Case No. D24/15

Case stated – principle on appeal by way of case stated – personal assessment – eligibility – permanent residence – whether appellant 'ordinarily resided' in Hong Kong – sections 41, 64, 66, 68, 69(1) and Schedule 1 of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Wong Kwai Huen (chairman), Julienne Jen and Stephen Suen Man Tak.

Date of hearing: Stated case, no hearing.
Date of decision: 29 January 2016.

The Deputy Commissioner of Inland Revenue ('CIR') determined that taxpayers Mr A and Ms B were ineligible for personal assessment ('PA'). Mr A appealed against the CIR's determination ('Determination'), contending that the CIR had wrongly ruled that he did not 'ordinarily reside' in Hong Kong and disallowed his statutory right to enjoy tax benefit. The appeal was dismissed by the Board ('Decision'). Mr A then applied to the Board to state a case to the Court of First Instance ('CFI') by proposing the following questions, namely: (a) whether CIR could deal with Mr A's objection to his election for PA being rejected in the same manner as an 'objection to an assessment' ('Question A1'); (b) whether the Board had any authority to deal with the Determination which was not an 'objection to an assessment' ('Question A2'); (c) whether the Determination was just and equitable in view of CIR's treatment towards taxpayer's grievance by requiring him to prove that he 'ordinarily resided' in Hong Kong ('Question B'); (d) whether CIR had erred in law in considering that 'a Chinese permanent resident's status would change from 'permanent' to 'temporary' depending on the number of days of stay in the territory during a year of assessment ('Question C'); (e) a directive or guideline for a 'permanent resident' to be eligible for PA ('Question D'); (f) rejecting Mr A's PA application is not in line with the revenue law and is contradictory to CIR's practice in allowing salary earners to have tax exemption by reason of their staying in Hong Kong was 60 days or lesser and at the same time impose no restriction on their PA eligibility ('Question E'); (g) to reject PA while the applicant taxpayer has a permanent and ordinary residency and had lived in there each and every year of assessment is out of expectation of a contemporary taxation professional ('Question F').

Held:

Legal principles

1. Under section 69(1) of IRO, an appellant or CIR may make an application requiring the Board to state a case on a question of law for the opinion of CFI

when: (a) the Board has misdirected itself in law; (b) the Board has drawn inferences or come to conclusions which cannot stand because the primary facts found by it do not admit of such inferences or conclusions; (c) there was no evidence on which the primary facts could be based. (Commissioner of Inland Revenue v Inland Revenue Board of Review & Anor [1989] 2 HKLR 40 and Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 considered)

2. It is incumbent on an applicant for a case stated to identify a question of law which is proper for CFI to consider. The questions should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts. An applicant for a case stated may not rely on a question of law which is imprecise or ambiguous. The Board is not to be treated as a mere cipher. It is wholly impermissible to go beating about the evidential undergrowth in the hope of flushing out some useful pieces of evidence that support an applicant's view, in total disregard of settled law that the Board's findings of primary fact are sacrosanct. (Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 considered)

3. The Board is required to apply a qualitative assessment to the proposed questions of law and is duty bound to decline to state a case if the question of law proposed is not a proper one, e.g. one which is plainly and obviously unarguable. (Honorcan Limited v Inland Revenue Board of Review [2010] 5 HKLRD 378, Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456 and Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 considered)

4. The function of the Board is to evaluate evidence and to find facts based upon that evidence. An applicant for a case stated should not seek CFI's re-evaluation of the evidence. It is inappropriate and an abuse of power for an applicant to put in further and new evidence during an appeal to CFI.

Analysis

5. Mr A had not been able to state clearly and concisely any question of law in his draft case. None of the questions proposed is proper question of law. In particular: (1) Questions A1 and A2 are irrelevant and/or does not arise from the Decision; (2) Question B was directed at CIR and its Determination; (3) Question C concerns whether a person ordinarily resides in Hong Kong, which is a question of fact. The Board had to consider all the circumstances of the case, and the number of days is only one of the factors considered by the Board; (4) Question D is hypothetical and irrelevant. It is a question of fact which can only be decided by taking into account all the circumstances of the case. The Board is not in a position to suggest any definitive length of

stay for the eligibility of being considered a 'permanent resident' under IRO; (5) Questions E and F are statements of Mr A's proposition and not a proper question. They are irrelevant and do not arise from the Decision. Mr A's assertion had already been sufficiently canvassed and considered at the hearing of the appeal.

