

CACV 23/2005

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

CIVIL APPEAL NO. 23 OF 2005
(ON APPEAL FROM HCAL No. 144 of 2004)

BETWEEN

SIT KWOK KEUNG

Appellant

and

COMMISSIONER OF INLAND REVENUE

Respondent

Before : Hon Rogers VP and Sakhrani J in Court

Date of Hearing : 27 May 2005

Date of Judgment : 27 May 2005

Date of Handing Down Reasons for Judgment : 3 June 2005

REASONS FOR JUDGMENT

Hon Rogers VP:

1. I agree with the judgment of Sakhrani J.

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Hon Sakhrani J:

2. These are my reasons for dismissing the appeal on 27 May 2005 with costs against the appellant.

3. This is an appeal against the order of Hartmann J made on 4 January 2005 whereby he dismissed the appellant's application for leave to apply for judicial review.

Background

4. There were previous proceedings brought by the appellant against the respondent. That was an appeal against a decision of the Board of Review concerning his tax assessment.

5. The Board of Review ("the Board") decided that for the year of assessment 1988/99, the appellant was not entitled to either the married person's allowance or the single parent allowance under the *Inland Revenue Ordinance*, Cap 112 ("the *Ordinance*").

6. The appellant appealed the Board's decision. This came before Chung J who on 24 September 2001 upheld the decision of the Board.

7. By Civil Appeal No. 3137 of 2001 ("Civil Appeal 3137") the appellant appealed against the order of Chung J. His appeal was dismissed by the Court of Appeal (Rogers VP, Le Pichon JA and Seagroatt J) for the reasons given in the judgment of Le Pichon JA in *Sit Kwok Keung v Commissioner of Inland Revenue* [2002] HKLRD 286 at pages 287 to 291. The judgment in Civil Appeal 3137 was handed down on 23 May 2002.

8. The facts as distilled from the judgment of Le Pichon JA are that the appellant and his ex-wife were husband and wife until the marriage was dissolved on 13 November 1997. By an order dated 25 September 1997, the appellant was ordered to pay his ex-wife periodical payments of \$15,000 per month, of which \$5,000 was payable to his ex-wife and \$5,000 to each of the two sons of the marriage. His ex-wife was given custody of the two sons and the three of them lived in a flat provided by the appellant. The appellant himself lived elsewhere.

9. 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. The appellant appealed to the Board of Review who dismissed his appeal. He appealed to the High Court and Chung J dismissed the same. He then appealed to the Court of Appeal who dismissed his appeal for the reasons given.

10. It was held that the appellant was not entitled to a married person's allowance under section 29 of the *Ordinance* as he was not "married" in the year of assessment in question. It was

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also held that he did not have the “sole or predominant care” of his two sons during the year of assessment in question and hence he could not avail himself of the single parent allowance under section 32 of the *Ordinance*.

The application for leave

11. By a notice of application for leave to apply for judicial review dated 23 November 2004, the appellant sought leave to apply for judicial review of the order of the Court of Appeal in Civil Appeal 3137. This was supported by the affidavit of the appellant sworn on 23 November 2004.

12. The relief sought by the appellant was an order that the respondent be ordered to take the maintenance payments paid by the appellant to his ex-wife as her taxable income and to exclude such sums from the appellant’s taxable income. He also sought damages.

13. Hartmann J directed an oral hearing of the application for leave and gave leave for counsel representing the respondent to attend. Having heard the parties the judge refused to grant leave to the appellant to apply for judicial review on 4 January 2005.

This appeal

14. The appeal before us is from the order of Hartmann J refusing leave to apply for judicial review.

15. The first point to consider is whether the order of the Court of Appeal made on 23 May 2002 in Civil Appeal 3137 is amenable to judicial review. As Mr. Fung, for the respondent, rightly submitted judicial review is never available against a decision of the High Court. As Lord Diplock said in: *In re Racal Communications Ltd* [1981] AC 374 at page 384:

“Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court.....”

16. Although the Court of Appeal gave its decision in Civil Appeal 3137 on 23 May 2002 the appellant never applied for leave to appeal the same to the Court of Final Appeal. That must be the end of the matter. It seems to me that the application for leave to apply for judicial review of the order of the Court of Appeal was misconceived. On this ground alone the appeal must be dismissed.

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17. There is, in any event, no merit in the appeal. The ground of appeal set out in the notice of appeal is that section 8(2)(i) of the *Ordinance* contravenes Article 25 of the *Basic Law*. This point was never raised before Hartmann J.

18. Article 25 provides that all Hong Kong residents shall be equal before the law.

19. Section 8(2)(i) of the *Ordinance* provides that in computing the income of any person for the purposes of salaries tax, any amount *received* by way of periodical payments in the nature of alimony or maintenance by a person from his or her spouse or former spouse is excluded. Hence, the recipient of the payments in the nature of alimony or maintenance does not have to pay tax on the same. Since the appellant is not the recipient but the payer of the maintenance I fail to see how it can possibly assist him to argue that section 8(2)(i) contravenes the *Basic Law*. In the circumstances it is not necessary to consider whether section 8(2)(i) contravenes Article 25 of the *Basic Law*.

20. The real complaint of the appellant seems to be the unfair tax policy whereby persons in the position like the plaintiff receive no tax relief for the payments made to ex-spouses.

21. The Court in Civil Appeal 3137 expressed its sympathy with persons in the position of the appellant. Le Pichon JA dealt with this at paragraphs 8 to 10 of her judgment at pages 289 and 290 as follows:

“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.

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.....

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’.”

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22. I also have considerable sympathy with persons in the position of the appellant who receive no tax relief for maintenance payments made to a former spouse. The Legislature's attention was directed to this 'iniquity' in the judgment of Le Pichon JA. This matter was debated in the Legislative Council on 10 July 2002 following the decision in Civil Appeal 3137. It is clear from the press release of that debate supplied to us that the Government did not consider it appropriate to introduce a tax allowance to persons in the position of the appellant for alimony or maintenance payments to a former spouse. Any reform in this regard is a matter entirely for the Legislature and not for the Courts.

23. The appeal was dismissed for the above reasons.

24. Costs should normally follow the event. There is no reason why that should not apply in this appeal. An order was therefore made that the appellant do pay the respondent its costs of the appeal.

(Anthony Rogers)
Vice-President

(Arjan H. Sakhrani)
Judge of the Court of First Instance,
High Court

The Applicant/Appellant, in person, present

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