

INLAND REVENUE BOARD OF REVIEW DECISIONS

HCIA 1/2001

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE**

HIGH COURT INLAND REVENUE APPEAL NO. 1 OF 2001

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BETWEEN

SIT KWOK KEUNG

Appellant

AND

COMMISSIONER OF INLAND REVENUE

Respondent

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Coram: Hon Chung J in Court  
Date of Hearing: 21 August 2001  
Date of Handing Down Opinion: 24 September 2001

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O P I N I O N

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**Introduction**

1. This is the decision on the case stated by the Board of Review pursuant to section 69 of the Inland Revenue Ordinance Cap. 112 which reads:-

"(1) The decision of the Board shall be final.

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Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is in writing and delivered to the clerk to the Board together with a fee ... within 1 month of the date of the Board's decision ...

- (5) Any judge of the Court of First Instance shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the court thereon. Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require ... "

2. The 2 questions posed for the opinion of the Court by the Board are:-

- "(1) Whether on the facts as found by the Board, the Board is correct in law in holding that the Taxpayer is not entitled to married person's allowance in the year of assessment 1998/99.
- (2) Whether on the facts as found by the Board, the Board is correct in law in holding that the Taxpayer is not entitled to single parent allowance in the year of assessment 1998/99".

### **The Background Facts**

3. The background facts leading to the hearing before the Board have been set out in the case stated and can be summarised as follows.

4. The taxpayer and a Madam Yim ("Yim") were husband and wife. Yim was a housewife. They have 2 sons who are still at school. Their marriage was dissolved by a court decree on 13 November 1997 and the taxpayer was ordered to pay periodical payments to Yim in the sum of \$15,000 per month. \$5,000 of that is payable to Yim while the remaining \$10,000 was payable to (and shared equally by) the 2 sons. Custody of the children was given to Yim and the 3 of them resided in a flat in Tuen Mun. The taxpayer resided in Yuen Long.

5. One of the 2 sons completed his secondary studies in July 1999. The taxpayer approached 2 schools and liased with the school principal for admission tests to be taken by his son. The taxpayer also succeeded in his claim for civil service fringe benefits regarding his sons on the basis that they are his "dependents".

6. The taxpayer claimed in his tax return for the year of assessment 1998/99 "Married Person's Allowance" and "Single Parent Allowance". The Revenue was of the view that he was not entitled to such allowances. The taxpayer contended before the Board

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that he was but the Board, having determined in effect that the Revenue's view was correct, dismissed his appeal.

### **Married Person's Allowance**

7. Section 29 of the Inland Revenue Ordinance, Cap. 112 provides that:-

"(1) An allowance ('married person's allowance') shall be granted under this section in any year of assessment if a person is, at any time during that year, married and?

(a) the spouse of that person did not have assessable income in the year of assessment ...

(4) Where husband and wife are living apart a married person's allowance shall only be granted where the spouse claiming the allowance is maintaining or supporting the other".

Section 2, Cap. 112 provides:-

" 'Marriage' means?

(a) any marriage recognised by the law of Hong Kong; or

(b) any marriage, whether or not so recognised, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so ...

and 'married' shall be construed accordingly ...

'spouse' means a husband or wife ...

'wife' means a married woman whose marriage is a marriage within the meaning of this section".

8. At the hearing before the Board, the taxpayer relied on section 29(4) and argued that this sub-section shows that some flexibility should be afforded to a taxpayer when applying section 29(1). The Board rejected this argument essentially on the ground that the taxpayer is not within section 29(1) because he was not married at the relevant time.

9. The taxpayer's said argument was repeated at the hearing before the Court. I agree with the Board's decision because even section 29(4) refers to a "husband and wife ... living apart ... ". The use of the words "husband and wife" clearly shows that although 2 people may not be living together, their relationship must still be that of a married couple before section 29 can be relied upon.

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10. The taxpayer raises a further argument at the hearing before the Court. He contends that the way in which the Revenue and the Board construed section 29, Cap. 112 will result in Yim being deprived of an allowance which would have been available to her. He takes the view that the allowance actually belongs to Yim because she is the person who incurred the expenses, that is, she is the one who spent the money to take care of the sons.

