

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D64/02

Personal assessment – whether result of personal assessment fair and equitable – whether the Commissioner should exercise the discretion provided in section 64(2) – whether the provisions of the Inland Revenue Ordinance ('IRO') are unfair or against the Basic Law – sections 5(1), 5(1A), 41, 42, 42A, 43 and 64(2) of the IRO – Articles 8, 11 and 25 of the Basic Law.

Panel: Patrick Fung Pak Tung SC (chairman), Liu Ling Hong and William Tsui Hing Chuen.

Date of hearing: 20 June 2002.

Date of decision: 25 September 2002.

For the years of assessment 1998/99, 1999/2000 and 2000/01, the taxpayers, a married couple, were the joint tenants of a property that had been let out for rental income. They offered their income derived from employment and the rental income derived from the said property for assessment to salaries tax and to property tax respectively. The taxpayers elected for personal assessment and sought to deduct against their share of net assessable value in respect of the said property interest expenses.

The assessor aggregated all the income of the taxpayers and made the assessments. The taxpayers objected to the personal assessments on the ground that:

- (a) It is not fair and equitable to increase the amount of tax charged under personal assessment when their respective joint income is the same as the net assessable income.
- (b) Compared with two joint tenants who are not husband and wife, they have to pay a higher amount of tax as a result of electing personal assessment.
- (c) It is against the principle of 'equality of law' to increase their tax liability and the Commissioner should exercise the discretion provided in section 64(2) to revise the assessments accordingly.

There was no dispute about the facts set out in the determination and that if the taxpayers had not been husband and wife, the tax liabilities assessed against them would be less than what they are now.

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The taxpayers argued that Articles 8 and 25 of the Basic Law provided that there should be equality before the law. Further, although there was nothing wrong with the tax law itself, the Commissioner in making an assessment had failed to exercise his discretion under section 64(2) in such a way as to produce a result that their tax liabilities were no different from those of an unmarried couple in exactly the same situation as themselves. On the other hand, the Commissioner argued that in making an assessment on the taxpayers, he was merely following the mechanics laid down by the IRO and he had no discretion to produce a result which was desired by the taxpayers.

Held:

1. The taxpayers misunderstood the term 'rules of equity' in Article 8 of the Basic Law. The term is a reference to the principles of law which have evolved in the Courts of Chancery in England over the last few hundred years. It certainly does not mean that in the application of a piece of legislation the same result must be produced for all persons despite the fact that they have different circumstances. Furthermore, in applying the IRO strictly to every person in accordance with the machinery provided therein without regard to the personal circumstances of the individual involved, the Commissioner is exactly complying with Article 25 of the Basic Law.
2. The taxpayers elected for personal assessment because it was of more advantages to them to do so. Once they have done so, they are also obliged to observe the other terms in the scheme. They cannot say that they elect for personal assessment only for its good features and that the terms which are less beneficial to them should not apply.
3. The provisions of the IRO in question are not in any way unfair or against the Basic Law.

Appeal dismissed.

Case referred to:

Kilman v Winckworth 17 TC 569

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer in person and for another taxpayer.

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Decision:

1. These are two appeals heard together. They are appeals by the Appellants ('the Taxpayers') who are husband and wife against personal assessments raised on them for the years of assessment 1998/99, 1999/2000 and 2000/01. Objections were lodged by the Taxpayers against such assessments. By his letters dated 8 February 2002 and addressed to the Taxpayers respectively, the Respondent ('the Commissioner') made a determination and rejected the Taxpayers' objections. The Taxpayers have brought these appeals against such determination.

The facts

2. The relevant facts and figures are summarised and set out in the determination. For the sake of convenience, we set out the relevant paragraphs thereof below:

'(2) [Mr A] and [Ms B] are husband and wife.

