INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D85/00

Salaries tax – whether certain sums were paid by employer as a refund of rent – appeal lodged outside the prescribed period – sections 61 and 66 of the Inland Revenue Ordinance (' IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Andrew Mak Yip Shing and Thong Keng Yee.

Date of hearing: 26 August 2000.
Date of decision: 11 November 2000.

The taxpayer appealed out of time against the Commissioner' s determination of additional salaries tax assessment for the two years of assessment 1995/96, 1996/97 and salaries tax for the year of assessment 1997/98. He claimed that certain sums were allegedly paid to him by his former employer on account of rent and should not be assessed as a cash allowance.

Held:

1. The employer' s ' rental reimbursement' was meant for those ' who are renting a flat for yourselves' . The taxpayer was not renting a flat in 1994 and had not rented a flat from 1994 to 1998.

2. The documents put forward by the taxpayer purporting to be written tenancy agreements made by the employer of the taxpayer were not consistent with the contemporaneous documents from the employer.

3. Neither party to any of the five relevant written tenancy agreements produced by the taxpayer had any intention to create legal relations, and neither party to any of the relevant written tenancy agreements intended them to be legally binding. All of them were made for the consumption of IRD.

4. Further, the five relevant written tenancy agreements produced by the taxpayer were artificial and/or fictitious and/or were not in fact given effect to. They fall to be disregarded by virtue of section 61 of the IRO.

Obiter:

A party who is unable or unwilling to write or submit in Chinese or prefers to write or submit in English should not ask for a hearing in Chinese. Conducting the appeal in English does not mean that evidence has to be in English. Evidence may be given in Cantonese or any dialect provided that early written notice is given to the Clerk so that she may be able to make arrangements for an interpreter.

Appeal dismissed.

Chiu Kwok Kit for the Commissioner of Inland Revenue.
Taxpayer represented by his elder brother.

Decision:

1. This is an appeal out of time pursuant to leave granted by us with the consent of the Respondent against the determination of the Commissioner of Inland Revenue dated 31 March 2000 confirming the following assessments :

(a) Additional salaries tax assessment for the year of assessment 1995/96 under charge number 9-3878691-96-7, dated 19 August 1998, showing additional assessable income of $483,629 with tax payable thereon of $64,386;

(b) Additional salaries tax assessment for the year of assessment 1996/97 under charge number 9-2158806-97-8, dated 19 August 1998, showing additional assessable income of $472,786 with tax payable thereon of $70,918; and

(c) Salaries tax assessment for the year of assessment 1997/98 under charge number 9-0874850-98-7, dated 23 September 1998, showing assessable income of $1,122,898 with tax payable thereon of $168,434, but reducing tax payable under that charge to $151,590 to give effect to the tax exemption (1997 Tax Year) order.

2. The Taxpayer stated that in January 1995, he was promoted to assistant director grade and was entitled to quarters, effective 1 April 1995. He asserted that his employer allegedly rented two properties both of which were jointly owned by the Taxpayer and his wife, and that certain sums were allegedly paid on account of rent. At the end of the Taxpayer' s case, we told the parties that we were not calling on the Respondent and that we would give our decision in writing which we now do.

3. To start with, the employer's 'rental reimbursement' was meant for those 'who are renting a flat for yourselves' [see the memorandum dated 24 March 1993 from the employer's director of personnel and administration ('DPA')]. The Taxpayer was not renting a flat in 1994 and had not rented a flat from 1994 to 1998.

4. The Taxpayer put forward five documents purporting to be written tenancy agreements made by his employer.

Date of document	**Undated**	**Undated**	**21-3-1996**	**1-4-1997**	**20-4-1998**
Period of tenancy	1-4-1995 – 31-12-1995	1-1-1996– 31-12-1996	1-4-1996– 31-3-1997	1-4-1997– 31-3-1998	1-9-1997– 31-8-2000
Deposit	$35,915	$39,500	Deleted	Nil	$48,000
Monthly rent	$35,915	$39,500	$44,000	$50,000	$48,000
Rent payable	In advance on first day of month	In advance on first day of month	'rent for the period from month of 1 April 1996 – 31 March 1997 to be made upon the signing of this agreement'	'~~in advance~~ on the last ~~first~~ day of each and every calendar month'	In advance on first day of month
Expenses payable by landlord	All miscellaneous, life, water, pump, cleaning, caretaking, etc	All miscellaneous, lift, water, pump, cleaning, caretaking, etc	Rent at $44,000 per month 'including management fee and rates' and Clause 4 which provided for payment of 'all water gas and electricity charges' etc by tenant was deleted	All water gas and electricity charges etc	**By tenant –** All miscellaneous, lift, water, pump, cleaning, caretaking, etc
Taxpayer's monthly housing benefit	$35,915 (Apr–Dec 1995)	$39,500 (Jan–Mar 1996) (see next	$39,500 (Apr–Dec 1996) $43,690	$43,690 (Apr–Aug 1997) (see next	$43,690 (Sep–Dec 1997) $46,265

