CACV 3137/2001

**IN THE HIGH COURT OF THE**
**HONG KONG SPECIAL ADMINISTRATIVE REGION**
**COURT OF APPEAL**

CIVIL APPEAL NO. 3137 OF 2001
(ON APPEAL FROM HCIA NO. 1 OF 2001)

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BETWEEN

SIT KWOK KEUNG Plaintiff

AND

COMMISSIONER OF INLAND REVENUE Defendant

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Before: Hon Rogers VP, Le Pichon JA and Seagroatt J in Court
Date of Hearing: 23 May 2002
Date of Judgment: 23 May 2002
Date of Handing Down Reasons for Judgment: 29 May 2002

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R E A S O N S F O R J U D G M E N T

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**Hon Le Pichon JA:**

1. This was an appeal by the taxpayer ("the appellant") from the order dated 24 September 2001 of Chung J who upheld the decision of the Board of Review ("the Board") that for the year of assessment 1998/99, the appellant was not entitled to either the married person's allowance or the single parent allowance. At the hearing, the appeal was dismissed with no order as to costs. Written reasons were to be given later. This we

now do.

**The facts**

2. The facts as found by the Board were as follows. The appellant and Madam Yim were husband and wife until their marriage was dissolved on 13 November 1997. By an order dated 25 September 1997, the appellant was ordered to pay Madam Yim periodical payments of $15,000 per month of which $5,000 was payable to Madam Yim and $5,000 to each of the two sons of the marriage, Hong Shing and Yu Shing. Madam Yim was given custody of the sons and the three of them resided in a flat in Tuen Mun provided by the appellant. The appellant himself lived in Yuen Long.

3. A few months before Hong Shing completed his Form 5 education in 1999, the appellant approached two schools in England for Hong Shing's further education. He liaised with Hong Shing's principal for admission tests to be taken by Hong Shing in Hong Kong. He also succeeded in his claim before civil service fringe benefits in relation to both his sons on the basis that were his "dependants".

4. In his tax return for the year 1998/99, the appellant claimed, *inter alia*, the married person's allowance and the single parent allowance. The Revenue disallowed his claim to both allowances and the appellant appealed to the Board. On 22 March 2001, the Board dismissed the appellant's appeal.

5. The appellant exercised his right to have a case stated under section 69(1) of the Ordinance. The points of law for consideration by the Court of First Instance were the following:

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.

**Married person's allowance**

6. Section 29 of the Ordinance, in pertinent part, provides:

"(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; or

(b) ...

...

(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(1) of the Ordinance is the interpretation section and, for present purposes, the following provisions are relevant:

"'marriage' (婚姻) means-

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

(b) ...

and 'married' (結婚) shall be construed accordingly;

'spouse' (配偶) means a husband or wife;

'husband' (丈夫) means a married man whose marriage is a marriage within the meaning of this section;

'wife' (妻子) means a married woman whose marriage is a marriage within the meaning of this section;"

7. The Board held that the appellant was not within section 29(1) of the Inland Revenue Ordinance because for the year of assessment in question i.e. 1998/99, the appellant and Madam Yim were not "husband and wife" and the appellant was not a "spouse" within the meaning of the Ordinance in that year of assessment. Given the statutory meanings ascribed to those terms in subsections (1) and (4) of section 29, the decision of the Board to the effect that the appellant was not "married" for the purposes of section 29(1) in the relevant year of assessment was unassailable and the judge was plainly right in upholding the decision of the Board in that regard.

8. Whilst as a matter of statutory construction the appellant is not entitled to the married person's allowance, the appellant's sense of grievance in being deprived of the married person's allowance when, in reality, he is compelled to support his former wife under a court order, is real and not fanciful. At the hearing, counsel for the Revenue confirmed that there are no provisions under the Ordinance which would accord a divorced person who is under a legal obligation to maintain a former spouse any form of tax relief. Maintenance payments made Madam Yim pursuant to the court order are not deductible under section 12(1) of the Ordinance because they do not satisfy the conditions of that section.

