

**Case No. D15/17**

**Salaries tax** – home loan interest — section 26E of the Inland Revenue Ordinance (‘IRO’)

Panel: Wong Kwai Huen Albert (chairman), Chan Wai Kam Caroline and Lee Tsung Wah Jonathan.

Date of hearing: 5 July 2017.

Date of decision: 27 October 2017.

The taxpayer leased the property at Address B for the period from 10 June 2013 to 9 June 2015. By an assignment dated 3 September 2013, the taxpayer acquired the property at Address C (the Property) as a sole owner and obtained a bank loan which was secured by a legal charge over the Property. Subsequently the taxpayer let out the Property for the period from 8 September 2014 to 7 September 2016. The taxpayer’s claim that the Property was her only basic shelter secured by a bank mortgage and should be allowed deduction of home loan interest as any other first-time property owners was not accepted by the Respondent. The taxpayer appealed, relying on section 26E of the IRO and alleging that she did stay in the Property before letting it out in the relevant year of assessment. The Respondent produced records of utilities consumption of the Residence and the Property for the period from 1 April 2014 to 7 September 2014 (the Relevant Period) and submitted that the readings demonstrated that the taxpayer did not use the Property but, on the contrary the Residence, as her sole or primary place of residence.

**Held:**

1. The Board considers that section 26E(1) of the IRO envisages that a property can be used by a person either exclusively or partly as his place of residence. That is to say the section covers a situation where a person dwells in a property partly as his place of residence but at the same time dwells partly in another property. This is not uncommon when a person works in another city or in two different places far apart. That explains the purpose of section 26E(2)(a) which allows the adjustment of the amount of home loan interest to be deducted in such circumstances as is reasonable.
2. However, in this appeal, the taxpayer was unable to prove that the Property had ever been used by her as a place of residence, principally or otherwise during the Relevant Period. It is difficult to accept that the taxpayer had used both the Residence and the Property as her place of residence simultaneously; especially in view of the huge discrepancies in the utility consumptions.

3. The taxpayer is ordered to pay costs in the sum of \$6,000.

**Appeal dismissed and costs order in the amount of \$6,000 imposed.**

Cases referred to:

D108/02, IRBRD, vol 18, 45  
D8/04, IRBRD, vol 19, 111  
D44/10, (2011-12) IRBRD, vol 26, 1

Appellant in person.

Lee Chui Mei and To Yee Man, for the Commissioner of Inland Revenue.

**Decision:**

**1. The Facts**

- (1) Ms A ('the Appellant') has objected to the Salaries Tax Assessment for the years of assessment 2014/15 raised on her. The Appellant claims that she should be allowed deduction of home loan interest.
- (2) By a tenancy agreement dated 10 June 2013, the Appellant leased the property at Address B ('the Residence') from the landlord at a monthly rent of \$30,000 for the period from 10 June 2013 to 9 June 2015.
- (3) By an assignment dated 3 September 2013, the Appellant acquired the property at Address C ('the Property') as a sole owner. On the same date, the Appellant obtained a loan from Bank D, which was secured by a legal charge over the Property.
- (4) By a tenancy agreement dated 20 August 2014, the Appellant let out the Property at a monthly rent of \$30,000 for the period from 8 September 2014 to 7 September 2016.
- (5)
  - (a) In her Tax Return – Individuals for the year of assessment 2014/15, the Appellant declared a total employment income of \$372,619 for the period from 23 September 2014 to 31 March 2015.
  - (b) The Appellant claimed deduction of home loan interest in the amount of \$103,340 in respect of the Property. She had not

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

declared whether the Property was occupied as her residence for the full year.

- (6) Based on her tax return, the Respondent raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2014/15:

	\$
Income	372,619
<u>Less: Home loan interest*</u>	<u>100,000</u>
	272,619
<u>Less: Basic allowance</u>	<u>120,000</u>
Net Chargeable Income	<u>152,619</u>
Tax Payable thereon (after tax reduction)	<u>3,486</u>

\* The allowable amount was restricted to the statutory limit.

