Case No. D13/15

Salaries tax – disabled dependent allowance – dependent not Hong Kong resident – assessor allowing allowance subject to review on further information provided by Appellant – Appellant failing to provide required information – whether assessor entitled to withdraw allowance – sections 31A, 60(1) and 68(4) of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Cissy K S Lam (chairman), Chau Cham Kuen and Mak Po Lung Kelvin.

Date of hearing: 23 June 2015.
Date of decision: 29 September 2015.

The Appellant's son ('Mr A') was born in Country B, outside Hong Kong. In her 2012 tax return, the Appellant claimed disabled dependent allowance ('DDA') in respect of Mr A. The Assessor allowed DDA subject to review, and requested the Appellant to supply: (a) Mr A's Hong Kong identity card or birth certificate number; (b) documents issued by Social Welfare Department ('SWD') showing that Mr A had received disability allowances during the financial year, alternatively, a medical assessment in the form specified by SWD showing that Mr A was eligible for the said allowance. The Appellant failed to provide the requested documents, but instead furnished Mr A's birth certificate issued by Country B and letter from a health centre in Country B on Mr A's medical condition ('Mr A's Documents').

The Appellant later filed her 2013 tax return claiming DDA in respect of Mr A again by enclosing Mr A's Documents. The Assessor pointed out that, in order to claim DDA, Mr A must be eligible to claim allowance under the Government's Disability Allowance Scheme ('DAS'), otherwise the Appellant had to withdraw the DDA claim. The Assessor then conditionally allowed DDA in the assessment, subject to the Appellant's reply. Failing to receive any reply from the Appellant, the Assessor withdrew the DDA granted, and took the view that Mr A was not eligible to claim an allowance under DAS because he did not reside in Hong Kong. The Appellant objected. The objection was dismissed by IRD, and such decision was confirmed by the Commissioner. The Appellant appealed.

The Appellant agreed that she was not entitled to DDA in respect of Mr A. However, the Appellant asserted that: (a) it was unfair to her because it was the fault of IRD, who wrongfully misled her to apply for DDA without knowing that she was not entitled to do so; (b) after she had supplied Mr A's Documents (which were all from Country B), IRD did not bother to ask where Mr A resided; (c) as the Appellant could not supply the documents asked for, the Assessor should have realized that Mr A did not reside in Hong Kong and stopped DDA, without having to wait for another year to do so; (d) IRD should have known

that the Appellant was not entitled to DDA and should not have made her out as a criminal taking money that did not belong to her.

Held:

1. DDA was a statutory allowance, to which the applicant must satisfy the requirements under IRO. IRD had no discretion in the matter.

2. A taxpayer should seek proper advice on his tax liability. It was in his interests to acquaint himself with the information, and should not treat IRD as a handy, free of charge tax adviser. It was not incumbent on IRD to give advice.

3. The Assessor did not give the Appellant any 'wrong information'. The Assessor was not alerted to the fact that Mr A was not living with the Appellant. If the Appellant did not supply the Assessor with the full facts, she could hardly expect the Assessor to give her a full advice. The Appellant's complaint that nobody bothered to ask her where Mr A resided was also unfair.

4. The Assessor did not 'agree' or 'approve' the Appellant's DDA claim; it was a unilateral mistake by the Appellant. The Assessor made it clear that DDA was only 'conditionally allowed' subject to the Appellant's reply. Although it would have been expedient if the Assessor acted more promptly in seeking clarification from the Appellant about the documents she submitted (which were not documents requested by the Assessor), the Assessor's conduct was far from negligent.

5. There was nothing which could have given the Appellant an impression that IRD was treating her as a criminal. The Board did not consider the Appellant's claim to DDA to be anything other than a genuine mistake.

6. In any event, the Boards' function was to look at the assessment to see if it was incorrect or excessive. The Board considered the assessment *de novo*, unencumbered by misconduct of the Assessor. (Hossacks v IRC [1974] STC 262, Aspin v Estill (Inspector v Taxes) [1987] STC 723, Shui On Credit Co Ltd v CIR (2009) 12 HKCFAR 392 and D45/13, (2014-15) IRBRD, vol 29, 278 considered).

Appeal dismissed.

Cases referred to:

Hossacks v IRC [1974] STC 262

Aspin v Estill (Inspector v Taxes) [1987] STC 723
Shui On Credit Co Ltd v CIR (2009) 12 HKCFAR 392
D45/13, (2014-15) IRBRD, vol 29, 278

Appellant in person.
Wong Suet Mei, Leung Wing Chi and Lo Hok Leung Dickson for the Commissioner of Inland Revenue.

