

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D22/04

Salaries Tax – home loan interest deduction – property under Home Ownership Scheme – beneficial owner as opposed to a legal (registered) owner – sections 2(1) and 26E of the Inland Revenue Ordinance.

Panel: Patrick Fung Pak Tung, SC (chairman), Benjamin Chain and Cheung Wai Hing.

Dates of hearing: 3 June 2003 and 24 February 2004.

Date of decision: 21 June 2004.

The taxpayer is the beneficial owner of a property under the Home Ownership Scheme ('HOS') which is held by his elderly father as legal owner on a resulting trust in favour of the taxpayer.

The said property has been used as the residence of the father as well as the taxpayer.

The taxpayer claimed that he should be entitled to a tax deduction in respect of the interest paid by him on the mortgage of the said property under section 26E.

Such interest on the mortgage had been allowed to be deducted in previous years of assessment.

Held:

1. On this appeal, the Board has to determine whether the expression 'sole owner' in section 26E is so affected by the definition of 'owner' in section 2(1) which includes a sole beneficial owner.
2. The Board opined that a beneficial owner of property is not entitled to the benefit of the tax deduction under section 26E.
3. Section 26E(9) only caters for three classes of persons: 'a sole owner', 'a joint tenant', and 'a tenant in common' in that the word 'held' suggests a holding at law as opposed to the existence of an interest in equity.
4. The word 'owner' in section 26E is required to have a meaning not exactly the same

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as defined in section 2(1).

Obiter:

1. Under the terms and conditions of HOS and the operation of the Housing Ordinance (Chapter 283), only the father and no one else would be recognized as the owner and that any transfer of legal or beneficial interest in the said property would not be recognized unless first approved by the Housing Authority.
2. As there had been caveat that the deductions allowed were subject to review, the deductions of the mortgage interest allowed in favour of the taxpayer in previous years of assessment would not affect the taxpayer.

Appeal dismissed.

Cases referred to:

D20/01, IRBRD, vol 16, 187

D94/01, IRBRD, vol 16, 792

Herbert Li of Department of Justice for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against the determination by the Respondent ('the Commissioner') dated 30 December 2002 rejecting the objection by the Taxpayer to an assessment for salaries tax against him for the year of assessment 2001/02.
2. The point in issue is a very narrow one. It relates to a property known as Address A ('the Property'). The Property was purchased from the Hong Kong Housing Authority ('the Housing Authority') under the Home Ownership Scheme ('HOS') on 23 November 1995 in the name of Mr B, the elderly father of the Taxpayer. There is no dispute that the purchase of the Property has been financed totally by the Taxpayer who has been paying off the mortgage on the Property. The Property has been used as the residence of the father as well as the Taxpayer. The Taxpayer claims that he should be entitled to deduction from his assessable income for the year of assessment 2001/02 the interest paid on the mortgage in the sum of \$31,163. Such interest on the

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mortgage had been allowed by the Inland Revenue Department to be deducted in the previous years of assessment.

3. The relevant provisions in the Inland Revenue Ordinance Chapter 112 ('the IRO') are as follows:

' 26E. Home loan interest

(1) *Subject to the other provisions of this section and to section 26E where a person pays during any year of assessment any home loan interest for the purposes of a home loan obtained in respect of a dwelling which is used at any time in that year of assessment by the person exclusively or partly as his place of residence, a deduction in respect of the home loan interest shall be allowable to that person for that year of assessment.*

(2) (a) *Subject to paragraphs (b) and (c) and subsection (3), a deduction allowable to a person under subsection (1) in respect of any home loan interest paid by the person during any year of assessment shall be –*

(i) (A) *where the dwelling is used by the person exclusively as his place of residence during the whole of that year of assessment, the amount of the home loan interest paid;*

...

(b) *For the purposes of this section, where a dwelling is held by a person otherwise than as a sole owner, the amount of the home loan interest paid referred to in paragraph (a)(i) shall be regarded as having been paid –*

(i) *where the dwelling is held by the person as a joint tenant, by the joint tenants each in proportion to the number of the joint tenants; or*

(ii) *where the dwelling is held by the person as a tenant in common, by the tenants in common each in proportion to his or her share in the ownership in the dwelling.*

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...