- (7) The Appellant objected to the 2014/15 Salaries Tax Assessment on the ground that she should be allowed deduction of the mandatory contributions in the amount of \$9,000 made by her to retirement scheme for the period from October 2014 to March 2015.
- (8) In reply to the Respondent's enquiries, the Appellant confirmed that she let out the Property and leased the Residence as her shelter at the same building.
- (9) The Respondent accepted the Appellant's deduction claim for retirement scheme contributions. However, the Respondent considered that the Property was not occupied as the Appellant's residence and the deduction of home loan interest previously granted should be withdrawn. Accordingly, the Respondent proposed to the Appellant that the Salaries Tax Assessment for the year of assessment 2014/15 be revised as follows:

	\$
Income	372,619
<u>Less: Retirement scheme contributions</u>	<u>9,000</u>
	363,619
<u>Less: Basic allowance</u>	<u>120,000</u>
Net Chargeable Income	<u>243,619</u>
Tax Payable thereon (after tax reduction)	<u>9,415</u>

- (10) The Appellant did not accept the Respondent's proposal. She claimed that the Property was her only basic shelter secured by a

bank mortgage and should be allowed deduction of home loan interest as any other first-time property owners.

(11) In its determination dated 7 March 2017, the Respondent determined that Salaries Tax Assessment for the year of assessment 2014/15 under Charge Number X-XXXXXXX-XX-X, dated 11 November 2015, showing Net Chargeable Income of \$152,619 with Tax Payable thereon of \$3,486 (after tax reduction) is increased to Net Chargeable Income of \$243,619 with Tax Payable thereon of \$9,415 (after tax reduction).

(12) The Appellant appeals to this Board.

## 2. The Relevant Statutory Provisions

Home loan interest is governed by section 26E of the Inland Revenue Ordinance ('IRO') which contains the following provisions:

(1) **Section 26E(1)**

*'... where a person pays during any year of assessment any home loan interest for the purposes of a home loan obtained in respect of a dwelling which is used at any time in that year of assessment by the person exclusively or partly as his place of residence, a deduction in respect of the home loan interest shall be allowable to that person for that year of assessment.'*

(2) **Section 26E(2)(a)**

*'... a deduction allowable to a person under subsection (1) in respect of any home loan interest paid by the person during any year of assessment shall be—*

(i) (A) *where the dwelling is used by the person exclusively as his place of residence during the whole of that year of assessment, the amount of the home loan interest paid;*  
*or*

(B) *in any other case, such amount (whether representing the full amount of the home loan interest paid or any part thereof) as is reasonable in the circumstances of the case; or*

(ii) *the amount specified in Schedule 3D in relation to that year of assessment,*

*whichever is of the lesser amount.'*

(3) **Section 26E(9)**

*‘place of residence (居住地方), in relation to a person who has more than one place of residence, means his principal place of residence.’*

**3. The Case Law**

The Respondent referred to the following cases:

- (1) D108/02, IRBRD, vol 18, 45 On the issue of place of residence, the Board held that:

*‘16. Assistance can be derived from section 26E itself which uses and defines the expression “home loan interest” and there is, therefore, an implication that the concession only applies in relation to a place of residence which is used as a “home”. That would also be consistent with one of the meanings given to the phrase in Words and Phrases, third edition which states that “the residence of a person is by implication that person’s home, where at least he or she has a sleeping apartment or shares one, although merely sleeping on the premises is not conclusive of residence”. The question is essentially one of fact and degree.’*

- (2) D8/04, IRBRD, vol 19, 111 The Board had the following interpretation on the place of residence under section 26E(1) at page 114:

*‘5. To claim a deduction under section 26E(1), the Flat must not only be a dwelling ..., but it must be the Appellant’s sole or primary “place of residence”, and “used” by the Appellant as such ... The cases cited by both parties indicate that a “place of residence” means the place where a person normally lives and sleeps ... ’*

- (3) D44/10, (2011-12) IRBRD, vol 26, 1 The taxpayer was allotted a place of residence in the dormitory for his family by his employer. He claimed deduction of the loan interest in respect of another property. The taxpayer declared that the property had been left empty for a long time and reserved for vacation use. In the relevant years of assessment, the consumption of water and electricity in the dormitory was many times greater in the dormitory than in the property. The Board decided that the property was not the taxpayer’s principal place of residence.

