

Case No. D10/23

Salaries Tax – whether the Appellant had already paid the assessed tax – burden of proof on Appellant – whether the Inland Revenue’s system could have lost the tax payment record – whether home loan interest was deductible – insufficiency of proof – section 68(4) and section 26E of the Inland Revenue Ordinance.

Panel: William M F Wong SC (chairman), Butt Yiu Yu and Kwan Wai Yi Janet.

Date of hearing: 4 January 2023.

Date of decision: 13 September 2023.

The Appellant contended that she had already paid her salaries tax for the year of assessment 2014/15, contrary to the determination of the Inland Revenue Department (‘IRD’) that the tax remained unpaid. She argued that it was unlikely for the IRD to have failed to detect unpaid tax for such a long period and suggested that a system error might have erased her tax payment records. However, she could not produce any documentary evidence, such as bank records or receipts, to substantiate her claim.

The Appellant further submitted that the estimated assessment issued in June 2020 did not take into account her usual allowances, such as married couple allowance, child allowance, and home loan interest deduction, which she had consistently claimed in prior years.

Regarding home loan interest deduction, the Appellant claimed a deduction of \$100,000 for the year of assessment 2014/15. However, the Board found that she failed to provide sufficient documentation to establish that the claimed deduction was related to a qualifying home loan under section 26E of the Inland Revenue Ordinance (‘IRO’). The evidence showed that the loan in question was a re-mortgaged loan obtained in 1999, and there was no proof that it was used wholly or partly for the acquisition of the property.

Held:

1. Under section 68(4) of the IRO, the burden was on the Appellant to prove that the assessment was incorrect. The Board noted that the Appellant failed to provide any evidence (such as bank records or tax receipts) to substantiate her claim that she had already paid the 2014/15 salaries tax. The Board ruled that mere assertions were insufficient and that the absence of IRD reminders or demand notes did not constitute proof of payment.
2. The Board found it inexplicable that the Appellant and her spouse only checked with the bank in May 2021, nearly a year after the estimated

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assessment was issued. The Board rejected the argument that the pandemic prevented them from checking their bank records, noting that electronic banking services were widely available.

3. The Board held that the Appellant failed to substantiate her home loan interest deduction claim. The re-mortgaged loan in question was not proven to have been used for the acquisition of the property, and even if part of the loan was used for that purpose, apportionment under section 26E(3)(a) of the IRO would have been required. Furthermore, the Board observed that the home loan interest allowable should have been limited to the Appellant's share of ownership (50%) before she became the sole owner of the property in October 2014.
4. The Appellant alleged that the IRD's computer system might have erased her tax payment records, but she failed to provide any evidence to support this claim. The Board found this argument unsubstantiated and speculative.
5. The Board dismissed the appeal on the basis that the Appellant failed to discharge the burden of proof regarding both the alleged tax payment and the home loan interest deduction. However, the Board made no order as to costs, acknowledging that the IRD had also been substantially late in issuing its notice of assessment.

Appeal dismissed.

Cases referred to:

D37/11, (2011-12) IRBRD, vol 26, 631
D14/08, (2008-09) IRBRD, vol 23, 244
D57/06, (2006-07) IRBRD, vol 21, 1061
Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Common Empire Ltd v Commissioner of Inland Revenue [2007] 3 HKLRD 75
D106/00, IRBRD, vol 15, 913
D123/01, IRBRD, vol 16, 915
D18/02, IRBRD, vol 17, 483
D33/04, IRBRD, vol 19, 271
D23/07, (2007-08) IRBRD, vol 22, 559

Appellant's husband appeared for the Appellant.

Cheng Po Fung and Yau Yuen Chun, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. In the present appeal, the Appellant appeals against the Deputy Commissioner's Determination dated 3 August 2022 (the 'Determination') on a simple basis that she had paid her salaries tax for the year of assessment 2014/15 contrary to the determination of the Inland Revenue that she did not. This appeal also involves another issue in relation to the home loan interest allowable for that year.

2. The Appellant is very adamant that she had already paid her salaries tax for the year of assessment 2014/15 before the issuance of the estimated assessment in June 2020.

3. She submitted that the Inland Revenue would have sent her reminders and follow-up with her if the tax return for the year of assessment 2014/15 issued in 2015 had not been filed by her. It cannot be true that she still had not paid the tax for the year of assessment 2014/15. She contended that the computer system of the Revenue might be corrupted such that her tax payment record for the year of assessment 2014/15 had been erased. In fact, she had paid her salaries tax.

