madam D even though there were late payments of rent by him.

34. When questioned by the Board on the ownership of Property 1 between 15 April 1995 (the date of the 1995 Tenancy Agreement) and 6 July 1995 (the date of the assignment of Property 1 to Madam D) and the rent payments in respect of Property 1 for the months of April, May and June 1995, the Taxpayer admitted that Madam D did not become the owner of Property 1 until 6 July 1995, and although rent receipts for April, May and June 1995 were issued by Madam D in respect of Property 1, no rents were in fact paid by him in respect of Property 1 for those months. He admitted that he had made a mistake in respect of these rent payments. However, the Taxpayer claimed that rents of the same amount were paid by him in respect of another flat where they were then living.

Employment contract

35. In response to a question from the Board, the Taxpayer agreed that under the terms of his employment contract, Company B had to pay him a housing allowance of \$27,000 per month and a utilities allowance of \$3,000 per month regardless whether or not he had entered into a tenancy agreement. He agreed that there was an internal guideline of Company B that a tenancy agreement must be shown if the housing allowances were to be reported to the Revenue as reimbursement of rent. He explained that it was a tax arrangement and for this tax arrangement he entered into tenancy agreements with his wife.

The law

36. Section 8(1) of the IRO provides that salaries tax shall be charged on income from employment. Section 8(1) states:

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‘ 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; and

(b) any pension.’

37. Income from employment is defined in section 9(1) of the IRO to include perquisite or allowance. The definition is non-exhaustive and it states:

‘ 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;’

38. The rental value of any place of residence shall be deemed to be 10% of the income as defined in section 9(1)(a) of the IRO. Section 9(2) of the IRO provides:

‘ 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 ...’

39. Where rent refunds are made in respect of a place of residence, section 9(1A) of the IRO stipulates that the rent refunds shall be deemed not to be income. Section 9(1A) reads as follows:

‘ (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;

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...

- (b) *a place of residence in respect of which an employer or associated corporation has paid or refunded part of the rent therefore shall be deemed for the purposes 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.'*

40. Section 61 of the IRO further provides:

- ' Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.'*

41. Section 68(4) of the IRO stipulates:

- ' The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

Our decision

42. Prior to the hearing, the Respondent presented to this Board the authority 'Commissioner of Inland Revenue v Douglas Henry Howe [1997] HKLR 436' and a series of Board of Review decisions on issues under this appeal. They are:

1. D8/82, IRBRD, vol 2, 8
2. D62/92, IRBRD, vol 8, 85
3. D19/95, IRBRD, vol 10, 157
4. D92/95, IRBRD, vol 11, 173
5. D33/97, IRBRD, vol 12, 228
6. D18/99, IRBRD, vol 14, 204

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7. D44/92, IRBRD, vol 7, 324

We have considered each of those decisions and where necessary for us to do so, we will refer to them below.

43. This appeal involves a question of whether the amounts of 'housing allowance' of \$324,000 and \$332,100 paid by Company B to the Taxpayer for the years of assessment 1996/97 and 1997/98 respectively were refunds of rents or simply cash allowances which did not amount to rent refunds.

44. The Respondent contended that the said sums of \$324,000 and \$332,100 were not refunds of rent. The reasons for its contention were given in details in its written submission. We do not intend to repeat them here. They are however, summarized under paragraphs 21 to 24 above.

45. Having carefully considered all the documents and material before us and the sworn evidence adduced by the Taxpayer, we reach the conclusion that despite the existence of the two written tenancy agreements in respect of Property 1, there was no landlord-and-tenant relationship existed between the Taxpayer and Madam D.