#### 4. Grounds of Appeal

The Appellant's grounds of appeal as stated in her notice of appeal and a letter dated 16 March 2017 can be summarized as follows:

- (1) The Appellant submitted that she should be allowed home loan interest deduction in respect of the Property as she did stay in the Property before letting it out. Besides, it was the only property owned by the Appellant in Hong Kong. She was the 'first-time property owner' and should be allowed to have a 'basic shelter' in Hong Kong. She did not have a second property that generated income.
- (2) The Appellant claimed that she had used the Property before it was let out in the relevant year of assessment and relied on the provisions in section 26E which mentioned that '... a dwelling which is used at any time in that year of assessment by the person exclusively or partly as his place of residence'.

#### 5. The Board's Findings

- (1) At the hearing, the Respondent produced records of the utilities consumption of the Residence and the Property:

##### (a) *Electricity Consumption*

<u>The Property</u>		<u>The Residence</u>	
<u>Reading date</u>	<u>Units consumed</u>	<u>Reading date</u>	<u>Units consumed</u>
08-04-2014	37	08-04-2014	584
09-05-2014	53	09-05-2014	699
10-06-2014	58	10-06-2014	1,000
09-07-2014	54	09-07-2014	881
08-08-2014	57	08-08-2014	946
06-09-2014	68	08-09-2014	976

##### (b) *Water Consumption*

<u>The Property</u>		<u>The Residence</u>	
<u>Period covered</u>	<u>Consumption (cubic metres)</u>	<u>Period covered</u>	<u>Consumption (cubic metres)</u>
19-03-2014 – 23-07-2014	2	19-03-2014 – 23-07-2014	137
23-07-2014 – 05-09-2014	0	23-07-2014 – 14-11-2014	127

- (2) The Respondent submitted that during the period from 1 April 2014 to 7 September 2014 ('the Relevant Period'), the electricity

consumptions of the Property (37 to 68 units) were 13 to 17 times less than those of the Residence (584 to 1,000 units). The water consumptions of the Property were only 2 cubic metres (for about 4 months) and zero (for about 1.5 months) while those of the Residence was much greater. These readings demonstrated that the Appellant did not use the Property as her place of residence. On the contrary, the high utilities consumptions of the Residence showed that the Appellant used it as her sole or primary place of residence. The Respondent argued that even if the Property is accepted by the Board as the Appellant's place of residence, it was not her principal place of residence during the Relevant Period.

- (3) The Appellant took a different approach in the interpretation of section 26E. She seemed to be contending that she only had to prove that she had partly taken the Property as her place of residence, she would be entitled to a deduction of the home loan interest or at least part of it. There was no need for her to prove that the Property was her principal place of residence.
- (4) The Board considers that section 26E(1) envisages that a property can be used by a person either exclusively or partly as his place of residence. That is to say the section covers a situation where a person dwells in a property partly as his place of residence but at the same time dwells partly in another property. This is not uncommon when a person works in another city or in two different places far apart. That explains the purpose of section 26E(2)(a) which allows the adjustment of the amount of home loan interest to be deducted in such circumstances as is reasonable.
- (5) However, in this appeal, the Appellant was unable to prove that the Property had ever been used by her as a place of residence, principally or otherwise during the Relevant Period. Other than the allegation that the Appellant had once allowed her relatives to stay for a period of time, the Appellant failed to produce any evidence to convince the Board that she had dwelled in the Property. The Board also could not accept her reasoning that different families would consume different quantities of utilities. It is difficult to accept that the Appellant had used both the Residence and the Property as her place of residence simultaneously; especially in view of the huge discrepancies in the utility consumptions. The Board has therefore not found any support for the argument that the Property had been used at all as the Appellant's place of residence.
- (6) The Respondent has accepted the Appellant's deduction claim for retirement scheme contributions of \$9,000 for the year of assessment 2014/15. The Appellant's claims for similar deductions for the years of assessment 2003/04 to 2007/08 and 2011/12 are

outside the purview of the present appeal and should be dealt with by the Respondent separately.

**6. Conclusion**

- (1) The Board holds that the Appellant is not entitled to any deduction of home loan interest in this case and that the Appellant has failed to discharge her onus of proving that the 2014/15 Salaries Tax Assessment are excessive or incorrect. This appeal is dismissed.
- (2) The Appellant is ordered to pay costs in the sum of \$6,000.