INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D78/90

Salaries tax – computation of value of quarters occupied jointly by two persons – whether 10% or 4% assumed value shall be halved – section 9 of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), Benjamin Kwok Chi Bun and Brian S Mcelney.

Date of hearing: 27 February 1991.
Date of decision: 26 March 1991.

Two taxpayers appealed against determination of the Deputy Commissioner in which the Deputy Commissioner had assessed them respectively to salaries tax on the value of quarters provided by the Government as their employer. They argued that the quarters were joint and accordingly the deemed value of the quarters, 10% or 4%, should be halved.

Held:

Section 9(2) of the Inland Revenue Ordinance makes it clear that the value of quarters is a percentage of taxable emoluments as set out in the Ordinance. There is no provision for apportionment of the value of quarters provided by the employer. The value of the quarters must be calculated in accordance with the provision of the Inland Revenue Ordinance.

Appeal dismissed.

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

Decision:

1. Two taxpayers are appealing against the determination of the Deputy Commissioner of Inland Revenue dated 4 January 1991 confirming the salaries tax assessments raised on them respectively for the year of assessment 1988/89. The issue is how the rental value of the quarters allocated to them jointly by their employer should be computed.

The Facts

2. The Taxpayers are and were at all relevant times employed by the Hong Kong Government on the same terms and conditions of service. They lived together in quarters provided on their joint application, although they were each entitled to separate quarters. For the first 345 days of the year in question they lived firstly in one flat, then in another, and lastly, for two days prior to going on leave, in an hotel room.

3. The Civil Service Regulations ('CSR') formed part of the terms and conditions of the Taxpayers' employment. CSR 872(1) specifies the rent payable for quarters provided for an officer to be 7.5% of his salary. CSR 874 provides for the pro-rating of the rent of quarters which are allocated jointly to officers. The Taxpayers therefore each paid rent at half the normal rate, that is, 3.75% of their respective salaries.

The Law

4. The income of an employee includes, when a place of residence is provided by the employer at a rent less than the rental value, the excess of the rental value over the rent (section 9(1)(c) of the Inland Revenue Ordinance). The rental value of any place of residence provided by an employer is deemed to be 10% of the income derived from the employment for the period during which a place of residence is provided; provided that if such place of residence be a hotel, hostel or boarding house the rental value is deemed to be: (i) 8% of that income where the accommodation consists of not more than two rooms and (ii) 4% where the accommodation consists of not more than one room (section 9(2)).

5. The assessments under appeal are in each case based on the computation of the deemed rental value at 10% of the income of each Taxpayer for the residential flats and at 4% for the hotel. The Taxpayers complain that it is unfair because they consider that they are being taxed as if they each enjoyed the benefit of the exclusive use and occupation of the entire quarters. To be fair, they contend, the rental value for each of them should be computed at 5% and 2% of their respective incomes. It is common ground that if only one of them had taken quarters from the Government and the other had waived his entitlement to quarters and had simply lived with the former in the same quarters, the rental values would have been computed at 10% for the flats and 4% for the hotel respectively of the income of the one taking the quarters, and the rent at 7.5% of that income, while the other, not having taken any quarters from the Government, would not have been liable to be taxed for quarters at all. We have some sympathy for the Taxpayers' contention, as it seems likely, if this appeal fails, that in the longer term the Taxpayers' affairs can be adjusted by way of redress in the way described above. But the basic solution would be an amendment of the law to apportion the rental value on a joint allocation of quarters to two or more employees.

6. On the other hand, Mr Gaskin, the Commissioner's representative submitted that whether or not one believes an end-result to be just or not, one can only look fairly at the words used in the charging Ordinance. We think that is the correct approach; the question is whether, as a matter of construction, 10% and 4% of the incomes are the correct measures for the quarters allocated jointly to the Taxpayers. The key words would appear to be 'the rental value of any place of residence provided by the employer'. There is no provision for pro-rating the rental value, nor is it in dispute that the quarters in question

were in each case provided for use and occupation by the Taxpayers as their residence. The only possible question left for consideration is whether the context of section 9(2) requires the words 'any place of residence provided by the employer' to mean any place provided by the employer wholly and exclusively for use and occupation by a single employee as his residence. To that the answer must be no. It is demonstrated by the fact that proviso (a) to that section contains the words 'if such place of residence be a hotel, hostel or boarding house ...', because it cannot be said that the legislature was contemplating the exclusive use and occupation of an entire hotel by one employee as his residence. In our view, the flats and the hotel in question are within the meaning of the words 'place of residence' even though neither Taxpayer had the whole of the flats nor hotel to himself; the rental value for each Taxpayer is therefore deemed to be 10% of his income for the flats and 4% for the hotel. The Taxpayers' complaint about 'unfairness' is based on a stark disparity between a contractual term (CSR 874) which allows the pro-rating of rent and the law (section 9(2)) which does not allow the pro-rating of the deemed rental value. However, the Board cannot change the law, although the legislature can and maybe should, cover the exceptional circumstances here.

The Decision

7. It follows that this appeal is dismissed and that the assessments under appeal are hereby confirmed.