9. The rationale for not according a divorced person the equivalent of the married person's allowance when he is nonetheless legally liable to support his former spouse is difficult to fathom. For my part, I have considerable sympathy with persons (of which there must be many) in the position of the appellant. The position under the legislation as it stands does seem to be both unfair and inequitable. It may be of more than passing interest to note the position in other jurisdictions. For example, under UK tax legislation, some form of tax relief has always been available. Under new rules brought in in 1988 which apply, *inter alia*, to all court orders made on or after 1 July 1988, tax relief is available to the spouse making the maintenance payment. The rules are complex but the concept is very similar to granting the married couple's allowance. See generally, *Jackson's Matrimonial Finance and Taxation*, 6th Ed., Chapter 6 where the extent of UK tax relief is considered at para. 6.10.

10. Quite why some form of tax relief is not available in Hong Kong is not readily apparent. However, redress lies not in the hands of the court but the legislature. It is perhaps timely to invite its attention to this 'iniquity'.

**Single parent's allowance**

11. Section 32(1) provides as follows:

> "(1) 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."

The burden was upon the appellant to establish that he had the "sole or predominant care" of the children. The appellant did not seek contend that he had the sole care of the two sons. His case was predicated on his claim to have had predominant care of the children. Whether or not he did have predominant care is a matter of fact. On the evidence adduced before it, the Board was not satisfied that the burden had been discharged.

12. The appellant complained that a letter dated 16 June 2000 written by Madam Yim to the Board had been ignored. He felt aggrieved. It would not appear that the appellant is levying any criticism at the judge since the letter which the judge said he would not take into account (referred to in para. 16 of the judgment below) was a different letter, dated 12 April 2001 which was not in the appeal bundles.

13. The letter of 16 June 2000 bears a receipt stamp of the Board dated 24 June 2000. In that letter, Madam Yim confirmed that during the year 1998/1999, the appellant had paid her no less than $17,500 per month by way of maintenance for herself and the two sons and that he had also provided them with a residence in Tuen Mun. Madam Yim further stated that the appellant had discharged his parental duties towards his sons.

14. The appellant's sense of grievance appears to be misplaced. First, the

evidence suggests that in reaching its conclusions as to whether the appellant had discharged the burden of proof on him to establish that he had predominant care of his sons, the Board did take into account the letter of 16 June 2000 from Madam Yim confirming that the appellant provided for his sons and discharged his parental duties. Those were matters that the Board plainly took into account as is apparent from para. 11 of its decision. Second, the appellant appeared to be labouring under a misconception: even if Madam Yim had stated in that letter (which she did not) that the appellant had the predominant care of the sons, the Board would not have been bound by that statement.

15. Further, the case stated so far as it related to the single parent allowance concerned a point of law to be decided "on the facts as found by the Board". It was therefore, in any event, not open to the appellant to challenge the findings of the Board although as I have indicated, there was really no valid basis for the appellant's belief that the letter of 16 June 2000 had not been taken into consideration by the Board.

**Costs**

16. The appeal was dismissed with no order as to costs. The costs order made was not meant to reflect any improper conduct on the part of the Revenue. Rather, it appeared to the court that the appellant had raised a legitimate and important issue which affects a section of the public in the same predicament as himself. The grievance is real. In the circumstances, it would compound the iniquity to visit the costs of this appeal upon the appellant.

**Hon Seagroatt J:**

17. I agree and have nothing to add.

**Hon Rogers VP:**

18. I agree.

| (Anthony Rogers)<br>Vice-President | (Doreen Le Pichon)<br>Justice of Appeal | (Conrad Seagroatt)<br>Judge of the<br>Court of First Instance |
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Representation:

The Appellant acting in person, present

Mr Eugene Fung, instructed by the Secretary for Justice, for the Respondent

INLAND REVENUE BOARD OF REVIEW DECISIONS