HCIA 2/2003

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

INLAND REVENUE APPEAL NO. 2 OF 2003

BETWEEN

WONG TAI WAI, DAVID	1st Appellant
LEE CHI MAN	2nd Appellant

and

COMMISSIONER OF INLAND REVENUE	Respondent

Before: Deputy High Court Judge To in Court
Date of Hearing: 15 September 2003
Date of Decision: 15 September 2003

DECISION

Introduction

INLAND REVENUE BOARD OF REVIEW DECISIONS

1. This is an appeal by the Appellants by way of a case stated pursuant to section 69 of the Inland Revenue Ordinance, Cap 112 against the decision of the Board of Review. The Appellants are husband and wife and joint owners of a rental property. For the three years of assessment 1998/99, 1999/00 and 2000/01, they offered their income from employment for assessment to salaries tax and the assessable value of their rental property for assessment to property tax. For these three years of assessment, the salaries tax and property tax computation were as follows:

		1998/1999	1999/2000	2000/2001
1st Appellant	Salaries tax	$62,135	$106,147	$973
	Property tax	$8,198	$7,072	$6,778
	Total tax	$70,333	$113,219	$7,751
2nd Appellant	Salaries tax	$45,906	$30,665	$50,550
	Property tax	$8,198	$7,072	$6,778
	Total tax	$54,104	$37,737	$57,328
Total tax payable by both Appellants		**$124,437**	**$150,956**	**$65,079**

2. For each of the three years of assessment, they elected for personal assessment and sought to deduct interest expenses against their share of net assessable value in respect of their rental property. Their salary income and their share of the assessable value of their property were aggregated together. After deducting the appropriate allowance and interest expenses, they were taxed as one tax entity. This resulted in a reduction of their tax liability as shown in the table below:

		1998/1999	1999/2000	2000/2001
1st Appellant		$62,914	$94,782	$12,460
2nd Appellant		$55,627	$52,530	$44,704
Total tax payable by both Appellants	With personal assessment	**$118,541**	**$147,312**	**$57,164**
	Without personal assessment	**$124,437**	**$150,956**	**$65,079**

3. If the Appellants were not married to each other during the three years of assessment, their income would not have been aggregated together and each of them would have attracted a lower rate of tax. Each of them would only have to pay under personal assessment exactly the same amount of tax chargeable under salaries tax as the interest expenses would wipe out their share of net assessable value in respect of their rental property. Their joint tax liability during these three years of assessment as unmarried individuals would have been lower than their tax liability as a married tax entity as shown in the table below:

		1998/1999	1999/2000	2000/2001
1st Appellant	Unmarried	$62,135	$106,147	$973
	Married	$62,914	$94,782	$12,460
2nd Appellant	Unmarried	$45,906	$30,665	$50,550

	Married	$55,627	$52,530	$44,704
1st and 2nd	Unmarried	**$108,041**	**$136,812**	**$51,523**
Appellants together	Married	**$118,541**	**$147,312**	**$57,164**

Thus, in effect, the Appellants are comparing the tax that they had to pay under personal assessment as a married couple with the tax they otherwise would have to pay under personal assessment if they had not been married to one another.

4. Despite a reduction of their joint tax liability by electing for personal assessment, the Appellants were not satisfied. They appealed to the Board of Review against the Commissioner's assessment. They felt aggrieved that the Commissioner refused to assess their tax liability on the basis that they were not married to one another. The Appellant's case before the Board was that in accordance with the Basic Law there should be equality for everyone before the law and hence, in applying the provisions of the Inland Revenue Ordinance, the Commissioner should not cause or permit an assessment to be made so as to produce an unjust result for a married couple to the extent that such married couple would have to pay more tax than if they had not been married to each other.

5. On 25 September 2002, the Board of Review dismissed the Appellant's appeal and the Appellants applied for a case to be stated on a question of law pursuant to section 69(1) of the Inland Revenue Ordinance. The questions posed by the Board are as follows:

(1) Whether the provisions in the Inland Revenue Ordinance, Cap 112, which enable a married couple to elect for personal assessment and which may produce the result that such married couple will end up having a greater tax liability on the same income than if they had not been married to each other are null void and of no effect for the reason that they contravene the Basic Law, in particular, Articles 8, 11 and 25 thereof.

(2) Whether in making an assessment for tax against a married couple who have elected for personal assessment or in considering an objection against an assessment by such married couple, the Commissioner of Inland Revenue is bound by the Basic Law, in particular, Articles 8, 11 and 25 thereof, to exercise her discretion to adjust the assessment in such a way so that the tax liability of such married couple is no different from their tax liability on the same income if they had not been such married couple.