Decision:

Late Appeal

1. The Appellant objected to the Additional Salaries Tax Assessments for the years of assessment 2011/12 and 2012/13 ('the Additional Assessments'), which disallowed her claim for disabled dependant allowance ('DDA') in respect of her son, Mr A. By a Determination dated 22 January 2015 ('the Determination'), the Deputy Commissioner of the Inland Revenue ('the Commissioner') confirmed the Additional Assessments. Dissatisfied with the Determination, she appeals to this Board.

2. By section 31A(1) of the Inland Revenue Ordinance ('IRO'), DDA '*shall be granted in any year of assessment to a person in respect of every dependant of his or hers who is eligible to claim an allowance under the Government's Disability Allowance Scheme*'.

3. Under the Social Security Allowance Scheme ('the SSA Scheme') operated by the Social Welfare Department ('the SWD'), a monthly allowance is provided to Hong Kong residents who are severely disabled. It includes Normal Disability Allowance and Higher Disability Allowance.

4. To be eligible for an allowance under the SSA Scheme, a person must satisfy the following residence requirements:

(1) He must have been a Hong Kong resident for at least seven years; and

(2) he must have resided in Hong Kong continuously for at least one year immediately before the date of application (absence from Hong Kong up to a maximum of 56 days during the one-year period is treated as residence in Hong Kong).

5. To be eligible for a Normal Disability Allowance, a person must also fulfill the following criteria:

(1) He is certified by the specified authority to be severely disabled; and

(2) his disabling condition will persist for at least six months.

6. Section 60(1) of the IRO provides that: '*Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, ….*'

The Facts

7. The background facts are set out in the Determination. There is no material dispute. We adopt those facts insofar as they are relevant.

8. Mr A was born in Country B in June 1981. He was over 25 years of age in 2011.

9. In the Tax Return – Individuals for the year of assessment 2011/12 filed on 11 June 2012 ('the 11/6/2012 Return'), the Appellant declared that she wished to claim DDA in respect of Mr A. In support of her claim, the Appellant provided, *inter alia*, copies of the following documents:

(a) Country B birth certificate of Mr A.

(b) Letter dated 3 February 2011 issued by a Country B health centre confirming the medical conditions of Mr A.

10. In accordance with the 11/6/2012 Return, on 22 August 2012, the Assessor raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2011/12 ('the 22/8/2012 Assessment'):

		$	$
Income			655,181
Less:	Self education expenses	17,000	
	Retirement scheme contributions	12,000	29,000
Net income			626,181
Less:	Basic allowance	108,000	
	Single parent allowance	108,000	
	Child allowance in respect of Mr A	60,000	
	DDA in respect of Mr A	60,000	336,000
Net Chargeable Income			290,181
Tax Payable thereon (after tax reduction)			25,330

11. Paragraph 1 of the Assessor's Note to the 22/8/2012 Assessment stated that any deductions allowed were subject to review.

12. By letter of 27 December 2012 ('the 27/12/2012 Letter'), the Assessor informed the Appellant that she would carry out a review of the 11/6/2012 Return and requested the Appellant to supply the following information and documents:

(a) Mr A's Hong Kong Identity Card number or Hong Kong Birth Certificate number.

(b) Copy of the document issued by the SWD showing that Mr A had received Disability Allowances during the relevant year of assessment; or

(c) if Mr A was eligible to claim Disability Allowance but had not formally applied for it, a medical assessment in a form specified by the SWD to show that Mr A was eligible for the allowance.

13. In response to the Assessor's enquiries, the Appellant by letter of 2 January 2013 ('the 2/1/2013 Letter') provided, among others, copies of the following documents:

(1) Country B birth certificate of Mr A.

(2) Letter dated 17 December 2012 issued by a Country B health centre showing the long-term medications and classifications in respect of Mr A.

14. On 2 June 2013, the Appellant filed her Tax Return – Individuals for the year of assessment 2012/13 ('the 2/6/2013 Return'), in which she declared that she wished to claim DDA in respect of Mr A. In support of her claim, the Appellant provided copies of the following documents:

(1) Country B birth certificate of Mr A.

(2) Letter dated 10 May 2013 issued by a Country B health centre confirming the medical conditions of Mr A.