4. One would have thought that this is a simple factual issue. The Appellant had not produced any records that she had paid for the same. She contended that she did not have record to prove her tax paid. It is her case that it was unreasonable to require a person to retain bank records for over 6 years as evidence.

5. Further, the Appellant submitted that the estimated Salaries Tax Assessment for the year of assessment 2014/15 did not take into account the usual annual allowance such as married couple allowance, child allowance and mortgage interest allowance that she used to claim for years, which was unusual.

6. The material facts are set out in Facts (1) to (9) of the Determination and the same are not repeated here.

7. The Appellant's main complaint is that the Inland Revenue should have the database and it is inconceivable that if she had not paid her salaries tax for so many years, the Inland Revenue's system would not have detected that. The only reasonable inference is that she had paid for the same although she could not prove it due to the lapse of time. Hence, it is unfair to her as she had to prove her own case so many years after the event.

The Applicable Legal Principles

8. There can be no dispute that as a matter of law, the burden of proof rests squarely on the Appellant to satisfy this Board of Review that she had paid her salaries tax for the year of assessment 2014/15.

9. In D37/11, (2011-12) IRBRD, vol 26, 631, the appellant was assessed to tax

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almost 5 years after filing his tax return. The appellant objected to the assessment claiming that it was made out of time, and that there was maladministration within the Inland Revenue. In dismissing the appeal, the Board commented that:

‘26. ... maladministration of the IRD... the IRD accepted responsibility for the delay and offered apologies. The delay was inordinate and the explanation unsatisfactory. We sympathize with the Appellant’s complaints, but short of any capricious and dishonest conducts (which are not alleged) we do not find mere delay or flaws in administration as sufficient to affect the validity of the assessment.’

10. In D14/08, (2008-09) IRBRD, vol 23, 244, the Board at paragraph 53 said that *‘[a] taxpayer’s tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. The absence or silence of a witness does not assist the taxpayer.’*

11. In D57/06, (2006-07) IRBRD, vol 21, 1061, the Board also said at paragraph 12 that *‘[an] appellant who does not bother to give evidence in support of his appeal cannot expect this Board to act on bare allegations.’*

12. Section 68(4) of the IRO places the burden of proving an assessment incorrect on the taxpayer. In Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433, Bokhary and Chan PJJ said:

‘47. Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y. The taxpayer will have to prove his contention. So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y.’

13. In Common Empire Ltd v CIR [2007] 3 HKLRD 75, Deputy Judge Anthony To (as he then was) said:

‘32. ... Section 68(4) of the Inland Revenue Ordinance imposes on the taxpayer the legal or persuasive burden of proving that the assessment appealed against is excessive or incorrect. The Commissioner has no burden of proving that the assessment is correct. Hence, the Board is not bound to make any finding of fact one way or the other. If the taxpayer fails to adduce any evidence to discharge his burden, or if his evidence is disbelieved, the appeal shall be resolved on burden of proof by dismissing the appeal and upholding the assessment.’

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14. As to the deduction of home loan interest, there are many previous decisions made by the Board about the calculation of home loan interest to be allowed where re-mortgaged loans were involved. In D106/00, IRBRD, vol 15, 913, the taxpayer and his wife purchased their residence as joint tenants and the acquisition of the residence was financed by a mortgaged loan. Later, a second bank loan under mortgage was borrowed, and part of which was used to repay the first mortgaged loan in full. The taxpayer claimed that he should be granted the maximum amount of the home loan interest deduction of \$100,000. In dismissing the appeal, the Board decided that:

- (a) If the re-mortgaged loan was used to repay the original loan which was executed for acquisition of his dwelling, the portion of loan interest paid, pro-rata to the outstanding balance of the original loan, is tax deductible.
- (b) Only part of the second bank loan had been applied in paying off the outstanding principal under the first mortgaged loan, apportionment under section 26E(3)(a) of IRO was necessary.

The observations above have been applied in other cases such as D123/01, IRBRD, vol 16, 915, D18/02, IRBRD, vol 17, 483 and D33/04, IRBRD, vol 19, 271.

15. In D23/07, (2007-08) IRBRD, vol 22, 559, the Board rejected the taxpayer's deduction claims on the ground that the first condition for claiming deduction was to accurately prove every expense was indeed incurred, and must not rely on estimates. The Board had no power to allow deductions based on estimates, let alone to make estimates for the taxpayer.