		column)	(Jan – Mar 1997)	column)	(Jan–Mar 1998)
Rent exceeded benefit (monthly)	Same (Apr–Dec 1995)	Same (Jan–Mar 1996) (see next column)	$4,500 (Apr–Dec 1996) $310 (Jan–Mar 1997)	$6,310 (Apr–Aug 1997) (see next column)	$4,310 (Sep–Dec 1997) $1,735 (Jan–Mar 1998)
User of premises	Domestic	Domestic	' Tenant ... for residence of himself or his family only'	' as staff quarter for [Taxpayer] and his family only'	Domestic
Break Clause	Nil	Nil	Forthwith upon notice by either party	Forthwith upon notice by either party	Nil
Landlord	Taxpayer' s wife	Taxpayer' s wife	Taxpayer' s wife	Taxpayer and his wife	Taxpayer' s wife
Property	A	A	A	A	B
Language	Chinese	Chinese	English	English	Chinese
Referred to below as	TA1	TA2	TA3	TA4	TA5

5. TA1 to TA5 were all signed by DPA.

6. These five documents are not consistent with the contemporaneous documents from the employer, particularly the letters dated 1 April 1997 and 24 December 1997.

7. The letter dated 16 December 1994 from the then chief executive of the employer informed the Taxpayer ' will be promoted to the position of Assistant Director (Grade 2) effective 1 January 1995 ... monthly remuneration will be increased to $71,830 on a twelve-month basis effective 1 January 1995' . There was no mention of housing benefit. The promotion and the increased in salary both took effect from 1 January 1995, but the alleged entitlement to housing benefit was alleged to take effect from 1 April 1995.

8. The letter dated 22 December 1995 from the then chief executive informed the Taxpayer that his remuneration would ' be increased to $79,000 per month effective 1 January 1996' , there being no mention of housing benefit.

9. The letter dated 30 December 1996 from a new chief executive of the employer informed the Taxpayer that his remuneration would ' be increased to $87,380 per month effective

1 January 1997' , there being no mention of housing benefit.

10. The letter dated 1 April 1997 was a ' Supplement to your existing letter of employment on remuneration & salaries tax matters' , stating that (emphasis added):

> ' This is to confirm that **with effect from 1 April 1997**, your monthly compensation package will be $87,380 comprised of basic salary, rental reimbursement and holiday allowance as specified below.
>
> ...
>
> b. Rental **reimbursement**
>
> Your monthly entitlement will be $43,690 and will be paid to you together with your basis salary.
>
> **This payment is intended to cover the cost incurred by you of renting your accommodation** in Hong Kong.
>
> **For tax purposes,** you are required to provide the Company with a copy of your lease or other rental agreement, which should be stamped by the Government of Hong Kong. In addition, you are also required to provide the Company with a copy of the invoices for rent, government rates, management fees and car park fees; where the amount paid by you in this respect equals the amount paid to you mentioned above, the sum paid to you will be reported to the Inland Revenue Department **as if the quarters were provided by the Company to you.**
>
> If you are not able to produce the relevant documentation or the monthly rent, government rates, management fees and car park fees fall short of the rental reimbursement paid to you, either the whole sum or the unspent balance will be reported to the Inland Revenue Department **as if** it were an additional cash allowance paid to you and consequently will be fully taxable.'

11. Significantly, the 1 April 1997 letter was from DPA to the Taxpayer and countersigned by the Taxpayer. The effective date stipulated in this letter is 1 April 1997, in contrast with the Taxpayer' s case that the effective date for the increase in housing benefit took effect from 1 January 1997. More importantly, it made no reference whatsoever to TA4 signed by DPA, the Taxpayer and his wife, and also dated the same date, that is, 1 April 1997. The Taxpayer' s housing benefit confirmed by both DPA and the Taxpayer by the 1 April 1997 letter was rental **reimbursement**. If the parties to TA4 intended to create legal relations and intended TA4 to be legally binding, the employer was renting accommodation for use as the Taxpayer' s quarters. The

employer, as the tenant under TA4, would be paying rent. There would be no question of rental reimbursement. If the Taxpayer managed to provide the employer with the required documentation, then '**for tax purposes**', the amount would be reported to the Inland Revenue Department ('IRD') '**as if**' '**quarters**' were provided by the employer – in direct contrast with TA4 which restricted user of the property '**as staff quarter for [Taxpayer] & his family only**'.

12. This contemporaneous document signed by both DPA and the Taxpayer compelled us to conclude that the parties to TA4 had no intention to create legal relations and that neither party intended TA4 to be legally binding. TA4 was a document for the consumption of the IRD.

13. The letter dated 24 December 1997 from the chief executive informed the Taxpayer of the revision of his 'rental reimbursement' to $46,265 effective 1 January 1998.