(3) In their respective tax returns for the years 1998/99, 1999/2000 and 2000/01, [Mr A] and [Ms B] reported and offered their income derived from employment for assessment to salaries tax. Details of the salaries tax assessments raised on them are as follows:

(a) [Mr A]

	<u>1998/99</u>	<u>1999/2000</u>	<u>2000/01</u>
Assessable Income	\$567,267	\$797,399	\$151,200
<u>Less: Deductions</u>	<u>2,000</u>	<u>3,240</u>	<u>4,291</u>
Net Assessable Income	565,267	794,159	146,909
<u>Less: Basic allowance</u>	108,000	108,000	108,000
Child allowance	<u>30,000</u>	-	-
Net Chargeable Income	<u>\$427,267</u>	<u>\$686,159</u>	<u>\$38,909</u>
Tax Payable thereon	<u>\$62,135</u>	<u>\$106,147</u>	<u>\$973</u>

(b) [Ms B]

	<u>1998/99</u>	<u>1999/2000</u>	<u>2000/01</u>
Assessable Income	\$499,800	\$441,600	\$531,600
<u>Less: Deductions</u>	-	<u>1,450</u>	<u>4,482</u>
Net Assessable Income	499,800	440,150	527,118
<u>Less: Basic allowance</u>	108,000	108,000	108,000
Child allowance	-	30,000	30,000
Dependent parent			

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allowance	<u>60,000</u>	<u>60,000</u>	<u>30,000</u>
Net Chargeable Income	<u>\$331,800</u>	<u>\$242,150</u>	<u>\$359,118</u>
Tax Payable thereon	<u>\$45,906</u>	<u>\$30,665</u>	<u>\$50,550</u>

Neither [Mr A] nor [Ms B] had objected to the above salaries tax assessments which had become final and conclusive in terms of section 70 of the Inland Revenue Ordinance [“the IRO”].

- (4) At all relevant times, [Mr A] and [Ms B] were the joint tenants of a property known as [Address C] [“the Subject Property”] which had been let out for rental income. They offered the rental income derived from the Subject Property for assessment to property tax. Details of the property tax assessments raised on them are as follows:

	<u>1998/99</u>	<u>1999/2000</u>	<u>2000/01</u>
Rental Income	\$143,000	\$122,400	\$117,600
<u>Less: Rates</u>	<u>6,365</u>	<u>4,530</u>	<u>4,637</u>
	136,635	117,870	112,963
<u>Less: 20% allowance</u>	<u>27,327</u>	<u>23,574</u>	<u>22,593</u>
Net Assessable Value	<u>\$109,308</u>	<u>\$94,296</u>	<u>\$90,370</u>

The Taxpayers did not object to the above property tax assessments which had become final and conclusive pursuant to section 70 of the IRO.

- (5) For each of the years 1998/99, 1999/2000 and 2000/01, [Mr A] and [Ms B] elected personal assessment and sought to deduct against their share of net assessable value in respect of the Subject Property the following amount of interest expenses:

	<u>1998/99</u>	<u>1999/2000</u>	<u>2000/01</u>
[Mr A’s] share	\$89,690	\$76,781	\$72,148
[Ms B’s] share	<u>89,690</u>	<u>76,870</u>	<u>72,148</u>
Total	<u>\$179,380</u>	<u>\$153,651</u>	<u>\$144,296</u>

- (6) Pursuant to sections 42, 42A and 43 of the IRO, the Assessor aggregated all the income of [Mr A] and [Ms B] and made the following personal assessments for the years 1998/99, 1999/2000 and 2000/01:

- (a) Year of assessment 1998/99

	<u>[Mr A]</u>	<u>[Ms B]</u>	<u>Total</u>
Net Assessable Income [Fact (3)]	\$565,267	\$499,800	\$1,065,067
Net Assessable Value [Fact (4)]	<u>54,654</u>	<u>54,654</u>	<u>109,308</u>

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	619,921	554,454	1,174,375
<u>Less: Interest expense [Note 1]</u>	<u>54,654</u>	<u>54,654</u>	<u>109,308</u>
Total income	<u>\$565,267</u>	<u>\$499,800</u>	1,065,067
<u>Less: Married person's allowance</u>			216,000
Child allowance			30,000
Dependent parent allowance			<u>60,000</u>
Net Chargeable Income			<u>\$759,067</u>
Tax Payable thereon [Note 2]	<u>\$62,914</u>	<u>\$55,267</u>	<u>\$118,541</u>

