Case No. D76/88

Assessments– 'error or omission' – assessment made in accordance with prevailing practice – whether assessment could be reopened – s 70A of the Inland Revenue Ordinance.

Salaries tax – 'place of residence' – civil servant supplied with quarters while remaining at his place of work for extended periods – whether assessable on rental value of quarters – s 9(1)(c) of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Elsie Leung Oi Sie and Henry Tang Ying Yen.

Date of hearing: 22 December 1988.
Date of decision: 10 March 1989.

The taxpayer was a civil servant. He was required in the course of his employment to remain at his place of work for extended periods, and he was provided with accommodation during these periods. He and his family lived elsewhere.

The taxpayer was assessed to salaries tax on the 'rental value' of such accommodation. He failed to object within the one month statutory period prescribed by section 64. Subsequently, he claimed that there had been an 'error' in the assessment within the meaning of section 70A, thereby entitling the assessment to be corrected.

It was conceded by the IRD that the assessment was indeed incorrect. However, the IRD refused to apply section 70A and amend the assessment on the ground that the assessment had been made in accordance with the generally prevailing practice of the IRD at the time the taxpayer made his return. This practice was to assess tax on the value of quarters provided by the Hong Kong Government to all of its employees regardless of the individual facts of each case. A practice instruction issued by the Commissioner to assessors was tendered as evidence of this practice.

Held:

The assessment could not be reopened under section 70A because the error was made in accordance with previously prevailing practice.

Although the assessment was clearly incorrect, there must be some finality in tax matters. It is not permissible to reopen assessments every time that there is a change in practice.

The decision also contains some discussion on the meaning of 'place of residence' for rental value purposes.

Appeal dismissed.

Cases referred to:

BR12/76, IRBRD, vol 1, 218
D46/87, IRBRD, vol 2, 447

D J Gaskin for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by the Taxpayer against a determination of the Commissioner in which he upheld an assessor's refusal to correct an error under the provisions of section 70A of the Inland Revenue Ordinance.

At the hearing, the Taxpayer appeared on his own behalf and gave evidence and was cross-examined. The Commissioner's representative, in addition to making submissions, also called a senior assessor from the Inland Revenue Department to give evidence. The evidence given by both the Taxpayer and the senior assessor was straight forward and we accept the evidence of both of them. Any differences in the evidence given by the two witnesses can be resolved as we mention below.

The facts are as follows:

1. The Taxpayer was employed by the Hong Kong Government. During part of the year of assessment 1986/87, the Taxpayer was required in the course of his employment to remain at his place of work for extended periods of time. He was provided with accommodation ('quarters') which he occupied when on duty but not as a residence. He lived elsewhere with his family.

2. In his tax return for the year 1986/87, the Taxpayer included a statement that his employer provided him with operational quarters from the period from 1 April 1986 to 31 December 1986. When computing the Taxpayer's liability to tax, the assessor included a sum of $35,523 as being the assessable value of the quarters provided by the employer and levied tax thereon.

3. The tax assessment for the year 1986/87 was dated 30 September 1987 and, pursuant to section 64 of the Inland Revenue Ordinance, the Taxpayer had a period of one month with which the lodge notice with the Commissioner that

the amount of the assessment was disputed. This the Taxpayer did not do and the assessment became final pursuant to section 70 of the Inland Revenue Ordinance.

4. The year in question was the first year in which the Taxpayer had been provided with such quarters by his employer and he said that he did not notice that the value of the quarters had been included in his tax assessment.

5. The Taxpayer said that he subsequently noticed that tax had been assessed on the value of the quarters provided and that, immediately he realised this, he raised the matter with officers of the Inland Revenue Department and spoke informally to the Commissioner.

6. A Board of Review decision, D46/87 (IRBRD, vol 2, 447) was decided on facts similar to these in favour of the taxpayer in that case.