Analysis of Evidence

16. The Appellant did not attend the hearing on 4 January 2023. Instead, the Appellant's spouse, Mr A and a friend of the Appellant, Mr B, attended the hearing for the Appellant. Mr A submitted, among others, that completing tax returns and paying tax annually were his and the Appellant's duties, since they were jointly assessed to tax. Mr B did not give evidence at all.

17. Mr A repeated the Appellant's stance that the Appellant did not keep any copies of documents evidencing the payment of the Appellant's salaries tax when the assessment was issued in 2020. He did not have the receipts for the tax paid for the year 2014/15. Neither did he have any record of the tax payment.

18. The Board takes the view that it only accords with commonsense that when a tax assessment notice was received in 2020 or even in 2021 for the Appellant or Mr A to have contacted their banks to check if there were any payment of salaries tax effected in the year 2015 or 2016. The Board do not agree that the payment of salaries tax can be compared

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with the buying of ordinary household items.

19. Mr A's evidence is that upon receipt of the Appellant's text message, he did not contact the bank for checking his bank records, due to the pandemic. Mr A further said after returning to Hong Kong in May 2021 (and the completion of a 3-week quarantine), he spent some time for taking care of his mother. Mr A and the Appellant then visited the bank for checking the relevant records. However, Mr A was reportedly told by the bank that his account had been closed and its records could not be retrieved.

20. The Board does not understand why the pandemic would have prevented the Appellant and/or Mr A to contact their banks to check for their bank records. Nowadays, one can easily access one's bank records electronically or even by a call to the relevant bank officers.

21. Further, Mr A was referred to the Appellant's 2015/16 return in which her income was reported at \$978,000, and home loan interests were claimed at \$100,035. For that year, the deduction of home loan interest (capped at \$100,000) had been allowed in the assessment issued to the Appellant on 19 October 2016.

22. On the same date, the Inland Revenue also informed the Appellant, under separate cover, that for the year 2015/16, '*... You have been allowed the claim / nominated your spouse to claim for deduction of [Home Loan Interest] for 1 year(s) of assessment ...*'. Mr A was asked whether the Appellant had doubted the correctness of the said statement, where her claim was that she had previously filed the tax return for the year 2014/15 (in which home loan interest would normally be claimed).

23. In reply, Mr A said he did not say that home loan interest had been claimed by the Appellant in the 2014/15 tax return previously filed. He was then referred to the Appellant's income of \$997,500 and \$978,000 reported for the years 2014/15 and 2015/16 respectively. He was asked whether deduction of home loan interest would have been claimed by the Appellant for the year 2014/15 based on her income reported for the same year. He then agreed that such deduction would have been claimed in the 2014/15 tax return previously filed.

24. As to home loan interest, Mr A agreed that had the loan been repayable in full in 20 years, most of the loan would have been repaid by April 2014. For the charge or mortgage created in favour of Company C and Bank D in August 1996 and March 1999 respectively, Mr A had no information about the outstanding principal of the previous loan upon discharge of the related charge or mortgage. Neither did Mr A have any information about the purpose and the amount of the respective loan later obtained by the charge or mortgage created. He, however, suggested that loans might have been obtained to foot daily expenses and mainly for business purpose.

25. Having considered the evidence and submissions carefully, although the Board understands the concerns of the Appellant, the Board is bound to apply the law and the burden of proof rests squarely on the Appellant to which the Appellant has not discharged to show that the Appellant had paid her assessed salaries tax.

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26. Further, this Board takes the view that had the Appellant been diligent, she could have obtained evidence to discharge the burden of proof.

27. The Appellant submitted that she paid tax annually according to the tax assessment received. Since reminders and demand note had not been sent to her before in respect of the tax return and tax due for the year 2014/15, she contended that the tax for the year 2014/15 should have already been paid, despite such record was deleted from the records kept by the Inland Revenue. This Board disagrees. One cannot make such presumptions and this depends on evidence which the Appellant has adduced none.

28. This Board agrees that it is quite extraordinary that Mr A and the Appellant only checked with the bank after May 2021. Given that the Estimated Assessment demanded tax payment of nearly \$100,000 (\$96,775 to be exact) on or before 17 July 2020, the matter was therefore pressing in June 2020. The Appellant would not be required to pay this amount if she managed to find proof that she had already paid tax for 2014/15 under the Alleged Assessment. It is inexplicable why they failed to contact Bank D for payment records for nearly or more than one year (from June 2020 to after May 2021).