15. By letter of 9 September 2013 ('the 9/9/2013 Letter'), the Assessor set out section 31A of the IRO and pointed out that it was a condition for granting DDA that the dependent child must be eligible to claim an allowance under the Government's Disability Allowance Scheme. If the child was not so eligible, then she would be obliged to withdraw the DDA. The Assessor enclosed a Medical Assessment Form issued for the purpose of claiming DDA under the IRO, and advised the Appellant that if the child was eligible for the Disability Allowance but had not applied for it, she should return the enclosed medical

assessment form duly completed by a Medical Officer of the Hospital Authority to substantiate her claim. In the 9/9/2013 Letter, the Assessor concluded by stating: 'Meanwhile, we will conditionally allow this allowance in your 2012/13 assessment subject to the outcome of your reply. Please reply within 6 weeks.'

16. On the same day, the Assessor raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2012/13 ('the 9/9/2013 Assessment'):

		$	$
Income			727,201
Less:	Self education expenses	14,200	
	Retirement scheme contributions	14,500	28,700
Net income			698,501
Less:	Basic allowance	120,000	
	Single parent allowance	120,000	
	Child allowance in respect of Mr A	63,000	
	DDA in respect of Mr A	66,000	369,000
Net Chargeable Income			329,501
Tax Payable thereon (after tax reduction)			34,015

17. Paragraph 1 of the Assessor's Note to the 9/9/2013 Assessment stated that any deductions allowed were subject to review and paragraph 5 stated that the Assessment was subject to review upon receipt of further information.

18. No reply to the 9/9/2013 Letter was received. In the absence of a reply, on 9 April 2014, the Assessor withdrew the DDA previously granted and raised the Additional Assessments:

	2011/12 $	2012/13 $
Additional Net Chargeable Income (i.e. DDA withdrawn)	60,000	66,000
Tax Payable thereon	10,200	11,220

19. By letter of 17 April 2014, apparently written after previous telephone enquiry or enquiries, the Appellant explained that she did not receive the 9/9/2013 Letter because she had changed her address. She did not know the content of the letter or why the DDA was withdrawn.

20. On 30 May 2014, the Appellant supplied further documents to the Assessor:

(1) Mr A's Country B passport.

(2) Community services card issued by the Country B Government together with a mobility parking permit for the disabled used in Country B.

(3) Letter dated 27 May 2014 issued by the Organisation C of Country B confirming that Mr A was suffering from post-traumatic stress disorder for which he was receiving both psychological and physical treatment.

21. In reply by letter of 30 June 2014, the Assessor set out both section 31A of the IRO and the residence requirements under the SSA Scheme. The Assessor took the view that Mr A was not eligible to claim an allowance under the Government's Disability Allowance Scheme because he did not reside in Hong Kong. She declined to amend the Additional Assessments and invited the Appellant to withdraw her objections. The Appellant declined to do so, as per her letter of 7 July 2014. The Assessor by letter of 19 August 2014, informed the Appellant that she maintained her decision. The Appellant replied by letter of 27 August 2014, maintaining her objections as follows:

(1) The Inland Revenue Department ('the IRD') confirmed that the Appellant could claim DDA in respect of Mr A and asked for relevant documents, which she supplied. She had asked a friend who spoke Cantonese to ring up the IRD to confirm that she was eligible to claim the DDA.

(2) The Appellant had provided all the documents as requested by the Assessor, who approved the granting of the DDA. It was the fault of the IRD to grant her an allowance that should not have been granted. It was not the fault of the Appellant. It was unfair that she had to suffer the consequences and pay the tax due to withdrawal of the DDA by the Assessor.

(3) The Appellant followed all the rules and did everything that she was asked to do. But the IRD gave her wrong information. She should not be held accountable because of the IRD's incompetence.

(4) The IRD was reviewing her claim for DDA in December 2012. The Appellant questioned why the IRD did not stop the granting of DDA and explain to her that she was not entitled to the allowance, and withdrew the claim only after another whole year.

(5) Mr A lived in Hong Kong for six weeks every year. So the Appellant could take care of him and spent time with him.

The Evidence

22. The Appellant gave evidence and called Ms D as her witness. The Appellant confirmed the objections set out in her statement of appeal. She further gave evidence of the telephone conversations she had with the IRD. Some colleagues of her knew of her situation and suggested that she could claim disability allowance regarding Mr A. So she rang the IRD to check if that was the case. She was told to supply documents in support of her claim. She could not be sure if she told the IRD that Mr A was living in Country B, but she definitely did not tell them that he was living in Hong Kong.