(b) Year of assessment 1999/2000

	<u>[Mr A]</u>	<u>[Ms B]</u>	<u>Total</u>
Net Assessable Income [Fact (3)]	\$794,159	\$440,150	\$1,234,309
Net Assessable Value [Fact (4)]	<u>47,148</u>	<u>47,148</u>	<u>94,296</u>
	841,307	487,298	1,328,605
<u>Less: Interest expense [Note 1]</u>	<u>47,148</u>	<u>47,148</u>	<u>94,296</u>
Total income	<u>\$794,159</u>	<u>\$440,150</u>	1,234,309
<u>Less: Married person's allowance</u>			216,000
Child allowance			30,000
Dependent parent allowance			<u>60,000</u>
Net Chargeable Income			<u>\$928,309</u>
Tax Payable thereon [Note 2]	<u>\$94,782</u>	<u>\$52,530</u>	<u>\$147,312</u>

(c) Year of assessment 2000/01

	<u>[Mr A]</u>	<u>[Ms B]</u>	<u>Total</u>
Net Assessable Income [Fact (3)]	\$146,909	\$527,118	\$674,027
Net Assessable Value [Fact (4)]	<u>45,185</u>	<u>45,185</u>	<u>90,370</u>
	192,094	572,303	764,397
<u>Less: Interest expense [Note 1]</u>	<u>45,185</u>	<u>45,185</u>	<u>90,370</u>
Total income	<u>\$146,909</u>	<u>\$527,118</u>	674,027
<u>Less: Married person's allowance</u>			216,000
Child allowance			30,000
Dependent parent allowance			<u>30,000</u>
Net Chargeable Income			<u>\$398,027</u>
Tax Payable thereon [Note 2]	<u>\$12,460</u>	<u>\$44,704</u>	<u>\$57,164</u>

Note 1: Under the proviso to section 42(1), the amount of interest deductible is restricted to the amount of net assessable value of the Subject Property.

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Note 2: Under section 43(2B), the amount of respective tax payable by [Mr A] and [Ms B] is arrived at by apportioning the total tax payable with reference to the his/her total income and their joint total income.

- (7) On divers dates, [Mr A] and [Ms B] objected to the personal assessments set out in Fact (6) above. Their grounds of objection can be summarized as follows:
- (a) It is not fair and equitable to increase the amount of tax charged under personal assessment when their respective joint income is same as the net assessable income.
 - (b) Compared with two joint tenants who are not husband and wife, they have to pay a higher amount of tax as a result of electing personal assessment.
 - (c) It is against the principle of “equality of law” to increase their tax liability and the Commissioner should exercise the discretion provided in section 64(2) to revise the assessments accordingly.’

The respective cases of the parties

3. There is no dispute about the facts and figures set out in the determination as referred to in paragraph 2 above.
4. There is also no dispute about the fact that, if the Taxpayers had not been husband and wife, the tax liabilities assessed against them would be less than what they are now.
5. The Taxpayers’ argument can be summarised as follows:
- (a) They rely on Articles 8 and 25 of the Basic Law of the Hong Kong Special Administrative Region which provide that there should be equality before the law.
 - (b) Although there is nothing wrong with the tax law itself, in making an assessment on them, the Commissioner has failed to exercise his discretion under section 64(2) of the IRO in such a way as to produce a result that their tax liabilities are no different from those of an unmarried couple in exactly the same situation as themselves.

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6. On the other hand, the Commissioner argues that in making an assessment on the Taxpayers, he is merely following the mechanics laid down by the IRO and he has no discretion to produce a result which is desired by the Taxpayers.

7. We should add that in the annexures to his notice of appeal dated 3 March 2002, the Taxpayer (Mr A) has set out certain allegations of victimisation of him by the Government as a result of some incident in 1998 which involved the Independent Commission Against Corruption. At the commencement of the hearing of the appeal, we inquired of Mr A as to whether he was pursuing the same as a ground of appeal. We were informed by Mr A that he was not relying on the said incident and that we were not required to consider 'bad motive' on the part of the Government as a ground of appeal.