29. Mr A did mention some incidents to justify the delay, eg he was then in City E, the pandemic, a 3-week quarantine and taking care of his mother. However, in these modern times, it is not hugely complicated to check one's own bank records if one was diligent about it. Mr A could have contacted the bank by electronic means when he was outside Hong Kong or through the Appellant and/or with the assistance of the Appellant who was in Hong Kong. We agree that it is relevant to note that the Appellant said she had been with the IT industry for many years. Hence, initiating and conducting enquiries with the bank by electronic means should not be difficult for her.

30. This Board also notes that Mr A did not tell the Board when they visited Bank D (ie after he returned to Hong Kong in May 2021, was subject to a 3-week quarantine, and spent some time for taking care of his mother).

31. This Board agrees that had written request or application been made for obtaining bank or other transaction records for any tax paid, the Appellant (and Mr A) should be able to get and provide the relevant records, for which the bank was obliged to retain business records for at least 7 years. In other words, the Appellant should still be able to get (even in December 2022) the relevant records for checking her tax paid for the year 2014/15 (if any), which would usually be due for payment in early 2016.

32. The Inland Revenue also submitted that receipts of the tax paid for the year 2014/15 were not available but the Appellant managed to keep and provide a copy of the 2015/16 assessment issued to her in October 2016 (for which the tax was said to have been paid by the two due dates set in 2017). The Inland Revenue's case is that that the Appellant might have wrongly taken the tax paid for the 2015/16 assessment as the one paid for the year 2014/15.

33. The Inland Revenue further submitted that the Appellant or Mr A should be

well aware of the fact that home loan interest was allowable only for a certain number of years. Hence, they should be quite concerned to see that the deduction of home loan interest was claimed in the year when tax savings could be achieved, like what they did for the other years. Mr A said the deduction of home loan interest would have been claimed by the Appellant for the year 2014/15.

34. Alternatively, had the deduction of home loan interest been omitted (for whatever reasons) from the 2014/15 assessment said to have been issued before the Estimated Assessment, the Appellant would most certainly claim for such deduction before paying the reduced tax due for that year. Notably, the deduction of home loan interest is still being pursued as a ground of the Appellant's appeal against the Estimated Assessment.

35. Where the deduction of home loan interest had been allowed for the year 2014/15 before the Estimated Assessment, the Appellant would have been informed that such deduction had been allowed to her for the year 2014/15, like the other years. In such case, the letter issued to the Appellant for the year 2015/16 (in October 2016) should have stated that she had been allowed the deduction of home loan interest for 2 years of assessment (as opposed to 1). However, the Appellant seemed not to have doubted about this 'incorrect' information, which was inconsistent with the saying that home loan interest would have been claimed (and that she had paid tax) for the year 2014/15. Hence, the Inland Revenue submitted the Appellant had not been assessed to and could not have paid any tax for the year 2014/15, prior to the Estimated Assessment.

36. Finally, as to the Appellant's allegation that there was data loss or corruption of the Inland Revenue's records leading to the loss of her tax payment records for the year 2014/15, Mr A fairly admitted that he had no evidence to prove such allegation.

37. As for as home loan interest is concerned, the Property was acquired by the Appellant and Mr A in May 1995. By April 2014, they had held the Property for almost 19 years. No evidence was given about the length of the repayment period of the loan obtained in 1995 which would have been repaid by the Appellant (and Mr A) for some 19 years, if such loan had not been redeemed.

38. Section 26B(2) of the IRO provides that every person who claims a deduction shall make his claim in the specified form and the deduction should be allowed only if the claim contains such particulars and is supported by such proof as required.

39. The 'Guide to Tax Return – Individuals' stated that '*Documentary evidence in support of your deduction or allowance claims ... should be retained for a period of 6 years after the expiration of the relevant year of assessment. You may be required to provide such evidence ...*'. In other words, the Appellant has been advised to keep supporting documents to substantiate her deduction claims, for at least 6 years after the expiration of the relevant year.

40. Further, a taxpayer has to complete Part 8 of the tax return in respect of any deduction claim of home loan interest, and Section 9 of the Appendix if a re-mortgaged loan is involved. It is a fact that in the tax return filed, the Appellant neither indicated that a re-

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mortgage was involved nor provided any information about the re-mortgage at Bank D. Instead, she only claimed to deduct home loan interest of \$100,000. As said, to substantiate any deduction claim, the Appellant was obliged to provide such particulars in her tax return filed, and the deduction claims should be supported by relevant documents for verification.