6. Before me, the 1st Appellant repeated his argument about the discretion of the Commissioner, equity and the Basic Law. His arguments were convoluted and based on a misunderstanding of the rules of equity and the Basic Law. In brief, he argued that the rules of equity are preserved by Article 8 of the Basic Law, that everyone is equal before the law, that the rules of equity prevail over the law, that the taxing provisions relied on by the Commissioner are

void as they contravened the Basic Law, that it was inequitable for the Commissioner not to exercise her discretion to assess their tax liability on the basis that they were not married to one another which would have resulted in a lower tax liability for the Appellants.

Equity in tax statute and proper approach to construction of tax statute

7. "Equity" is a word with many meanings. In a wide sense or as is generally used by laymen in everyday language, it means fairness, justice, moral and ethical correctness. But its legal meaning is much narrower. It refers to the body of law or legal principles developed by the Court of Chancery in England and consistently applied by the Court of Chancery before the Judicature Act of 1873 came into force. A litigant asserting some equitable right or remedy must show that his claim has "an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction: see *Re Diplock* [1948] Ch 465 at 481, 482. In its technical sense, it means the body of legal principles which is not to be equated with the loose sense of fairness or even conscience. The Appellants could not refer to any specific equitable doctrine or principle in their claim for equity. They have clearly misunderstood the meaning of "equity" which will be enforced by the court and equated it with fairness. That is certainly incorrect. As Jessel MR put it in *Re National Funds Assurance Co.* (1878) 10 Ch D 118 at 128, "This court is not, as I have often said, a Court of Conscience, but a Court of Law."

8. Tax is essentially a liability created by statute. By nature, any tax statute is inequitable in the wide sense of the word. It takes away what a person has earned by his sweat and labour and puts it in general revenue for purposes, many of which have no interest or concern to the taxpayer, such as making welfare payments to the unemployed, providing subsidised housing to a section of the general public and funding litigation for those who cannot afford it. There could be an endless list of such purposes which are of no interest to the taxpayer. Yet he has to provide funds for those purposes with the tax he pays. Thus there is no equity about a tax, as by nature it is "inequitable" in that it takes away what one has earned by his sweat and labour. It is therefore a contradiction in terms to say that a taxing statute should be construed "equitably". Since a taxing statute purports to deprive a person of what he has, it should be construed restrictively so that a person would only be taxed if he is caught within the letter of the law. Apart from that, there is no room for giving any taxing statute an "equitable construction" as suggested by the Appellants. Thus, in interpreting a taxing statute, one just look at what the statute clearly said. Nothing is to be read in, nothing is to be implied. One just look fairly at the language used. Indeed, Lord Cairns LC had this to say in *Partington v A-G* (1869) LR 4 HL 100 at 122:

> " If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not

admissible in a taxing statute, where you can simply adhere to the words of the statute."

The true construction of sections 41 and 42A

9. With the above in mind. I now turn to examine the relevant provisions in the Inland Revenue Ordinance. The Inland Revenue Ordinance creates three forms of direct taxes, namely, property tax, salaries tax and profits tax. These are respectively provided for under Parts II, III and IV of the Ordinance. In respect of salaries tax, a taxpayer shall be charged salaries tax at a progressive rate in respect of his net chargeable income, which is his total salaries income net of his personal allowance and other allowances. Property tax and profits tax are charged at a fixed rate, i.e. the standard rate on 80% of the assessable value of the property and the standard rate on the assessable profits, without any deductions for personal allowances. As a concession, under Part VII of the Ordinance, an individual may elect for personal assessment on his total income, including his salaries, rental income and business profits and claim personal allowance as in the case of salaries tax. The relevant provisions are section 41 and 42A. These sections provide:

" **41**(1) Subject to subsection (1A), an individual –

...

may elect for personal assessment on his or her total income in accordance with this Part.

(1A) (1) ... Where –

(a) an individual is married and not living apart from his or her spouse; and

(b) both that individual and his or her spouse –

(i) have income assessable under this Ordinance; and

(ii) are eligible to make an election under subsection (1),

then that individual may not make such an election unless his or her spouse does so too.

42A. (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

(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) ... "

10. Section 41(1) gives an individual a choice to elect for personal assessment so that his tax liability will be assessed on his total income in accordance with Part VII instead of under the three different heads of tax, i.e. salaries tax, property tax and profits tax. It is a matter of choice for the taxpayer. If he elects for personal assessment, his tax liability will be assessed in accordance with Part VII but not in any way he likes by taking the benefit of Part VII (deduction of expenses and personal allowance) without at the same time its disadvantages (aggregated income and single assessment), or by combining the features of Part VII with those of the other heads of tax contained in Part II, Part III and Part IV (see below).

