

Case No. D2/21

Salaries tax – dependent grandparent allowance – dependent disputed the payment of the sum – whether the grandfather resided with the appellant is a fact finding exercise – sections 30A and 68(4) of the Inland Revenue Ordinance

Panel: William M F Wong SC (chairman), Hui Lap Tak and Lee Wong Wai Ling Winnie.

Date of hearing: 27 May 2020.

Date of decision: 26 April 2021.

The Appellant objects to the Additional Salaries Tax Assessments for the years of assessment 2012/13 to 2016/17 raised on her. The Appellant has appealed to the Board against the Determination only on the ground that she should be allowed an additional dependent grandparent allowance in respect of the Grandfather for the years of assessment 2015/16 and 2016/17.

Held:

1. Whether the Grandfather resided with the Appellant is a fact finding exercise and the Board takes into account all relevant factual circumstances and applies the balance of probability test to determine this factual issue (In D30/07, (2007-08) IRBRD, vol 22, 723 followed)
2. The Board has balanced the evidence in order to justice and fairness in the present case. On balance, the Board comes to the view that the Appellant has discharged her burden of proof and on a balance of probabilities, the Board believes that the Grandfather did reside with the Appellant during the relevant time period, being for the years of assessment 2015/16 and 2016/17.
3. This Board makes no order as to costs in this appeal as the Appellant made her case clear during the appeal and the Revenue was proper to reach the conclusion it did according to the documentary evidence submitted by the Appellant.

Appeal allowed.

Cases referred to:

D30/07, (2007-08) IRBRD, vol 22, 723

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

Appellant in person, accompanied by Appellant's husband.
Lo Hok Leung Dickson, Cheng Po Fung and Leung Hoi Sze, for the Commissioner of Inland Revenue.

Decision:

The Appeal

4. Ms A (the 'Appellant') objects to the Additional Salaries Tax Assessments for the years of assessment 2012/13 to 2016/17 raised on her.

5. She submitted that she should be granted an additional dependent grandparent allowance ('ADGA') in respect of her grandfather, Mr B (the 'Grandfather'), for the years of assessment 2015/16 and 2016/17.

6. On 29 August 2019, Deputy Commissioner of the Inland Revenue ('the Revenue') issued a determination ('the Determination') confirming all five Additional Salaries Tax Assessments for the years of assessment 2012/13 to 2016/17 raised on the Appellant.

7. The Appellant has appealed to the Board against the Determination only on the ground that she should be allowed ADGA in respect of the Grandfather for the years of assessment 2015/16 and 2016/17.

8. The Appellant's ground of appeal was that she should be entitled to ADGA in respect of the Grandfather in the years of assessment 2015/16 and 2016/17 as the Grandfather resided with her continuously throughout the years. The Grandfather did not reside at any other residence throughout the said years.

9. The Appellant relies on the following documents to support her claim that the Grandfather resided with her during the years of assessment 2015/16 and 2016/17:

- (a) the application for employment of domestic helper from aboard signed by Mr C, the Appellant's husband ('the Husband') in June 2015.
- (b) bank correspondences to the Grandfather at her residential address.
- (c) the Grandfather's statement to the Revenue.
- (d) the Grandfather's statement to the Board.
- (e) the Ambulance Journey Record and the letter from Hospital D.
- (f) the domestic helper's statement to the Board.

- (g) the letter from Estate E Management Services Office.

The Applicable Legal Principles

10. Section 30A of the Inland Revenue Ordinance ('the Ordinance') provides that:

*'(IAA) In this section, **dependent grandparent allowance** means an allowance granted under subsection (1) or (1A).*

(1) An allowance shall be granted in any year of assessment to a person

(a) if -

(i) the person; or

(ii) his or her spouse who is not living apart from that person,

maintains a grandparent or a grandparent of his or her spouse in that year; and

(b) if that grandparent—

(i) was ordinarily resident in Hong Kong; and

(ii) was -

(A) aged 60 or more; or

(B) under the age of 60 and was eligible to claim an allowance under the Government's Disability Allowance Scheme,

at any time in that year.

(1A) ...

(2) A dependent grandparent allowance may be granted in respect of each such grandparent who is so maintained.

(3) A dependent grandparent allowance grantable in respect of a grandparent under subsection (1) is -

(a) an allowance of the prescribed amount;

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

(b) *an additional allowance of the prescribed amount if that grandparent resided, otherwise than for full valuable consideration, with the person who is eligible to claim the allowance under paragraph (a) for a year of assessment continuously throughout that year.*

11. Section 68(4) of the Ordinance provides that:

'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

12. In D30/07, (2007-08) IRBRD, vol 22, 723, the Board held that the word 'resided ... with' is to be construed as meaning that the parent shared the same residence or dwelling with the taxpayer. Further, the place of residence is normally the place 'where the person lives and sleeps'.