23. The Appellant's evidence of the telephone conversations was only vague and it is clear that she mixed up different conversations she had with the IRD at different points in time. This is understandable given the lapse of time and the language difficulties. Indeed, it was for fear of miscommunication that she asked Ms D, a former colleague, to help her call the IRD at various times.

24. Ms D gave her evidence in English, but she is Cantonese speaking. According to Ms D, she had called the IRD more than once to clarify matters for the Appellant. The first time she called was in 2011 or 2012. The Appellant told her whom to call and gave her the number, though she could no longer remember the name or number. It was a lady that she spoke to. Ms D explained to the lady that although the dependant was over 25, he was disabled and the Appellant had to incur substantial medical expenses in his maintenance. Hence the Appellant wanted to claim DDA in respect of the dependant and wanted to know what documents she needed to submit in support of that claim. The lady at the IRD told her the Appellant should submit proof of the dependant's disability, such as medical documentation. Ms D did not keep any note of the conversation. She told the Appellant what was required right after she had spoken to the IRD.

25. Similarly, with the lapse of time, Ms D's recollection of the conversation or conversations was sketchy. But she was certain about one thing: she never told the lady at IRD that Mr A did not reside in Hong Kong, nor was she ever told that the Appellant was required to submit proof of Mr A's residence, because it was at the hearing that she first learned of the residence requirements.

26. We accept that both the Appellant and Ms D are honest witnesses trying to recall events as best they could, but we find Ms D's evidence more helpful, as she seemed more confident in her recollection and there was no fear of misunderstanding arising from language barrier.

Our Decision

27. DDA is a statutory allowance. A taxpayer must satisfy the requirements laid down in the statutory provision, namely section 31A(1) of the IRO, in order to be entitled to the allowance. There is no discretion in the matter. There is only one consideration before this Board: are the requirements satisfied? Neither the Assessor or the Commissioner nor

this Board has power to allow DDA unless the requirements are satisfied. As they were not, the DDA was rightly withdrawn and the Additional Assessments were rightly made.

28. Indeed, the Appellant told us in no uncertain term that she accepted that she did not satisfy the requirements and was not entitled under section 31A(1) of the IRO to DDA in respect of her son. After she became aware of the residence requirements, she no longer made any claim for DDA in her tax return for the years of assessment 2013/2014. Nonetheless, she felt that it was unfair to her that she should be asked to pay the additional tax because it was the fault of the IRD that she was given wrong information about the requirements, leading her to apply for the DDA without knowing that she was not entitled to do so.

29. While we are sympathetic to the Appellant given her personal hardship, we do not find her complaints against the IRD just or justified.

30. First of all, it is up to a taxpayer to seek proper advice on his or her tax liability. A taxpayer can, of course, do so with the help of an accountant, but failing that, there are lots of useful information on the IRD's website. It is in the taxpayer's own interests to acquaint himself or herself with those information and with the Guide to Tax Return accompanying every tax return, and should not treat the IRD as a handy, free of charge tax adviser. It is not incumbent on the IRD to give advice.

31. Secondly, we do not agree that the Assessor ever gave the Appellant any 'wrong information' as alleged. If the Assessor specifically told the Appellant that she could claim DDA despite of the fact that the dependant did not reside in Hong Kong, then that would indeed have been a cause for concern. But that was not the case. Rather, the residence requirements were not mentioned. But if the Assessor failed to 'broach or mention' the subject, it was because the Appellant and Ms D did not 'broach or mention' the subject to the Assessor. It is clear from Ms D's evidence that her enquiries with the Assessor were directed to the possibility of an allowance being granted in respect of a child who was already over 25, on the ground of disability. The focus was thus on proving the child's disability. The Assessor was not alerted to the fact that the child, though disabled and dependent on the Appellant, was not living with her. If the Appellant did not supply the Assessor with the full facts, she could hardly expect the Assessor to give her a full advice. And there was no question of the Assessor 'agreeing' or 'approving' the DDA. At that stage, the enquiries were on how to make the claim in the tax return.

32. The Appellant complains that even after she had supplied the documents in support of her claim, which were all from Country B, nobody bothered to ask where her son resided.

