

Case No. D3/24

Property tax – rental income paid to another – whether liable for property tax – complaints of unfairness – jurisdiction of the Board – sections 5, 5B(2), 56 and 68(4) of the Inland Revenue Ordinance (‘IRO’)

Panel: Wong Man Kit Anson SC (chairman), Cheng Kit Hung David and Lai Ka Man.

Dates of hearing: 5 June 2024.

Date of decision: 26 June 2024.

Mr A and Ms B were spouses and joint owners of a property. The property was let out by Mr A and Mr B. The lease provided for the rent to be paid into a designated account in Ms B’s name.

For the relevant year of assessment, property tax was raised against Mr A and Ms B proportional to the period which they were owners of the property. Mr A objected mainly on the basis that he did not receive any rental income and that Ms B had absconded. The assessment was affirmed by the Commissioner.

Mr A appealed repeating essentially his grounds of objection. Mr A further complained that no action was taken by the Inland Revenue Department (‘IRD’) against Ms B.

At the hearing, Mr A did not dispute the assessment, nor that the IRD has the right to raise the assessment against him. He complained that the IRD had acted unfairly by taking no action against Ms B.

Held:

1. The Board has no jurisdiction to hear and determine Mr A’s complaint that the IRD had allegedly acted unfairly against him. These are matters of judicial review and may only be heard by the High Court.
2. Under IRO section 68(4), the onus of proving that the assessment is excessive or incorrect is on Mr A. There is no basis to suggest that the assessment is incorrect or otherwise excessive.
3. By virtue of IRO section 5B(2), the IRD has the right to raise property tax against Mr A as manner of payment under the lease were agreed to by Mr A, thus the rentals paid to Ms B were payments ‘to the order of’ Mr A.

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4. The Board dismissed the appeal and confirmed the assessment.

Appeal dismissed.

Cases referred to:

D27/98, IRBRD, vol 13, 227
D6/10, (2010-11) IRBRD, vol 25, 234
D42/12, (2012-13) IRBRD, vol 27, 881
Apsin v. Estill [1987] STC 723
D21/10, (2010-11) IRBRD, vol 25, 410

Robert Chui of Robert Chui CPA Limited, for the Appellant.
Cheng Po Fung, for the Commissioner of Inland Revenue.

Decision:

A. Introduction

1. This is the appeal by Mr A against the Commissioner's Determination dated 5 February 2024 (the '**Determination**') in respect of the Property Tax Assessment for the year of assessment 2021/22 (the '**Assessment**') raised on him and Ms B.

B. Factual Background

2. The factual background leading to the Assessment is simple and straightforward.
3. At the material time, Mr A and Ms B were husband and wife.
4. By an agreement for sale and purchase dated 24 November 2017, Mr A and Ms B as joint tenants purchased the property located at Address C (the '**Property**') at the consideration of HK\$17,000,000. Mr A and Ms B ceased to own the Property on 14 January 2022 when it was assigned to the next owner.
5. On XX April 2020, Mr A and Ms B entered into a tenancy agreement (the '**Tenancy Agreement**') with Company D (the '**Tenant**') in respect of the Property.
6. Under the Tenancy Agreement, the term of tenancy was for 2 years starting from XX April 2020 and the monthly rental payable by the Tenant was HK\$42,000 (exclusive of, *inter alia*, management fees and rates).
7. The Tenancy Agreement, which was signed by both Mr A and Ms B, expressly provided that all rentals should be paid into Ms B's designated account at Bank E ('**Ms B's Account**').

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8. Mr A filed the Property Tax Return in respect of the Property for the year of assessment 2021/22 (the '**Tax Return**'). In the Tax Return, Mr A reported, *inter alia*, that the address of Ms B was unknown and no information was available concerning the rental income for the period from 1 April 2021 to 14 January 2022

9. In a letter dated 29 April 2022 attached to the Tax Return, Mr A through his tax representative stated that he had no control over and did not receive any of the rentals, which were paid to Ms B's Account pursuant to the Tenancy Agreement, and that Ms B had absconded since March 2021.

10. Based on the Tenancy Agreement, the Assessor raised on Mr A and Ms B the Assessment as follows:-

	HK\$
Assessable Value	395,613 ¹
<u>LESS: 20% statutory allowance</u>	<u>(79,123)</u>
New Assessable Value	<u>316,490</u>
 Tax Payable thereon	 <u>47,473</u>

11. Mr A, through his tax representative, objected to the Assessment claiming that (i) he did not receive any rental income in respect of the Property, (ii) he had lost and was unable to contact Ms B, (iii) he had filed a petition for divorce against Ms B, and (iv) the Property was sold by a financier as a result of default in mortgage loan repayment.

12. By the Determination, the Commissioner rejected Mr A's objection and affirmed the Assessment.

C. This Appeal

13. In the Notice of Appeal dated 4 March 2024 filed by Mr A's tax representative on his behalf, Mr A seeks to appeal against the Determination, claiming that Ms B has substantial funds at bank, she took all money and absconded before the relevant assessment period, Mr A did not receive any rentals in relation to the Property, and the Inland Revenue Department ('**IRD**') does not appear to have taken any against Ms B.

14. For the purposes of this appeal, directions were given to the parties for the filing of witness statements, documents and submissions on which a party would wish to rely in this appeal. Mr A has not filed any such documents, and the IRD has filed documents and submissions in opposition to this appeal.