46. Our conclusion is supported by the following facts. Madam D declared in her loan application that Property 1 was to be self-used. Madam D never advised bank G, the mortgagee of Property 1, that Property 1 was let out to the Taxpayer. In her tax return for year of assessment 1996/97, Madam D also declared that Property 1 was self-used. The 1995 Tenancy Agreement was dated 15 April 1995. The security deposit of \$30,000 under the 1995 Tenancy Agreement should be payable on or before the signing of the agreement, that is, 15 April 1995. However, the security deposit was not paid until 24 April 1995 which was the date on the security deposit receipt. The 1995 Tenancy Agreement dated 15 April 1995 was not stamped until 7 June 1996. Despite the Taxpayer's obligation to discharge all the outgoings (except rates) of Property 1, the electricity charges were settled by Madam D by auto-pay and the Taxpayer confirmed that Madam D also paid the management fees of Property 1. The Taxpayer also admitted that because of the husband-and-wife relationship between him and Madam D, they did not strictly adhere to the terms of the tenancy agreements. Notwithstanding exclusive possession of Property 1 was granted to the Taxpayer under the tenancy, Madam D resided at Property 1. The Taxpayer informed the Board that Madam D had a practice of making out a rent receipt on the first day of a month and dating it the first day of the month for which the rent was payable, irrespective of when the rent was paid by the Taxpayer and even when it was a late payment. The Taxpayer acknowledged that there were occasions when he was late with his rent but no formal notice of demand was ever given by Madam D by reason of their husband-and-wife relationship. Again because of their husband-and-wife relationship, upon renewal of the 1996 Tenancy Agreement, the Taxpayer and Madam D maintained the rent at \$30,000 per month notwithstanding that the then fair market rent of Property 1 was about ten to twenty percent higher. Notwithstanding that Madam D did not become the

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owner of Property 1 until 6 July 1995, the term of the 1995 Tenancy Agreement commenced on 15 April 1995. The Taxpayer claimed that part of the withdrawal of cash of \$71,000 on 29 March 1996 was for payment of rent to Madam D. However, the money was withdrawn from the saving account with Bank E which was then held by the Taxpayer and Madam D under their joint names.

47. It is clear from the above facts that the Taxpayer and Madam D did not intend to create legally binding agreements between them in respect of Property 1 nor did they intend to discharge their respective legal obligations under the two written tenancy agreements. Since there was no landlord-and-tenant relationship between them, payment of rent did not arise. It is not enough for the Taxpayer simply to rely on the two written tenancy agreements although they were duly signed by them and stamped, the withdrawals of cash purportedly for payments of rent and the rent receipts issued by Madam D. As held in Board of Review Decision in No 33/97, it was not enough simply to rely upon 'the formal niceties of paying cheques to a family member, issuing receipts and completing property tax returns.'

48. Furthermore, we are not convinced that there were payments of rent by the Taxpayer to Madam D. The Taxpayer produced rent receipts issued by Madam D for the months of April, May and June 1995 in respect of Property 1 and yet Madam D did not become the owner of the Property 1 until 6 July 1995. When questioned by the Board, the Taxpayer admitted that a mistake had been made by him in this respect and he did not pay rents in respect of Property 1 for those months. The Taxpayer claimed that the two transfer withdrawals on 4 July 1997 and 1 August 1997 respectively were for payment of rent. The evidence before us was that one payment was to a person named 'Ms F' and the other to the Taxpayer's credit card account. Under the aforesaid circumstances, the Taxpayer has not satisfied us that rents had been paid by him to Madam D as claimed. It follows that the amounts in dispute cannot be classified as refunds of rent.

49. Even if we were to accept that there was a landlord-and-tenant relationship and there were payments of rent (which we do not), we would also find that the payment of 'housing allowance' by Company B to the Taxpayer was not 'refund of rent' but was payment of cash allowance.