7. Prior to D46/87, it had been the practice of the Inland Revenue Department to assess tax on the value of quarters provided by the Hong Kong Government to all of its employees regardless of the individual facts of each case. The practice adopted was that the employer, the Hong Kong Government, would issue a form entitled 'return of allowances' on which form the Government department to whom the employee was attached would specify whether or not quarters in the form of a house, flat, hotel, or hostel were provided. On the basis of this form, the Inland Revenue Department would assume that the quarters specified comprised 'a place of residence' within the meaning of section 9(1)(b) of the Inland Revenue Ordinance and assess tax on the assessable value thereof.

8. In the standing instructions given by the Commissioner to his assessors, it was stated that, notwithstanding Board of Review decision BR12/76 (IRBRD, vol 1, 218), 'departmental quarters' as provided to prison officers (and others) should not be excluded from assessment for salaries tax purposes. It was on the basis of this practice instruction that the assessor assessed the Taxpayer in this appeal to salaries tax on the value of the quarters provided. D13/80 decided that a nurse was not taxable in respect of overnight accommodation provided by the employer to enable the nurse to remain at her place of work for extended periods.

9. Subsequent to D46/87, the Commissioner accepted that it was incorrect to assess accommodation provided to a civil servant in the course of his duty and which was not used by him as a place of residence but had to be provided to him to enable him to perform his duties when he was on duty for extended periods of time and was required to sleep overnight at his place of work.

10. The Taxpayer made application under section 70A of the Inland Revenue Ordinance to have his tax assessment for the year 1986/87 reduced by the

amount of the value of the quarters included therein. The assessor rejected this section 70A application and this rejection was upheld by the Deputy Commissioner in his determination dated 1 July 1988.

11. The Taxpayer appealed against this determination of the Commissioner.

Much of the evidence which was called before the Board of Review by the Taxpayer and the Commissioner's representative related to various telephone conversations which the Taxpayer had with various officers of the Inland Revenue Department, and in particular with the senior assessor who was called to give evidence by the Commissioner's representative. None of this evidence is relevant to the appeal because it all relates to subsequent events. However, as it was clearly a source of major grievance to the Taxpayer, we comment that we found both the Taxpayer and the senior assessor to be truthful and frank witnesses. The Taxpayer was making enquiries with regard to his case and clearly wished to hear things which were favourable to him. The senior assessor in answering enquiries wished to be of help and assistance to the Taxpayer within the limits of his authority. The senior assessor in explaining the law to the Taxpayer introduced him to the provisions of section 70A and no doubt indicated that, under D46/87, if the Taxpayer's facts and circumstances were identical, then he should not have paid tax on the quarters in question for the year in question. Unfortunately, this raised the hopes of the Taxpayer who not unnaturally assumed that, if he had overpaid tax and there was a power in the Inland Revenue Ordinance to correct errors, he would be able successfully to have the amount of the assessment reduced accordingly. Unfortunately for the Taxpayer, his application under section 70A was rejected and, not unnaturally, the Taxpayer felt and still feels aggrieved.

This is not a pleasant case because this Board is asked and as a matter of law must decide in favour of the Commissioner even though the Taxpayer has been charged and has paid more tax than the Commissioner was, as a matter of law, entitled to charge.

According to the evidence given before us, the Commissioner had issued a practice instruction to his assessors in relation to the provision of quarters by an employer. This practice instruction read as follows:

> ' Quarters provided by employer at place of employment
>
> In the appeal case [BR12/76] the Board of Review decided that no rental value arose under section 9(1)(c) to a nurse who was married but who by reason of her employment was required for three nights a week to stay overnight at her place of duty. She had the use of accommodation, which was shared with two other nurses, and was required to pay to Government, by a deduction from salary, rent for the quarters provided. (The rent paid was not allowed by the Board of Review as an expense under section 12(1)(a): the Board found that the payment was of a 'private' nature.) In that case, the employee (i) had a place of residence available to her other than that provided by the employer; (ii) the Government accommodation was not occupied by her as her residence (her