The IRO

8. We deal first with the relevant provisions in the IRO.

9. Part II of the IRO deals with property tax. Section 5(1) provides for the levying of property tax on every person being the owner of any land or buildings or land and buildings computed at the standard rate on the 'net assessable value' of the same.

10. Section 5(1A) defines 'net assessable value' as meaning the assessable value of land or buildings or land and buildings ascertained in accordance with section 5B less:

- (a) rates paid by the owner and
- (b) an allowance for repairs and outgoings of 20% of that assessable value after deduction of any rates paid.

It is to be noted that there is no provision for the deduction of any interest paid by the owner on any mortgage loan on the land or buildings in question.

11. Part VII of the IRO deals with personal assessment. Section 41 provides that an individual may elect for personal assessment on his or her total income in accordance with Part VII. Section 41(1A) provides that if an individual elects for personal assessment, then his or her spouse must also do so.

12. Section 42 sets out the machinery for calculation of the total income of an individual. Subsection (1) reads as follows:

- '(1) For the purposes of this Part the total income of an individual for any year of assessment shall, subject to subsection (8), be the aggregate of the following amounts –*

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- (a)(ii) *in respect of the years of assessment commencing on or after 1 April 1983, the sum equivalent to the net assessable value as ascertained in accordance with sections 5(1A) and 5B:*

Provided that where an individual is a joint owner or co-owner of property, that individual's share of the net assessable value shall be computed by apportioning the value ascertained in accordance with section 5(1A) or 5B –

- (a) *in the case of joint ownership, between the joint owners equally; and*
- (b) *in the case of ownership in common, between the owners in common each in proportion to his share in such ownership;*
- (b) *the net assessable income of the individual for that year of assessment; and*
- (c) *subject to subsection (1A), the assessable profits of the individual for that year of assessment computed in accordance with Part IV:*

Provided that there shall be deducted from that part of the total income arising from paragraph (a) the amount of any interest payable on any money borrowed for the purpose of producing that part of the total income where the amount of such interest has not been allowed and deducted under Part IV.'

Thus, it can be seen that an advantage of a property owner who elects for personal assessment over an owner who does not do so is that the former is able to deduct the interest paid on any mortgage loan on the property from his income.

13. Section 42A reads as follows:

'42A. Assessment to tax

- (1) *In giving effect to an election under section 41 the assessor shall make a single assessment –*
- (a) *in the sum of the total income, as reduced under section 42(2) and (5), of the individual making the election; or*

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(b) *in the case of an election under section 41(1A), in the sum of the joint total income resulting from the aggregation of the total income of the one spouse, as so reduced, with that of the other, as also so reduced,*

as reduced in each case by such of the allowances prescribed in Part V as may be appropriate.

(2) *In the case of an election under section 41(1A) by a husband and wife who married one another in the year of assessment to which the election relates, they shall be deemed for the purpose of ascertaining their joint total income under subsection (1)(b) to have married at the commencement of that year.'*

14. Section 43(1) reads as follows:

'43. Rates of charge

(1) *Tax shall be charged on the amount of the assessment referred to in section 42A(1) at the rates specified in Schedule 2 –*

(a) *on the individual; or*

(b) *in the case of a husband and wife making an election under section 41(1A) on both of them subject to apportionment in the manner prescribed by subsection (2B).'*

15. In relation to the above, a number of matters are to be noted:

- (a) Certain benefits may be gained by an individual or a married couple electing for personal assessment.
- (b) The existence of such benefits and the extent of such benefits must necessarily depend on the actual figures and calculations and the particular circumstances of the individuals involved.
- (c) Personal assessment is a matter of election or choice by the taxpayer; it is not a matter of compulsion. It provides one option to the taxpayer to reduce his tax liability if his personal circumstances enable him to make use of the machinery provided by the legislature to his own benefit.

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- (d) The Commissioner is given no discretion in making an assessment under section 43(1).