33. This is not a fair complaint. We refer to Appendix A to the Determination, paragraph 9 above. The fact that Mr A was born in Country B by no means implied that he could not have moved to live in Hong Kong with the Appellant. Likewise, the fact that he received treatments in Country B did not mean he could not be living in Hong Kong. The

medical document supplied by the Appellant confirmed that Mr A was suffering from serious medical condition, but it did not indicate that he was confined to hospitalization in Country B. It revealed that Mr A had a Country B address, but that certainly did not preclude him from living part, if not whole, of the year in Hong Kong with his mother.

34. Further, and in any event, the Assessor did ask questions, viz by the 27/12/2012 Letter.

35. True, the 27/12/2012 Letter was sent after the 22/8/2012 Assessment, but it is a standard practice of the IRD to make an assessment based on a tax return and carry out a review subsequent to the assessment, the so-called 'Assess First Audit Later (AFAL) system'. This is done on the basis that (1) every taxpayer has a duty to submit a true and correct return, as borne out by the Declaration in Part 9 of the tax return, whereby a taxpayer declares that '*the information given in this return, its Appendix (if applicable) and any other document attached is true, correct and complete*' ; and (2) by section 60(1) of the IRO, the assessor can review any assessment so long as it is within the 6 years time limit. So there is no question of fault that the Assessor decided to review the 22/8/2012 Assessment. We would further point out that the Assessor's Note to the 22/8/2012 Assessment stated in clear term that any deductions allowed were subject to review.

36. The Appellant then complains that, as she could not supply the documents asked for in the 27/12/2012 Letter, it must be extremely clear that Mr A did not live in Hong Kong, the Assessor should have realised her mistake and stop the allowance and should not have waited for another year to do so.

37. Again, this is not a fair criticism. In the 2/1/2013 Letter purportedly in reply to the 27/12/2012 Letter, the Appellant wrote: 'I attach the documents requested in your letter dated 27 December 2012. There are 4 pages attached.' So the answer was not that the Appellant did not have the documents requested. Rather, the answer was that she did have those documents and here they were. Sure, the documents she supplied were not the documents requested, but it was only prudent for the Assessor in such circumstances to seek clarification from the Appellant. This the Assessor did, by the 9/9/2013 Letter. It is true that in the meantime, the Appellant had filed the 2/6/2013 Return making the same DDA claim. It would have been expedient had the Assessor acted more promptly in response, but her conduct was far from negligent.

38. The Assessor made it clear in the 9/9/2013 Letter that the DDA was only 'conditionally allowed' subject to the outcome of the Appellant's reply. The Assessor's Notes to the 9/9/2013 Assessment similarly stated that any deductions allowed were subject to review and the assessment was subject to review upon receipt of further information. If the Appellant was under any misconception that the Assessor had 'agreed' or 'approved' her claim for DDA, it was a unilateral mistake not brought about by the Assessor.

39. The Appellant complains that the IRD, as professionals trained in their job, should have picked up the fact that she was not entitled to DDA and should not have made

her out as a criminal taking money that did not belong to her. We do not find anything in any of the correspondence that could have remotely given the Appellant the impression that the IRD was treating her as a criminal. It is most unfortunate that the Appellant should conceive such an idea. The Appellant can be rest assured that this Board does not for one minute consider the Appellant's claim to DDA to be anything other than a genuine mistake.

40. The function of this Board, as repeated in many authorities, is simply to look at the assessment to see if it is incorrect or excessive (see Hossacks v IRC [1974] STC 262; Aspin v Estill (Inspector v Taxes) [1987] STC 723; Shui On Credit Co Ltd v CIR (2009) 12 HKCFAR 392, at paragraphs 29 & 30; D45/13, (2014/15) IRBRD, vol 29, 278), and the burden of proving this is on the Appellant (see section 68(4) of the IRO). This Board considers the assessment *de novo*, unencumbered by any decision of the assessor or the Commissioner, and certainly not affected by misconduct, if any, of the assessor. In any event, we find not a scrap of evidence to suggest negligence or wrongdoing on the part of the IRD. The Appellant felt aggrieved at the IRD's management of her case. We hope the above have sufficiently addressed her grievances. In particular, we would like to reassure the Appellant that we do not impute any dishonest motive in her conduct.

Conclusion

41. For the reasons given above, we find no ground to set aside the Additional Assessments. They were neither incorrect nor excessive. We hereby confirm the Additional Assessments and dismiss the appeal. We make no order as to costs.