14. We do not think it is necessary for us to decide whether TA1 to TA3 were contemporaneous documents. We assume that they are.

15. In our decision, neither party to any of the five TAs had any intention to create legal relations, and neither party to any of the five TAs intended any of the TAs to be legally binding. All five TAs were made for the consumption of IRD.

16. Parties to a tenancy agreement are perfectly entitled to agree that no rental deposit was required. The Taxpayer's wife (as landlord) and DPA on behalf of the employer (as tenant) agreed by TA1, TA2 and TA5 that rental deposit was payable, but none has ever been paid.

17. Again, parties to a tenancy agreement are perfectly entitled to agree when rent would be payable. The Taxpayer's wife (as landlord) and DPA on behalf of the employer (as tenant) agreed by TA1, TA2 and TA5 that rent was payable in advance on the first day of the month when the employer paid the Taxpayer, not his wife, the whole of the Taxpayer's monthly remuneration after deducting provident fund contributions. According to TA3, rent for all twelve months under TA3 was payable upon the signing of TA3 and the provision on deposit was deleted, but nothing was paid upon the signing of TA3.

18. The Taxpayer claimed that he requested cancellation of TA2. We see no reason why the employer, as the tenant under TA2, should enter into TA3 when nine months remained under TA2 and to agree to pay rent for the whole term of twelve months under TA3 upon signing of TA3. Monthly rent was increased from $39,500 to $44,000, despite the fact that the amount of the Taxpayer's housing benefit for the first nine months under TA3 remained at $39,500. The employer declined to pay the excess of $4,500. What allegedly happened was that the employer paid the full amount of rent to the Taxpayer; the employer deducted the excess of $4,500 from the Taxpayer's basic salary; and the Taxpayer accounted to his wife for the rent including the excess of $4,500. Effectively what supposedly happened was that at the Taxpayer's request, the Taxpayer's wife, as landlord under TA3, got an increase in rent of $4,500 each month and the

Taxpayer, as employee, received a deduction of $4,500 each month from his basic salary. This is artificial and unreal.

19. Both TA3 and TA4 could be terminated forthwith by either party upon notice. Such clauses are valid against the landlord but may be invalid against the tenant under Part IV of the Landlord and Tenant (Consolidation) Ordinance, Chapter 7. It is unusual for landlords to agree to such termination clauses.

20. The period under TA4 was from April 1997 to March 1998. The period under TA5 was from September 1997 to August 2000. We have not been told of any formal termination of TA4. If the partied intended to create legal relations and be bound by written tenancy agreements, there is no reason why no written tenancy was in place from 1 September 1997 to 19 April 1998. TA5 is dated 20 April 1998.

21. For the reasons we have given, we conclude that neither party to any of the five TAs had any intention to create legal relations; that neither party to any of the five TAs intended any of the TAs to be legally binding; and that all five TAs were made for the consumption of IRD. The appeal therefore fails.

22. Both the Taxpayer and his elder brother who was his representative were obsessed with a complaint that IRD refused a request by the Taxpayer for a meeting with the appropriate assessor to discuss the case further. Towards the end of the Taxpayer's case, his brother categorically told us that they had placed all the information before us and that they had said everything which they wished to say in the appeal. In view of this conformation, we do not think it is necessary to deal with their complaint.

23. Further and in any event, all five TAs are artificial and/or fictitious and/or were not in fact given effect to. They fall to be disregarded by virtue of section 61 of the Inland Revenue Ordinance. This is another reason why the appeal must fail and fails.

24. We dismiss the appeal and confirm the assessments appealed against.

25. Before we part with this appeal, we must record our disquiet about the Taxpayer's request that the hearing be conducted in Cantonese. The request was made in the notice of appeal dated 8 May 2000. By letter dated 5 July 2000, the Clerk to the Board of Review gave notice of the hearing date and time, highlighting that the appeal would be heard in Chinese. None of us had anything to do with the decision to conduct the appeal in Chinese.

26. With the exception of TA1, TA2 and TA5 and a bundle of rent receipts, all the documents in this appeal are in English. This points to English being the more appropriate language for the appeal.

27. Moreover, what the representative did after requesting that the hearing be conducted in Cantonese and after having been advised that the appeal would be heard in Chinese was to submit a bundle dated 9 August 2000 called ' Summary appeal report (evidences and facts)' . The first 21 pages of that bundle were representations and submissions made by the representative in English. The rest of the bundle is a copy of thirteen documents, all in English. At the hearing of the appeal, the representative submitted a further bundle of documents, all in English, and a five-page document in English, prepared by the representative and called ' Summary of disagreement of the statements of fact with commissioner' .

28. A party who is unable or unwilling to write or submit in Chinese or prefers to write or submit in English should not ask for a hearing in Chinese. Conducting the appeal in English does not mean that evidence has to be given in English. Evidence may be given in Cantonese or any other dialect provided that early written notice is given to the Clerk so that she may be able to make arrangements for an interpreter.