13. The Board expressed the said view at paragraphs 8 and 13 as follows:

'8. Hence the words "resided ... with" is to be construed as meaning that the parent shared the same residence or dwelling with the taxpayer. Although the word "residence" is not used in the statute, on proper construction of the legislation, the words "resided ... with" refers to the fact that the parent and the taxpayer lived in the same dwelling; or in other words, shared a common place of residence.

...

13. ... Although sleeping on the premises is not conclusive of residence, the place of residence is normally the place where the person lives and sleeps...'

14. Hence, whether the Grandfather resided with the Appellant is a fact finding exercise and the Board takes into account all relevant factual circumstances and applies the balance of probability test to determine this factual issue.

The Relevant Facts

15. The Appellant was requested to confirm if she agreed with the facts in Part I of the Determination under 'FACTS UPON WHICH THE DETERMINATION WAS ARRIVED AT'. The facts agreed between the Appellant and the Revenue had been included in the Statement of Agreed Facts ('SOAF').

16. In addition to the SOAF, the Revenue also relies on the following additional facts:

(a) In correspondence with the Assessor during the year 2015, the Grandfather stated that his residential address was Property F (i.e. Fact

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

- (14)). The Revenue submits that according to that document, the Grandfather resided at Property F in 2015, which is inconsistent with his subsequent declaration that he resided with the Appellant since 20 May 2014.
- (b) During the period from April 2012 to March 2017, there was significant electricity consumption in Property F (i.e. Fact (15)(b) and (15)(c)). The Revenue submits that the electricity consumption records in Property F suggest that the Appellant's claim that the Grandfather moved to reside with her since 20 May 2014 is not true.
- (c) In an application for Old Age Living Allowance ('OALA Form') signed by the Grandfather on 21 September 2017, the Grandfather declared that his residential address at that time was Property F. The Revenue submits that according to that document, the Grandfather resided at Property F in September 2017, which is inconsistent with his subsequent declaration that he resided at Estate E ('Property G') from 20 May 2014 to July 2018.

Analysis

17. The Board has carefully considered the Appellant's evidence including her oral testimony. The Board has also considered the Revenue's submissions in detail and understands why the Revenue considers that in terms of documentary evidence, the Revenue has reasonable grounds to conclude that the Grandfather did not reside with the Appellant during the relevant time period.

18. The Board has balanced the evidence in order to justice and fairness in the present case. On balance, the Board comes to the view that the Appellant has discharged her burden of proof and on a balance of probabilities, the Board believes that the Grandfather did reside with the Appellant during the relevant time period, being for the years of assessment 2015/16 and 2016/17. The Board comes to this decision on a number of reasons.

19. First, the Board considers that the letter from Estate E Management Services Office carries weight. In the letter dated 10 September 2019, Estate E Management Services Office, it is stated that, according to its records, the Appellant, the Husband and the Grandfather were residents at Property G from May 2014 to July 2018.

20. The letter states that:

'According to our record, the following people had been residency in Property G within the time period stated:

Mr B May 2014-July 2018'

21. The Board considers that this is an important piece of evidence because there is no reason and no motive on the part of the management company to lie or state a false

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

fact. The management company must have evidential record before it can satisfy itself to issue such a letter.

22. The Revenue submits that the management company did not mention in its letter the details of the records it held to show that the Grandfather was a resident of Property G from May 2014 to July 2018. That is a matter which the Revenue could have taken up with the management company. The Revenue could have verified this with the management company if it wishes. The Appellant has obtained this proof from the management company and she has not been informed what other evidence she should further obtain from the management company.

23. The fact that the officers of the management company did not reside in Property G is neither here nor there. The management company specifically stated that according to its records, the Grandfather did reside in Property G during the relevant time period. The Board considers that this evidence from an independent professional management company is of significant evidential value. There is no evidential basis for this Board to doubt the correctness of the letter and the management company is in a position to give evidence as to whether a certain individual did reside in any of the properties under its management according to its record.

24. Importantly, the Board accepts the Appellant's evidence that residents of Property G needed to use electronic access card to operate the lifts. Residents also have to use such electronic access cards to unlock the front door to the Appellant's flat. Hence, the management company would have kept a good record of those residing in Property G.

25. Secondly, the Board also notices that the Revenue did not challenge that the Appellant's grandmother, the late Ms H resided with the Appellant at Property G from May 2014 to November 2014 when she was sent to hospital from Property G and passed away in the hospital.

26. The Board considers that, on a balance of probabilities, it is more likely than not that the Grandfather would have resided with the grandmother at the material time. It is unlikely that the Grandfather moved out after the grandmother died and then moved back in Property G later. There is force in the Appellant's continuity argument.

27. Further, the Ambulance Journey Record and the letter from Hospital D all show that the Grandfather was sent to the hospital by ambulance from Property G on 16 May 2018 and the nurse had conducted home visit for the Grandfather at Property G from 24 May 2018 to 16 July 2018.

28. Although those incidents occurred in the year of 2018, the Board considers that it corroborates with the suggestion that the Grandfather continuously resided with the Appellant in Property G.