16. The relevant parts of section 64 provide as follows:

‘64. Objections

- (1) *Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment ...*
- (2) *On receipt of a valid notice of objection under subsection (1) the Commissioner shall consider the same and within a reasonable time may confirm, reduce, increase or annul the assessment objected to ...’*

The Basic Law

17. The Taxpayers in fact rely on the following three Articles in the Basic Law:

‘Article 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 11

In accordance with Article 31 of the Constitution of the People’s Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.

Article 25

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All Hong Kong residents shall be equal before the law.'

Our conclusion

18. We have come to the conclusion that the Taxpayers' argument cannot succeed.
19. To begin with, the Taxpayers have misunderstood the term 'rules of equity' in Article 8 of the Basic Law. That term is a reference to the principles of law which have evolved in the Courts of Chancery in England over the last few hundred years. It is often used in contradistinction with 'common law' or 'statute law'. It certainly does not mean that in the application of a piece of legislation the same result must be produced for all persons despite the fact that they have different circumstances.
20. Furthermore, in applying the IRO strictly to every person in accordance with the machinery provided therein without regard to the personal circumstances of the individuals involved, the Commissioner is exactly complying with Article 25 of the Basic Law.
21. What has happened in the present case is that the Taxpayers elected for personal assessment because it was of more advantages to them to do so. Once they have done so, they are also obliged to observe the other terms in the scheme. They cannot say that they elect for personal assessment only for its good features and that the terms which are less beneficial to them should not apply. In paragraph 3(7) of the determination, the Commissioner says: 'I wish to point out that had they not elected personal assessment, the total amount of tax (i.e. salaries tax and property tax) charged on them would be higher because they would not be able to deduct the interest expenses'. We have not heard evidence or argument from the Taxpayers to the contrary.
22. We have no doubt that there are cases where some other married couples elect for personal assessment, their personal circumstances are such that their tax liabilities would not be different whether they are married or unmarried.
23. In the English case of Kilman v Winckworth 17 TC 569, the General Commissioners stated a case for the opinion of the High Court. The statutory provision in question provided as follows:

'If the claimant proves that he is a widower and that for the year of assessment a person, being a female relative of his or of his deceased wife, is resident with him for the purpose of having the charge and care of any child of his or in the capacity of a housekeeper, or that he has no female relative of his own or of his deceased wife who is able and willing to take such charge or act in such capacity of a housekeeper, or that he has no female relative of his own or of his deceased wife who is able and willing to take such charge or act in such capacity and that he has employed some other female for the purpose he shall,

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subject as hereinafter provided, be entitled to a deduction of fifty pounds in respect of that female relative or female person.'

The General Commissioners allowed the taxpayer's claim for housekeeper relief despite the fact that he was not a widower but only a divorcee. In holding that the General Commissioners were wrong, Finlay J said:

'... but it seems perfectly plain that for taxation purposes, as for all other purposes, there are people who are single, there are people who are married, there are people who are widows or widowers and there are also people who have been divorced. ... The Commissioners say further: "On the grounds mentioned, and in equity, we directed that the housekeeper relief be granted." The grounds mentioned I have, out of respect to the Commissioners, gone through. I am not quite sure what they mean by the words "in equity", but it is, of course, elementary that in these cases what one has got to do is to look at the exact words of the Section which gives an exemption and ascertain whether the person brings himself within it. There is no room, of course, in a taxing Act for equitable considerations, if by "equity" the Commissioners meant there, as I suppose they did, considerations of what they conceived would effect a just result in all the circumstances. It is, of course, for the Legislature and not for the Courts to consider matters of that sort.'

24. In all the circumstances, we are of the firm view that there has been no breach of the Basic Law on the part of the Commissioner in not adjusting the assessments in favour of the Taxpayers as they desire. Indeed, the Commissioner has no choice but to act strictly in accordance with the provisions of the IRO.

25. Further, we do not think that the provisions of the IRO in question are in any way unfair or against the Basic Law. Indeed, Mr A himself expressly says that there is nothing wrong with the law itself.

26. Accordingly, we dismiss the appeals of the Taxpayers.