11. One of the features of personal assessment is that section 41(1A) requires that where an individual is married, he may not make such an election unless the spouse also elects for personal assessment. The language of section 41(1A) is unequivocal and admits of no other interpretation. Thus separate taxation for husband and wife is not available under personal assessment. If either of the spouse does not elect for personal assessment, the other spouse may not elect to do so. In the present case, both Appellants elected for personal assessment.

12. Another important feature of personal assessment is that the tax liability of the husband and wife shall be treated as one tax unit. Section 42A provides that the income of an individual shall be aggregated with that of the spouse and the assessor shall make a single assessment. Thus the income of the husband and wife shall be aggregated together and after deducting the applicable allowance available to a married couple, shall be taxed on a progressive scale in accordance with section 43. As provided in section 42A(1), the single assessment is to give effect to an election by the husband and wife electing for personal assessment jointly. Again the words used in the section are unambiguous and mandatory.

13. Thus the combined effect of these two sections is that the income of the husband and wife shall be aggregated and a single assessment on the aggregated income shall be made and that an individual may not elect for personal assessment unless the spouse does the same. There could be no room which would allow for any interpretation giving effect to separate assessments for each

spouse based on his or her total income as contended by the Appellants, let alone whether the Commissioner has any discretion to do so.

Question 1

14. Having set out the law, I now turn to the questions posed by the Board of Review. In short, the Appellant's complaint is that they should be allowed personal assessment as they elected but their tax liability should be assessed separately instead of being assessed as one tax unit. It cannot be doubted that when the progressive rate of tax is applied to the income of two persons which are aggregated together the result is a greater amount of tax than the combined tax of the two persons assessed separately. This is a matter of tax policy to be decided by the Legislature, the wisdom of which is not for this Court to challenge. Where a person is subject to two different heads of tax, for example, salaries tax and property tax, it is always advantageous to elect for personal assessment because he can off-set interest expenses incurred against the assessable value of the property which is subject to property tax. Depending on actual figures, he may even have the benefit of the lower rate of tax under the progressive scale than if the standard rate is applied to the assessable value of his property. But when the two persons are married to one another, the situation changes. They may be taxed separately on their salary income on the progressive scale and on the assessable value of their property at the standard rate. Or, they may elect for personal assessment to have all their income aggregated together and subject to one single assessment. The question then is whether the tax benefit to be gained by savings in property tax is sufficient to off-set the disadvantage of being taxed on the higher slices of the progressive scale in respect of their aggregated income. The taxpayer has also to take into account the additional consideration that the standard rate of tax would apply if the amount of tax assessed under the standard rate would be less that that which would have been assessed had the progressive rate been applied. Thus it is all a matter of mathematics for the taxpayer to work out whichever option is to his and his spouse's best joint benefit. But in the majority of cases, as in the Appellants' case, there is a benefit to be gained by electing for personal assessment because of the saving in property tax which otherwise they would have to pay. What the Appellants now want is the benefit of personal assessment but without the disadvantage of being assessed as one tax unit on their aggregated income. That is something which is expressly disallowed by section 41 and 42A.

15. The Appellants argued that the relevant tax provisions in Part VII of the Ordinance are null and void as they contravene Articles 8, 11 and 25 of the Basic Law and that the Commissioner's and the Board of Review's decisions have "totally unconstitutionally and inequitably deprived" them of their constitutional rights to the rule of equity under the Basic Law. Article 8 preserves the laws previously in force in Hong Kong, including the rules of equity, except for any that contravene the Basic Law. As I have said, the 1st Appellant misunderstood the meaning of equity in its legal sense and equated it with general notion of fairness and justice and probably his own notion. There never was any equity about a tax. There never was any room for any equitable interpretation of a tax statute. There never was the kind of equity as the 1st Appellant

alleged in the Inland Revenue Ordinance to be preserved by the Basic Law. In my view, Part VII of the Ordinance clearly does not contravene Article 8 of the Basic Law.

16. Article 11 of the Basic Law provides that the systems and policies practised in the Hong Kong Special Administrative Region shall be based on the provisions of the Basic Law and no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene the Basic Law. The Basic Law sets out very broad general principles. The Appellants' complaint is in essence about treating the married couple as one tax unit. As analysed above, there is no room for "equitable interpretation" of a tax statute. The Appellants have the choice whether to elect for personal assessment. Whether it is beneficial to do so depends on the actual figures, the nature of their various forms of income and their expenditure. It is all a matter of mathematics. If personal assessment is not available, the Appellants together would definitely have to pay more by way of property tax and salaries tax. In my view, the Appellants have failed to show in what respect the tax policy regarding taxing a married couple as one unit under personal assessment contravenes the Basic Law. Indeed, for similar reasons as above, I find that Part VII does not contravene Article 11 of the Basic Law.