29. Thirdly, the Appellant had provided some bank correspondences addressed to the Grandfather at Property G in 2015, 2016 and 2017. The Revenue submits that the Grandfather could choose to receive his mails at Property G address as he considered

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

convenient and that address does not necessarily represent the place he resided, especially when there are other documents suggesting that he did not reside at Property G during the relevant years of assessment. However, the Board considers that in fact it would be rather inconvenient for bank statements to be posted to a different address than the one that the Grandfather was in fact residing. In particular, for a prolonged period of 2015 to 2017. The Board also notices that there were credit card bills which require timely attention and handling in order to avoid late charges.

30. Fourthly, the above is corroborated by the statement of Ms J, a domestic helper at Property F since 7 January 2017 dated 6 January 2020 who confirmed that the Grandfather had never resided at Property F since then. However, it is fair for the Revenue to submit that the domestic helper was not a witness of the case and her statement could not be questioned under cross-examination. Hence, this Board attaches no weight to this factor.

31. The same applies to the Grandfather's statement to the Revenue dated 4 September 2019 under which the Grandfather informed the Revenue that he resided at Property G from 20 May 2014 to July 2018 and his statement dated 11 January 2020 under which the Grandfather informed the Board that he resided at Property G with the Appellant during the years of assessment 2015/16 and 2016/17. The Revenue is right that the Board cannot rely on these as evidence as the Grandfather did not come to the Board to testify and the Revenue did not have any opportunity to cross-examine the Grandfather. This Board understands from the Appellant that the Grandfather is now about 80 and is suffering from chronic diseases, hence, the Appellant has made a perfectly understandable decision of not calling the Grandfather. However, it remains that the Board cannot take into account such evidence.

32. Finally, the Board agrees with the Revenue that the fact that the application for employment of domestic helper from aboard signed by the Husband in June 2015 is neither here nor there as the Husband's mother though stated in the relevant application like the Grandfather, actually did not reside at Property G. Hence, it could well be the case that a household member stated in the application (such as the Husband's mother) had never resided in Property G.

33. The Revenue submits that that the Grandfather resided at another property, namely, Property F during the years of assessment 2015/16 and 2016/17 on two principal grounds.

34. First, as a matter of contemporaneous documents:

- (1) In the Property Tax Return for the year of assessment 2014/15 dated 1 February 2015 signed by the Grandfather ('the Property Tax Return'), he declared his residential address at that time was Property F. He also declared in the Property Tax Return that the information given in the return was true, correct and complete.
- (2) In the OALA Form dated 21 September 2017 signed by the Grandfather, he declared that his residential address at that time was

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

also Property F. He also declared in the OALA Form that, to the best of his knowledge and belief, the information given in the form was true.

35. The above documents suggest that the Grandfather resided at Property F during the period from February 2015 to September 2017, i.e. during the years of assessment 2015/16 and 2016/17.

36. According to the electricity consumption records, there was significant electricity consumption in Property F during the period from April 2011 to March 2017. The significant electricity consumption recorded in Property F that continued long after May 2014 plainly suggested that there was no significant drop in the number of household members residing at Property F. The asserted removal of the Grandfather (and also the Father and the Mother) in May 2014 from Property F to Property G is unconvincing. In other words, the Grandfather should still reside at Property F after May 2014.

37. In relation to the first point, the Board accepts the Appellant's case that the Grandfather did not update all his residential records after moving to live with the Appellant as Property G was a rented property and was not considered to be his permanent residence. What he did was that he updated his residential address with some organizations which he had more frequent contacts, like banks for credit card statements but not for those with which he foresaw to have not so frequent contacts, to save the trouble of having to update the residential record later on. The Board considers that to be a probable and credible explanation. The Appellant's evidence is that she has personally spoken to the Grandfather and the Grandfather told her that that was the reason for not updating his residential address in some of the governmental documents. Overall, the Board finds the Appellant to be a credible witness and the evidence she gave to the Board is coherent despite the existence of some documentary evidence to the contrary. The Board reminds itself that it has to consider the reality of the situation and it is perfectly plausible that the Grandfather did put down a different but more permanent address for some documents.

38. The Board also accepts the Appellant's case that when application for domestic helpers was prepared, the reason why the Grandfather and indeed the Appellant's name were mentioned in a form which mentioned Property F was for expectation management of the domestic helper under contingency scenarios when the Appellant and the Grandfather might have to go back to Property F. As explained earlier, the issue in this case is a fact finding exercise as to whether the Grandfather resided with the Appellant.

39. As to the second reason, the Appellant's sister and her sister's husband lived there and the electricity consumption did show a decrease after September 2015. In any event, this Board finds it unsafe to draw any conclusive inference from the level of electricity consumption that the Grandfather did reside in Property F. There is also no comparison of the electricity consumption level at Property G.

Disposition

40. For all the reasons stated above, this Board allows the Appellant's appeal.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN AUGUST 2022)

41. This Board makes no order as to costs in this appeal as the Appellant made her case clear during the appeal and the Revenue was proper to reach the conclusion it did according to the documentary evidence submitted by the Appellant.