¹ Monthly rental income \$42,000 x 9 months and 13 days (from 1 April 2021 to 13 January 2022)

D. The Relevant Legal Principles

15. The relevant statutory provisions and case law are helpfully set out in sections 3 and 4 of the written submissions filed by the IRD. For the purposes of this appeal, it is only necessary for us to highlight the followings.

16. Section 5 of the Inland Revenue Ordinance (Chapter 112) ('IRO') provides, so far as material, as follows:-

*'(1) Property tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on **every person being the owner of any land or buildings** or land and buildings wherever situate in Hong Kong and shall be computed at the standard rate on the net assessable value of such land or buildings or land and buildings for each such year...*

*(1A) In subsection (1), **net assessable value** (應評稅淨值) means the assessable value of land or buildings or land and buildings, **ascertained in accordance with section 5B.**' (emphasis added)*

17. IRO Section 5B(2) provides that:-

*'The assessable value of land or buildings or land and buildings for each year of assessment shall be the consideration, in money or money's worth, **payable** in that year to, **to the order of,** or for the benefit of, **the owner** in respect of the right of use of that land or buildings or land and buildings.'* (emphasis added)

18. IRO Section 56 provides, so far as material, that:-

*'(1) **Where 2 or more persons are joint owners or owners in common** of any land or buildings or land and buildings, **any of those persons** appearing from any deed, conveyance, judgment or other instrument in writing registered in the Land Registry under the Land Registration Ordinance (Chapter 128) to be such an owner **shall be answerable** for doing all such acts, matters and things as would be required to be done under the provisions of this Ordinance by a sole owner.*

...

(3) Where any person pays property tax under subsection (1) and that person is not, apart from that subsection, liable to that tax or part of it, that person may recover from any other person that tax or part of it to which that other person, apart from that subsection, is liable under this Ordinance.' (emphasis added)

19. In D27/98, the taxpayer was the incorporated owners of a building. They objected to a property tax assessment in relation to the rental income derived from a car

parking space on the ground, *inter alia*, that such income were deposited into the management fund of the building, but not received by the taxpayer. The Board (chaired by Benjamin Yu SC) rejected this argument on the basis that ‘section 5B(2) [of IRO] does not limit the payment of money or money’s worth for the benefit of the owner, but extends to payment to or to the order of the owner’.

20. In D6/10, the taxpayer acquired a property from his parents, which was subject to an existing lease. He objected to the property tax assessment relating to the rentals derived from such lease on the ground that such rentals were received by his mother. The Board (chaired by Chow Wai Shun) noted (at paragraph 25) that it was the taxpayer’s case that it was an agreed term of the acquisition that the rentals were to be received by his mother and the taxpayer had no right to receive any rentals. The Board, however, held (at paragraph 26) that even if this were the case, the taxpayer would be required to pay property tax by reason of IRO section 5B(2).

E. Analysis

21. By virtue of IRO section 68(4), the onus of proving that the Assessment is excessive or incorrect is on Mr A.

22. At the hearing of this appeal, Mr A (who appeared together with his tax representative) confirmed that he does not dispute the legal principles referred to by the IRD in its written submissions.

23. In fact, Mr A went one step further to say that he does not dispute the Assessment. The nub of Mr A’s complaint is that the IRD has not acted fairly in that it had taken no action against Ms B and had not sought payment of tax from Ms B’s Account.

24. Mr A does not dispute that the IRD has the right to raise the Assessment against him². On a proper analysis, his complaint at best is that the IRD had abused or wrongly exercised its powers in failing to act fairly as between Ms B and he himself. This complaint is a matter of administrative law, in respect of which this Board has no jurisdiction.

25. In D42/12, the taxpayer complained, *inter alia*, that he was not fairly treated by the IRD in comparison with his colleagues. The Board held (at paragraph 19) that:-

*‘[19] Further, as mentioned in the case of D126/02, **the function of the Board** is to look at the facts of this Appeal and decide whether the Salaries Tax Assessment 2008/09 **was correctly made in accordance with the Ordinance.** The Board does not have the judicial review jurisdiction which is exclusively enjoyed by the High Court. As such, whether the Appellant was unfairly treated compared with his colleagues is not a matter for the Board to investigate’ (emphasis added)*

² The Assessment was issued against both Mr A and Ms B.

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26. In Apsin v. Estill [1987] STC 723, the taxpayer by way of an appeal (as opposed to a judicial review) argued that it was unfair and oppressive for the revenue to assess tax by reason that he had relied on the information given to him by the revenue. Sir John Donaldson MR held (at 726) that:-

*‘... the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was **an abuse of power** was one thing, and a matter **only to be considered by the High Court**. Whether, if he was right to make such assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners’ (emphasis added)*

27. The decision of Apsin has been consistently followed and applied by the Board in many decisions, which was summarised by the Board in D21/10 (at paragraphs 96-109).

28. Accordingly, this Board has no jurisdiction to hear and determine Mr A’s complaint that the IRD has (allegedly) acted unfairly against him.

29. As to the correctness of the Assessment, in view of the said position taken by Mr A at the hearing of this appeal, there is no basis to suggest that the Assessment is incorrect or otherwise excessive.

30. Further and in any event, this Board is satisfied that the Determination is a correct one as a matter of law. Pursuant to Clause 1 of the Tenancy Agreement, the Tenant was required to pay the rentals into Ms B’s Account. By signing on the Tenancy Agreement as one of the joint tenants of the Property, Mr A agreed to the said payment method. Accordingly, the rentals are clearly payments ‘to the order of’ of Mr A within the meaning of IRO section 5B(2).

F. Conclusion

31. For the above reasons, Mr A’s appeal should be dismissed and the Assessment should be confirmed.