17. As for Article 25, which provides that all Hong Kong residents shall be equal before the law, the Appellants argued that they should not be penalised by way of increased tax liability for being married to one another. The 1st Appellant also referred to section 5 of the Family Status Discrimination Ordinance and argued that they are discriminated by reason of their family status. As a matter of tax law, the change of status of an individual may bring about fiscal consequences. A married couple is treated as one tax unit under certain circumstances. This is a question of tax policy for the legislature. These consequences apply across the board to all married taxpayers. Similarly, people earning higher salaries are taxed at a higher rate under the progressive scale than those earning less. It cannot be said that the Appellants, and similarly higher salary earners, are not being treated equally before the law as compared to other Hong Kong residents, nor can it be argued that they are being discriminated.

18. In conclusion, I answer this question in the negative. The relevant provisions of the Inland Revenue Ordinance are not in contravention of the Basic Law.

Question 2

19. On the issue of whether the Commissioner has discretion to assess the Appellants' tax liability in a personal assessment on the basis that they are not married to one another, the 1st Appellant referred to an extract from the Director of Audit's report at paragraph 3.2 which reads as follows:

> " 3.2 Under the Inland Revenue Ordinance, IRD officers, including assessing officers, field audit officers and those involved in tax collection, are given or

> delegated by the Commissioner of Inland Revenue discretionary powers in performing their duties. ...
>
> 3.3 Since February 1998, the IRD has set up an in-house Operations Review and Monitoring Committee (ORAMCO), chaired by the Deputy Commissioner of Inland Revenue (Operation), to oversee the internal controls and the quality of judgment exercised by officers. Units 1 to 4 and the Computer Section of the IRD have each formed a subcommittee to review and monitor matters under their purview. The subcommittees are responsible for reviewing, through selected tax cases, the performance of duties by IRD officers, including their exercise of discretion."

He argued that the Commissioner was wrong in denying that he has discretionary powers under the Inland Revenue Ordinance and wrongfully refused to exercise the discretion to allow the Appellants to be assessed tax separately under personal assessment. The Commissioner clearly has certain discretionary powers under the Ordinance, for example, the Commissioner may compound penalty or may refuse to accept payment of penalty under section 51. The Commissioner and an assessor may issue notices under various sections of the Ordinance. Clearly, the Commissioner and an assessor have certain discretionary powers under the Ordinance. The question is whether she has the type of discretion the Appellants allege she has. The Commissioner does not have unfettered discretion to depart from the statute. Whatever discretion she has must have been derived from the terms of the statute.

20. In interpreting sections 41 and 42A, I have already found that on a true construction of these sections, the Commissioner has no discretion to permit separate assessments for the individual and the spouse if they have elected for personal assessment. As can be seen from the mandatory words used, section 42A does not give the Commissioner or an assessor any discretion to depart from the provisions and in the terms as argued by the Appellant. Quite apart from the very obvious fact that the Director of Audit's report is not an authoritative statement of the law and the discretion referred therein was not the same discretion as contended by the Appellants, the Appellants' argument has no basis at all. Thus, once the Appellants elected for personal assessment under section 41, the total income of the individual and the total income of the spouse shall be calculated in accordance with section 42, these income shall be aggregated and a single assessment shall be made in accordance with section 42A. In view of the mandatory terms used in the section, there is simply no room for the Commissioner to exercise the discretion in the way as contended by the Appellants. For the Commissioner to exercise the discretion in that way, she would be acting *ultra vires* the Ordinance.

21. The Basic Law sets out broad general principles. I am unable to find any provisions in Articles 8, 11 and 25 or any other articles in the Basic Law which gives the executive or any government officials the discretion to depart from the statute they are duty bound to enforce. As the Board of Review pointed out, in applying the Ordinance 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. Accordingly, I answer the second question posed by the Board of Review also in the negative.

Conclusion

22. Having answered both questions posed by the Board of Review, I dismiss the Appellants' appeal with costs to the Commissioner.

(Anthony To)
Deputy High Court Judge

Representation:

1st Appellant, Mr Wong Tai Wai, David, appearing in person.

2nd Appellant, Ms Lee Chi Man, represented by 1st Appellant.

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