Application dismissed.

Cases referred to:

Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKLR 40
Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409
Honorcan Limited v Inland Revenue Board of Review [2010] 5 HKLRD 378
Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
Shui On Credit Co Ltd v Commissioner of Inland Revenue [2010] 1 HKLRD 237
Reg v Barnet London Borough Council ex parte Shah [1983] 2 AC 309
Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173

Decision:

Introduction

1. On 2 September 2015 this Board delivered its decision ('the Decision') on the present appeal. One of the appellants, Mr A ('the Appellant') was dissatisfied with our Decision and applied on 23 September 2015 to this Board to state a case to the Court of First Instance ('the Application'). A copy of the Decision is annexed and marked 'Annexure A'.

2. This Board had asked for submissions from the parties and

2.1 the Appellant filed a submission on 30 September 2015;

2.2 the Appellant's further submission incorporating his draft case ('the Draft Case') was filed on 13 November 2015;

2.3 the Respondent's submission was filed on 11 December 2015 ('the Respondent's Submission'); and

2.4 the Appellant's reply was filed on 11 and 16 December 2015 ('the

Reply').

Relevant Legal Principles

3. Under section 69(1) of Inland Revenue Ordinance ('IRO'), an Appellant or the Commissioner of Inland Revenue ('CIR') may make an application requiring the Board of Review ('the Board') to state a case on a question of law for the opinion of the Court of First Instance ('CFI').

4. Broadly speaking, there are only 3 types of challenge that a party may mount against the Board's decision under section 69(1), namely:

4.1 The Board's decision can be impugned if it has misdirected itself in law, for example, upon the burden of proof, or by misinterpretation of a statute.

4.2 The Board's decision can be challenged if it has drawn inferences or come to conclusions which cannot stand because the primary facts found by it do not admit of such inferences or conclusions.

4.3 A challenge can be made to the Board's decision where there was no evidence on which the primary facts themselves could be based.

(see CIR v Inland Revenue Board of Review and Another [1989] 2 HKLR 40 (i.e. Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409, commonly referred to as the Aspiration case) at 57F-H (Barnett J))

5. In the Aspiration case, Barnett J also laid down the following principles when he said (at 57H-58A):

' *After reviewing the authorities and carefully considering the arguments which have been addressed to me, I am satisfied of the following matters:*

1. An applicant for a case stated must identify a question of law which it is proper for the High Court to consider.

2. The Board of Review is under a statutory duty to state a case in respect of that question of law.

3. The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.

4. If the Board is of the view that the point of law is not proper, it may decline to state a case.

5. If an applicant wishes to attack findings of primary fact, he must identify those findings.'

6. It is clear from the Aspiration case that:

6.1 It is incumbent on an applicant for a case stated to identify a question of law which is proper for the CFI to consider. It is not for the Board to frame questions for an applicant. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal. A satisfactory question has to be identified so as to trigger the preparation of the case. (at 47I and 48J)

6.2 The questions the Court is asked to answer '*should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts*'. (at 48E)

6.3 An applicant for a case stated may not rely on a question of law which is imprecise or ambiguous. (at 50G)

6.4 The Board is not to be treated as a mere cipher. (at 54H)

6.5 It is wholly impermissible to go beating about the evidential undergrowth in the hope of flushing out some useful pieces of evidence that support an applicant's view, in total disregard of settled law that the Board's findings of primary fact, in so far as there is any evidence to support them, are sacrosanct. (at 58F)

7. In Honorcan Ltd v Inland Revenue Board of Review [2010] 5 HKLRD 378, Fok J (as he then was) held that the Board is required to apply a qualitative assessment to the proposed questions of law and is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, such as a question which is plainly and obviously unarguable:

7.1 '*The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the proposed questions of law were not proper ones for the opinion of the Court.*' (paragraph 34)

7.2 '*As will be apparent from the cases cited above, it has not been held that the right of appeal under section 69(1) of the Ordinance is unqualified and absolute*'. (paragraph 49)

7.3 '*In my judgement, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable.*' (paragraph 50)

7.4 '*If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position.*' (paragraph 53)

8. In Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456, Barma J (as he then was) applied Honorcan and held that if the Board is satisfied that the argument has no prospect of success, it is not bound to include it amongst the questions that it poses for the consideration of the court. (paragraph 31)

9. In Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 Chung J ruled that certain questions put to the CFI by the Board of Review were not proper questions of law. They in fact amounted to a challenge on the findings of fact by the Board of Review.