(9) *In this section*

“dwelling” (住宅) means any building or any part of a building –

- (a) which is designed and constructed for use exclusively or partly for residential purposes; and*
- (b) the rateable value of which is separately estimated under section 10 of the Rating Ordinance (Cap. 116);*

“home loan” (居所貸款), in relation to a person claiming a deduction under this section for any year of assessment, means a loan of money which is –

- (a) applied wholly or partly for the acquisition of a dwelling which -*
 - (i) during any period of time in that year of assessment is held by the person as a sole owner, or as a joint tenant or tenant in common; and*
 - (ii) during that period of time is used by the person exclusively or partly as his place of residence; and*
- (b) secured during that period of time by a mortgage or charge over that dwelling or any other property in Hong Kong;*

“home loan interest” (居所貸款利息), in relation to a person claiming a deduction in respect of a dwelling under this section, means interest paid by the person as a sole owner, or as a joint tenant or tenant in common of the dwelling for the purposes of a home loan to –

- (a) the Government;*
- (b) a financial institution;*
- (c) a credit union registered under the Credit Unions Ordinance (Cap. 119);*

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(d) *a money lender licensed under the Money Lenders Ordinance (Cap. 163);*

(e) *the Hong Kong Housing Society;*

(f) *an employer of the person; or*

(g) *any recognized organization or association;*

“place of residence”(居住地方), in relation to a person who has more than one place of residence, means his principal place of residence;

...’

4. On the evidence, there is no doubt that the Taxpayer is the beneficial owner of the Property because:

- (i) he has provided all the purchase money;
- (ii) there is no presumption of gift by him to his father;
- (iii) there is no evidence that he was making a gift of the Property to his father.

The Property is being held by his father as legal owner on a resulting trust in favour of the Taxpayer in equity. The question is whether as such beneficial owner, the Taxpayer is entitled to a tax deduction in respect of the interest paid by him on the mortgage of the Property under section 26E of the IRO.

5. The relevant parts of section 2(1) of the IRO provide as follows:

‘2. Interpretation

(1) *In this Ordinance, unless the context otherwise requires -*

“owner”(擁有人) in respect of land or buildings or land and buildings, includes a person holding directly from the Government, a beneficial owner, a tenant for life, a mortgagor, a mortgagee in possession, a person with adverse title to land receiving rent from buildings or other structures erected on that land, a person who is making payments to a co-operative society registered under the Co-operative societies Ordinance (Cap. 33) for the purpose of the purchase thereof, and a person who holds land or

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buildings or land and buildings subject to a ground rent or other annual charge; and includes an executor of the estate of an owner;'

The question arises as to whether the expression 'sole owner' in section 26E is so affected by the definition of 'owner' in section 2(1) that it includes a sole **beneficial** owner.

6. We are of the opinion that a beneficial owner as opposed to a legal (registered) owner of property is not entitled to the benefit of the tax deduction under section 26E of the IRO for the following reasons:

- (i) Subsection (9) thereof caters for only three classes of persons : 'a sole owner', 'a joint tenant' and 'a tenant in common'. If the argument of the Taxpayer is correct, what is the entitlement of a beneficial owner of half of the property in question (for example, one who contributes to the purchase money half and half with the sole registered owner) or the entitlement of a joint tenant at law but who is a tenant-in-common in equity (which is a possibility under section 8(1) of the Conveyancing and Property Ordinance Chapter 219)? Section 26E of the IRO would simply not work.
- (ii) The word 'held' in the definition of 'home loan' in section 26E(9) suggests a holding at law as opposed to the existence of an interest in equity.
- (iii) As Mr Li representing the Commissioner has submitted, the operative words in section 26E of the IRO are 'dwelling' and 'residence' whereas the definition in section 2(1) does not mention either.
- (iv) The definitions in section 2(1) are qualified by the opening words 'unless the context otherwise requires'. In section 26E, it would seem that in the context of 'a sole owner' the word 'owner' is required to have a meaning not exactly the same as defined in section 2(1).

7. Our conclusion is supported by at least two previous decisions of the Board of Review in Case No D20/01, IRBRD, vol 16, 187 and Case No D94/01, IRBRD, vol 16, 792.

8. In addition to the above, in the present case, when the father of the Taxpayer purchased the Property from the Housing Authority, he became subject to the terms and conditions of the HOS and the operation of the Housing Ordinance Chapter 283 to the effect that only he and no one else would be recognized as the owner and that any transfer of legal or beneficial interest in the Property would not be recognized unless first approved by the Housing Authority. There has never been any such application or approval.

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9. As to the point that tax deduction had been allowed in favour of the Taxpayer in previous years of assessment, our attention has been drawn to the caveat in the relevant notices of assessment that the deductions allowed were subject to review. Such fact therefore does not affect the Taxpayer.

10. In all the circumstances, we have no alternative but to dismiss the appeal of the Taxpayer.