

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D107/89

Salaries tax - dependent parent allowance - natural mother of taxpayer with concubine status - step-mother lawful wife of father - whether taxpayer could claim allowances for both - sections 42B(2)(b) and 43A(c) of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Elsie Leung Oi Sie and David Wu Chung Shing.

Date of hearing: 28 December 1989.

Date of decision: 26 March 1990.

The taxpayer claimed dependent parent allowances in respect of both his natural mother who was the lawfully recognised concubine of his father and his step-mother who was the lawful wife of his father. The Commissioner only agreed to allow a dependent parent allowance in respect of the natural mother and not in respect of the step-mother.

Held:

On a correct interpretation of the Inland Revenue Ordinance, it was the intention of the legislature that the taxpayer should be entitled to claim dependent parent allowances for both his natural mother and his step-mother.

Appeal allowed.

Wong Yui Keung for the Commissioner of Inland Revenue.

Yu How Yuen of Yu How Yuen & Co for the taxpayer.

Decision:

This is an appeal by an individual taxpayer against the refusal by the Deputy Commissioner to allow him to claim a dependent parent allowance for the wife of his natural father who was not his natural mother.

The relevant facts of the case are simple and not in dispute. They are as follows:

1. The father of the Taxpayer was married to the first lady. The wedding is not disputed.

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2. The father took into the family as a concubine the second lady who was the natural mother of the Taxpayer. It is not disputed that she was recognised as a concubine under the law prior to the abolition of this relationship being recognised under the law of Hong Kong.
3. During the year in question, the Taxpayer maintained both his natural mother and the lawful wife of his father.
4. The Taxpayer considered the lawful wife of his father to be his mother according to Chinese law and custom as well as his natural mother. The Taxpayer was recognised by his father and the lawful wife of his father as being a legitimate son of the concubine and as a member of the family.

The question to be decided by this Board is whether or not the Taxpayer was allowed to claim dependent parent allowances for both of the two ladies whom he was maintaining.

The Commissioner's representative argued that the Taxpayer was only entitled to an allowance in respect of his natural mother and not in respect of the lawful wife of his father. With due respect, we do not agree with the Commissioner or his representative.

This case depends entirely on the technical interpretation of certain provisions of the Inland Revenue Ordinance, and as each year goes by, cases of this nature will become less and less common.

The starting point must be section 42B(2)(b) of the Inland Revenue Ordinance which defines 'parent' as follows:

'42B(2)(b) "Parent of the individual or his wife" means -

- (i) a parent of whose marriage, being a marriage recognised by the law of Hong Kong, the individual or his wife is the child;
- (ii) a parent by whom the individual or his wife was adopted in an adoption recognised by the law of Hong Kong;
- (iii) a step-parent;
- (iv) the natural mother of the individual or his wife; or
- (v) a parent of a deceased husband or wife of the individual.'

The relevant part of this definition is the first paragraph and the question is whether or not the Taxpayer was a child of the marriage between his father and his father's lawful wife.

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To answer this question, we must look at the definition of child under section 43A(c) of the Inland Revenue Ordinance which provides, inter alia, that 'in the case of Asiatics a child of the individual by his concubine if such child is recognised by him and his family as a member of his family'.

At the hearing of this appeal, the Taxpayer appeared and gave evidence. It is not disputed that he is a child of the concubine and it is also clear, as we have found in the facts, that he was recognised by his father and the family as being a member of the family.

The Commissioner's representative submitted that the definition of 'child' does not have any relevance in deciding the meaning of 'parent'. It only applies in deciding whether an allowance can be given in respect of a dependent child. This is where we consider the Commissioner has erred. It is clear to us that section 43A applies to the whole of part VII of the Ordinance. The first words of section 43A are 'In this part'. There is no restriction of the definition of 'child' to a dependent child. Accordingly the definition of 'child' applies equally to the word 'child' where it appears in the meaning of 'parent' in section 42B.

The Commissioner's representative argued that the meaning of parent is restrictive and where it says 'a parent of whose marriage' the individual is the child, it means a natural child of that marriage. We consider that this is importing words and meaning to the definition which are not naturally there.

In the present case, there was a marriage and only one marriage. The marriage was between the father and his lawful wife. Under the law as it then was he was entitled to have a concubine and to have lawful children by that concubine who were recognised within the marriage structure. The Taxpayer was the legitimate offspring of the marriage between the father and the lawful wife. If there had been no lawful wife, there could have been no lawful concubine and the Taxpayer would not have been legitimate. His entire status in the world depends upon and traces back to the original marriage between his father and his father's lawful wife.

In reaching this decision, we are fortified by a number of factors. Clearly the legislature has intended to benefit those who are responsible for and maintain their parents. In section 42B, specific mention is made of a 'step-parent'. There is no natural relationship between a child and his step-parent. However, a step-parent is a lawfully recognised relationship and is very similar to the relationship between the son of a concubine and the first wife of his father. Indeed, the relationship between a son and the first wife is even closer under Chinese law and custom. There is a moral if not legal obligation on a son to maintain the lawful wife and within the Chinese family structure, the first lawful wife is referred to and recognised as 'mother' by all legitimate children whether her natural children or not. In our opinion,

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it is clear that the legislature has intended to benefit a taxpayer such as the present one by including in the definition of 'child' a specific mention of children of concubines who are recognised by the family.

For the reasons given, we allow this appeal and direct that the assessment appealed against be remitted back to the Commissioner to grant the dependent parent allowance claimed and reduce the tax payable accordingly.