11. I reject the above argument for two reasons. One, if the taxpayer's argument was correct, the allowance would not have been claimable by him. In other words, he would have no locus standi to raise any objection because he would not be the one entitled to claim the allowance. Secondly, this argument is contrary to the provisions in Part V (relating to "Allowances"), Cap. 112 (including sections 29 and 32), especially section 27(1) thereof. Section 27(1) provides:-

"... This Part prescribes the allowances which shall be granted to persons chargeable to tax ... and the circumstances in which such allowances are grantable" (emphasis supplied).

The "person chargeable to tax" in the present case is the taxpayer and not Yim.

### **Single Parent Allowance**

12. Section 32(1) provides that:-

"An allowance ('single parent allowance') of the prescribed amount shall be granted if at any time during the year of assessment the person had the sole or predominant care of a child in respect of whom the person was entitled during the year of assessment to be granted a child allowance" (emphasis supplied).

13. The taxpayer's case before the Board was in short that he had had the sole or predominant care of his sons. He relied on (1) the efforts he made in locating schools for his sons in England, (2) his regular contacts with the sons in relation to their school home work and (3) he did not relinquish his responsibilities towards his sons.

14. The Board concluded that the taxpayer did not have the sole care of his sons. Further, while accepting that the taxpayer did not ignore his moral obligations as a father, the Board concluded that the onus of proof is on him to establish he had predominant care of his sons and (in brief) that he had failed to discharge that burden. In coming to the last-mentioned conclusion, the Board opined that the concept of "predominant care" involves a comparison of the respective roles played by the taxpayer and Yim as a parent. In the absence of such evidence, the taxpayer has failed to prove he has had predominant care of his sons.

15. Pursuant to section 68(4), the "onus of proving that the assessment appealed against is excessive or incorrect shall be on the [taxpayer]". The Board is therefore correct

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in casting the burden of proof on the taxpayer. Moreover, I do not find the approach or conclusions of the Board (set out above) to be erroneous. On the contrary, I agree with them. In this connection, the Revenue's reference to The New Shorter Oxford English Dictionary (1993) for the natural and ordinary meaning of the word "predominant" supports my view and that of the Board. According to the dictionary, this word means:-

- (1) "Having supremacy or ascendancy over others; predominating"; or
- (2) "Constituting the main or strongest element; prevailing".

16. At the hearing before the Court, the taxpayer relied on a letter in Chinese dated 12 April 2001 from Yim in support of his case. This document was written after the hearing before (13 November 2000), and the Decision of (22 March 2001), the Board. The Revenue objects to the reliance on the said letter on the grounds that (1) the jurisdiction of the Court of First Instance under section 69(5) is only to "hear and determine any question of law arising on the stated case" (emphasis supplied) and not to receive further evidence, or re-hear the appeal to the Board, or vary the Board's findings of fact, and (2) the second point of law posed in the case stated expressly states that it is to be decided "on the facts as found by the Board". I agree with the Revenue's objection and will thus ignore the said letter.

17. The taxpayer refers to the evidence which was admissible regarding an unrelated criminal proceeding to support his argument that the letter is admissible herein. Because the nature of that proceeding (involving an offence of travelling on a Light Rail Transit vehicle for more than 2 hours) must have been very different from the present, I do not find the comparison to be meaningful or valid.

18. Insofar as the taxpayer should rely on his argument about the allowance belonging to Yim, this has been dealt with under the heading "Married Person's Allowance" and will not be repeated.

### **Conclusion**

19. Finally, the taxpayer complains that the Revenue discriminates against male divorcees. I do not find any evidence to such effect. In my view, the Revenue was only administering the provisions of the Inland Revenue Ordinance and no criticism can be validly made against it for doing so.

20. For the above reasons, I find that the Decision of the Board regarding both types of allowance is correct and should be, and is, confirmed. Both questions posed in the case stated should be answered in the affirmative.

### **Costs**

21. There is no apparent reason to depart from the usual rule that costs should follow the event. The Revenue has been successful in this application. Accordingly, there

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will be a costs order nisi pursuant to RHC Ord 42 r 5B(6) that the costs should be paid by the taxpayer to the Revenue to be taxed if not agreed.

(Andrew Chung)  
Judge of the Court of First Instance  
High Court

Representation:

Appellant acts in person and present

Mr Eugene Fung, instructed by Department of Justice for the Respondent