> husband could not have used the accommodation); (iii) the accommodation was solely used by her to enable her to carry out her duties. The decision will not affect the assessability of the Government employee who, although he is possibly required to occupy departmental quarters, would occupy them for the dual purpose of residence and for the performance of duties. This case is not to be regarded as an authority for the exclusion from charge of the rental value of 'departmental quarters' generally (as provided to police officers or prison officers).
>
> The question of whether quarters provided constitute a 'place of residence' continues to be a question of fact. The Inland Revenue (Amendment) (No 6) Ordinance 1979 makes it clear that from 1978/79 onwards 'place of residence' includes a residence provided by an employer or an associated corporation notwithstanding that the employee is required to occupy that residence by or under his terms of employment and whether or not by doing so he can better perform his duties. If there is any restriction on the use of the quarters which would prevent them being used as a place of residence in the usual sense of the expression, nothing should be assessed under section 9; for example, where the employee has to vacate the premises at weekends or where his or her spouse and family are not allowed to reside in the premises. On the other hand, where the quarters are capable of being used as a place of residence but to suit his own convenience the taxpayer maintains a second residence, the value of the quarters should still be assessed.'

It would appear that the Commissioner had not understood the meaning of Board of Review decision BR12/76 and the full impact of the third paragraph of his own practice note. Each case must decide upon its own individual facts and whether or not quarters constitute a 'place of residence' is and always has been a question of fact. No doubt the practice instruction covered the majority of cases because, in most cases where exclusive accommodation is provided to a Government employee, the Government employee will occupy that accommodation with his family as a residence. It is only in exceptional cases such as those of superintendents of prisons that the Government provides exclusive accommodation because of the status of the employee even though such accommodation is not used as a place of residence by the employee.

The facts of BR12/76 and the facts of D46/87 make it quite clear that no place of residence was provided to the Taxpayer within the meaning of section 9(1)(b) of the Inland Revenue Ordinance.

In BR12/76, a nurse was required to stay overnight at her place of duty and was provided with somewhere where she could sleep. The accommodation was used by the nurse solely to enable her to carry out her duties. It was no more a benefit to her than the provision of a desk and chair for an office worker.

The facts of D46/87 were in practical terms similar to those of the nurse. In that case, the prison officer had his own residence where he and his wife and family lived. He was required to stay overnight at his place of duty and was provided with accommodation suitable in status to that of the superintendent of a prison. However the accommodation was never occupied by his family and was never used by him other than as a place where he could spend time when on duty. Even though it was accommodation in which he could have lived if he had wished, it was not provided to him on the facts of his case as a residence but was provided as a facility to enable him to perform his duties and nothing else.

In the appeal now before us, the Commissioner accepts that the Taxpayer is in all material respects identical to the prison officer in Board of Review decision D46/87. He accepts that the Taxpayer was wrongly assessed to tax but he argues that the assessment which the Taxpayer seeks to reopen has become final and conclusive by virtue of section 70 of the Inland Revenue Ordinance and cannot be reopened under section 70A because, even though there was an error, the proviso to section 70A stops errors being corrected where they were made on the basis of or in accordance with the practice generally prevailing at the time when the return was made.

The mistake which the Taxpayer seeks to correct is that he himself, in error when completing his own tax return form, had included particulars of the quarters which had been provided to him. It is unfortunate for the Taxpayer that the law states that tax returns and subsequent assessments which are based on the then current practice and which have not been appealed within the one month period provided cannot be reopened under section 70A at a later date.

Though it is strange for us to have to confirm indirectly a tax assessment which is accepted to be incorrect, the proviso to section 70A has no doubt been included in our law for good reason. There must be an element of finality in taxation matters. Section 70A was introduced to protect individuals and allow errors to be corrected but not to allow numerous tax assessments to be reopened and reviewed on an ongoing basis every time that there is a change of practice.

With some regret, we find in favour of the Commissioner and dismiss this appeal.