41. The Appellant however did not keep or provide any bank records showing the total amount of interest paid to Bank D during the period from 1 April 2014 to 9 October 2014. Rather, the amount of interest claimed for deduction was the Appellant's own estimate. This Board agrees that such estimate was far from sufficient to prove that the interest of \$54,000 (ie the Sum) had been paid, following D23/07.

42. Further, Section 26E(9) provides that a home loan is only confined to a loan of money that is applied wholly or partly for the purchase of a dwelling. Section 26E(3)(a) provides that if the home loan was not applied wholly for the acquisition of the dwelling, only a part of the interest paid can be allowed for deduction. In Fact (3)(c) of the Determination, the loan obtained from Bank D in 1999 was the 2nd re-mortgaged loan. To discharge the mortgage in 2014, the total amount payable was \$4,942,000 [Fact (7)(a) of the Determination], which was well above the loan obtained in 1995 when the Property was acquired (ie \$3,875,000; Fact (3)(a) of the Determination). Hence, the loan obtained from Bank D was not applied (at least not wholly) for the Property acquired.

43. Following the decisions of the Board, where a re-mortgaged loan was used to repay the original loan which was executed for acquisition of a taxpayer's dwelling, only the portion of loan interest paid (pro-rata to the outstanding balance of the original loan) is tax deductible. Yet, there was no details of the re-mortgaged loans, including the outstanding principal amount of the original mortgage loan and the 1st re-mortgaged loan upon discharge in 1996 and 1999 respectively [Fact (3)(a) and (b) of the Determination], or the principal loan amount of re-mortgaged loans later obtained. Further, there was no information about the respective usage of the re-mortgaged loans obtained [Fact (3)(b), (c) and (d) of the Determination]. Even if those loans were used partly for the acquisition of the Property, the amount of home loan interest allowable could not be ascertained in the absence of information required.

44. Further, the aggregate of the home loan interest allowable at \$42,597 [Fact (8)(a) of the Determination] and the Sum falls short of the home loan interest of \$100,000 claimed in the tax return filed by the Appellant [Fact (5)(b)(ii) of the Determination]. In any event, the home loan interest allowable to the Appellant before she became the sole owner of the Property in October 2014 was limited to her share of ownership of the Property, pursuant to section 26E(2)(b)(i). In other words, the claimed sum should not be allowed for deduction in full, even if it could be established that the re-mortgage loans had been applied wholly towards the acquisition of the Property.

45. This Board also notes that the Inland Revenue's case is that after almost 19 years, the loan obtained for the acquisition of the Property might have been fully repaid, or the loan that remained outstanding should be well below \$3,875,000 (at the very least). In any event, such loan outstanding could not have amounted to \$4,942,000 upon the discharge

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in October 2014. In fact, Mr A suggested that further loans had been obtained for the purposes that had nothing to do with the acquisition of the Property.

46. Relevantly, bank records showing the details of the loan later obtained by the Appellant and Mr A (by way of mortgage or charge created in 1996 and 1999), including the amount of principal remained unpaid upon discharge of the previous loan, were not kept or provided.

47. The Inland Revenue submitted that all these details are peculiarly within the knowledge of the Appellant (and Mr A) who had failed to give material evidence, despite enquiries. This Board agrees.

48. Fundamentally, this is simply a point of evidence. This Board agrees that in claiming for the deduction of home loan interest, the Appellant failed to satisfy the legal requirement for providing the proof required in support of her claim. In particular, the Appellant has failed to prove that the sum claimed represented the interest paid during the period from 1 April to 9 October 2014, and that it was paid for a loan applied for the acquisition of the Property.

49. Additionally, there is no evidence to show that the loans later obtained (including the one obtained from Bank D) was used to repay the original loan that had been applied for the acquisition of the Property.

50. In any event, the portion of any home loan interest allowable to the Appellant should be restricted at 50% (since the Property was then held by the Appellant and Mr A as joint tenants), pursuant to section 26E(2)(b)(i) of the IRO.

Disposition

51. For all the reasons stated above, the Board finds that the Appellant has failed to discharge the burden of proving that she had already paid the Salaries Tax for the year of assessment 2014/15 before the Estimated Assessment, or that the home loan interest allowable for that year should not be at an amount more than \$42,597.

52. Accordingly, the present appeal is dismissed.

53. However, this Board makes no order as to costs as the Inland Revenue has also been late, indeed, substantively late, in issuing its notice of assessment.