> ' *The proper course for the Board to take when it is asked to state a case but which involves no proper question of law is to decline the request. If the applicant (whether the taxpayer or the Revenue) is dissatisfied with the Board's refusal to state a case, it is up to the applicant to decide whether to take further action (and if so, what action to take).*'

Fresh Evidence

10. It is also well-established that the function of the Board is to evaluate evidence and to find facts based upon that evidence. An applicant for a case stated should not seek CFI's re-evaluation of the evidence. Fresh evidence is also not admissible. It is inappropriate and in fact an abuse of power for an applicant to put in further and new evidence during an appeal to CFI.

The Present Case

11. In the present case, the Appellant had not been able to state clearly and concisely any question of law in his Draft Case. Despite that this Board was not in a position to frame any question on behalf of the Appellant, it had done its best to try to understand

what questions the Appellant was asking in his Draft Case. The Appellant had proposed a number of questions or rather raised a number of issues related to sections 41 and 64 of the IRO. They are dealt with below adopting the alphabetical order used in the Draft Case.

Questions on Section 41 of the IRO – 'Legality to deal' (pages 4 to 7 of the Draft Case). They are referred to as Questions A(1) and A(2).

Question A(1) : The Appellant questioned 'whether the CIR could deal with the Appellant's objection to his election for Personal Assessment ('PA') being rejected in the same manner as an "objection to an assessment" under section 64 of the IRO.'

12. The Appellant tried to amplify on this question in his Reply by stating that 'the assessor fails to understand that this case is not to ask CFI to re-evaluate the evidence but to evaluate if CIR or the Board has been acting incorrectly in rejecting PA applications.' We consider that this question is irrelevant and does not arise from the Decision. In fact, this question is more directed at the CIR in its making the determination dated 29 November 2010 ('the Determination'). For the same reason stated below under Question A(2), this Board considers that it is not a proper question of law.

Question A(2) : 'Whether this Board had any authority under IRO to deal with CIR's Determination which was not an 'objection to an assessment' under section 64 of the IRO.'

13. This Question is directly linked with Question A(1). Both are based on the premises that CIR might not have power to deal with the Appellant's objection to the rejection of his election for PA.

14. The issues whether the Appellant was in fact objecting to the Property Tax Assessments and hence, whether the Board was empowered to handle the CIR's rejection of his election for PA had been considered as preliminary issues before the commencement of the hearing of the appeal. This Board had reminded the Appellant that if he would prefer to challenge the CIR's making the Determination being *ultra vires* he should consider withdrawing the appeal and applying for a judicial review. The Appellant decided to proceed with the appeal (see paragraphs 4 to 6 of the Decision). The Board then continued with the hearing pursuant to section 68 of the Ordinance.

15. In its Reply, the Appellant repeatedly challenged the CIR's power to review its decision. As already mentioned, this issue is irrelevant to the appeal. The Appellant might have taken other remedial actions as he thought fit if he considered that the CIR and this Board were *ultra vires* in handling his case. We therefore consider that these two questions are misconceived and not proper questions of law.

Question B : 'Not just and equitable'

16. The Appellant seemed to be questioning 'whether the CIR's Determination was just and equitable in view of CIR's treatment towards taxpayer's grievance by requiring him to prove that he "ordinarily resided" in Hong Kong'. The Appellant was aggrieved by the fact that he had to bear the burden of proof. (pages 7 to 8 of the Draft Case)

17. On hearing an appeal, the Board is to consider the matter *de novo* and make a finding of facts based on evidence adduced by the parties (see paragraph 30 of Shui On Credit Co Ltd v Commissioner of Inland Revenue [2010] 1 HKLRD 237). The Board is empowered to decide whether to accept or reject a piece of evidence and decides on its relevance and weight.

18. The question whether a person 'ordinarily resides in Hong Kong' is a question of fact and involves a consideration of all the circumstances of the case. No single factor is determinative. The concept of 'ordinary residence' is well established in Reg v Barnet London Borough Council ex parte Shah [1983] 2 AC 309, which has also been applied by Hong Kong courts.

19. In the present case, this Board has applied the legal principles in the Shah case after taking into account all the agreed facts together with documents from both parties and the evidence adduced at the hearing before coming to the conclusion that the Appellant was not ordinarily residing in Hong Kong during the relevant years of assessment (see paragraphs 13 to 29 of the Decision).