50. We come to this conclusion for the following reasons. Company B did not provide quarters to the Taxpayer nor did it pay the Taxpayer's rents. Under Company B's Letter of Appointment with the Taxpayer of 17 February 1995, apart from a salary of \$50,000 and an utilities allowance of \$3,000 per month the Taxpayer was entitled to a 'housing allowance' of \$27,000 per month. There were no provisions in the Letter of Appointment that the 'housing allowance' was refundable or that it was not payable, if housing expenses were not incurred by the Taxpayer. There was no provision for Company B to control the use of the 'housing allowance'. Although Company B's memorandum of 9 July 1986, provided a company policy on payment of housing allowance, we do not find this policy changed the nature of the payment of this housing allowance itself. The memorandum provided that 'subject to the employees producing documentary evidence to substantiate their using of the entire housing allowance for rental purposes,

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the housing allowance would be reported to the Commissioner of Inland Revenue in the employer's tax returns. If employees wished to have the payment of housing allowance reported as such, copies of tenancy agreements should be submitted for completion of the employer's tax return, as appropriate.' The policy did not impose conditions for the payment of this housing allowance nor stipulate refunds of the same from the employees in the absence of documentary evidence to substantiate their housing expenses. Nor did it provide a system of control by the company over the use of the housing allowance. Our view was fortified by the facts that the housing allowance of \$27,000 per month was paid by Company B to the Taxpayer notwithstanding that for the year of assessment 1996/97 the Taxpayer did not provide the company with a tenancy agreement in support of his claim for the housing allowance and as a result of the non-production of tenancy agreement Company B reported the payment in the employer's return for year of assessment 1996/97 as a part of the Taxpayer's emolument. In addition, in response to the questions from this Board, the Taxpayer acknowledged that if he did not show a tenancy agreement to Company B, Company B would not report the payment as a rental reimbursement to the Revenue but it would still pay him the housing allowance of \$27,000 per month as the payment was a term of his employment. As for the housing allowance in the year of assessment 1997/98, Company B reported it as a refund of rent by reason of the Taxpayer's provision of the 1996 Tenancy Agreement. However, we are of the view that notwithstanding the provision of the 1996 Tenancy Agreement, the legal position of those payments of \$27,000 per month in that year remained the same. The provision of the tenancy agreement did not change the nature of the payment of the 'housing allowance' which was governed by the same contract of employment of the Taxpayer (see D18/99, IRBRD, vol 14, 204). Under the Letter of Appointment, the Taxpayer was entitled to receive the housing allowance regardless whether housing expenses were incurred and equally Company B was bound by the terms of the Letter of Appointment to make the payment even if the Taxpayer had not incurred the housing expenses. Thus, the housing allowance was not intended or paid as a refund of rent within the meaning of section 9(1A)(a)(ii). As held in D8/82, IRBRD, vol 2, 8, '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 IRO.'

51. Referring to the Taxpayer's contention that his tax arrangement, that is, his entering into the two written tenancy agreements with his wife Madam D in respect of Property 1, was legitimate under the law, perhaps, it is appropriate for us at this juncture to quote from the Board of Review in D33/97, IRBRD, vol 12, 228:

' ... it is relevant to note that the salaries tax advantages of housing assistance being assessed under these provisions is well known. Equally well known is the Commissioner's pragmatic policy in administering these provisions (see D92/95, IRBRD, vol 11, 173). But in order to achieve the desired benefit, it must be clear to both employers and employees alike that simply designating an allowance as a rental benefit will not necessarily achieve that objective.

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A “refund” of rent connotes a repayment or reimbursements, not mere payment (see 19/95, IRBRD, vol 10, 157). This means, in the typical case, that sufficient control must, as a matter of fact (and not just in theory), be exercised by the employer over the payment so that the allowance is effectively a refund of rent and not just an additional emolument to be spent in any way that an employee may desire.’

52. For the aforesaid reasons, the appeal must fail. Accordingly, we hereby confirm the determination and dismiss the appeal by the Taxpayer.

53. Having dismissed the appeal as aforesaid, there is no need for us to consider whether the letting of Property 1 by Madam D to the Taxpayer amounted to a transaction which was fictitious or artificial within the meaning of section 61 of the IRO. Had it been necessary for us to do so, we would conclude that, on the basis of the evidence before us as aforesaid, the two written tenancy agreements were in terms of section 61 ‘artificial’ because it was an arrangement that had no basis in ordinary family affairs and also fictitious because the Taxpayer and Madam D never intended that the terms of the two written tenancy agreements should be carried out.