20. As the Appellant had decided to proceed with the appeal, he would have to bear the burden of proof under section 68(4) of the Ordinance. This Board found that the Appellant had failed to discharge this burden (see paragraph 29 of the Decision).

21. Just like the previous two questions, Question B is directed at the CIR and its Determination. We consider that this question is misconceived and not a proper question of law. An appeal to the Board under sections 66 and 68 of the IRO is not against the determination of the CIR but against the assessment in question.

Question C : 'Erred in law'

22. The Appellant asked if the CIR had erred in law in considering that 'a Chinese permanent resident's status would change from 'permanent' to 'temporary' depending on the number of days of stay in the territory during a year of assessment.' (pages 8 to 15 of the Draft Case)

23. Since this Board is to consider the matter *de novo* and make a finding of facts based on evidence adduced by both parties, whether the CIR's reasoning in the Determination erred in law is irrelevant, the Board is only concerned with the assessment.

24. Section 41(4) of the Ordinance defines 'permanent resident' as 'an individual who ordinarily resides in Hong Kong'. It is distinguishable from 'permanent residents of the Hong Kong Special Administrative Region' as defined in Article 24 of the Basic Law and the Immigration Ordinance (Chapter 115) (see paragraphs 17, 18 and 23 of the Decision). In the Immigration Ordinance, the status of 'permanent resident of Hong Kong' is dealt with at length in Schedule 1 of the Ordinance. It should be noted that different statutory provisions deal with different matters pursuant to diverse governmental policies. There is no logical necessity for the terms 'permanent resident' and 'permanent resident of Hong Kong' as appear in the two ordinances to have identical meanings.

25. The Appellant asserted that the number of days a person stayed in a place did not play an important role in determining whether he 'ordinarily resided' in that place. In determining whether a person ordinarily resides in Hong Kong, it is a question of fact and this Board has to consider all the circumstances of the case. The number of days is only one of the relevant factors considered by this Board in making its decision.

26. This Board therefore considers that this question is also misconceived and not a proper question of law.

Question D : 'Rule of law'

27. This Board is at a loss by the Appellant's putting a question under the heading 'Rule of Law' when the question did not touch upon this legal principle in any way. (pages 15 to 18 of the Draft Case).

28. The Appellant seemed to be asking for a directive or guideline for a 'permanent resident' to be eligible for PA. As mentioned in paragraphs 17 and 18 above, it is a question of fact which can only be decided by taking into account all the circumstances of the case. This Board is not in a position to suggest any definitive length of stay for the eligibility of being considered a 'permanent resident' under the IRO.

29. The Appellant tried to distinguish the facts of his case from Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173. However, he had failed to identify what legal principle the Board had mistakenly applied in the present case. It was only necessary for this Board to consider whether the Appellant was 'permanent resident' under section 41(4) of the Ordinance for election for PA during the relevant years of assessment. All the facts repeated in the Draft Case and the Reply had already been thoroughly canvassed during the hearing of the appeal.

30. This Board considers that this question is hypothetical, irrelevant and not a proper question of law.

Question E : 'Rejecting Appellant's PA application is not in line with the revenue law and is contradictory to Department practice in allowing salary earners to have tax exemption by reason of their staying in HK was 60 days or lesser and at the

same time impose no restriction on their PA eligibility' (pages 18 to 19 of the Draft Case)

31. This is a statement of the Appellant's proposition or contention and not a proper question. It is irrelevant and does not arise from the Decision. This Board considers that this is not a proper question of law.

Question F : 'To reject PA while the applicant taxpayer has a permanent and ordinary residency and had lived in there each and every year of assessment is out of expectation of a contemporary taxation professional' (pages 19 to 21 of the Draft Case)

32. This is again a statement of the Appellant's proposition or contention and not a question. The expectation and views of the Appellant are irrelevant. They do not arise from the Decision. The assertions of the Appellant having stayed in the territory at the material time had already been sufficiently canvassed and considered at the hearing of the appeal. This Board therefore considers that it is not a proper question of law.

Disposition of the Case

33. To summarize, having applied a qualitative assessment of the Appellant's questions, this Board finds that there appears no proper question of law raised by the Appellant in his Draft Case. In the circumstances, this Board will dismiss the application of the Appellant to state a case for the opinion of the CFI.

Annexure A
D11/15

BOARD OF REVIEW

Appeal by Ms B and Mr A

(Date of Hearing: 21 May 2015)

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D E C I S I O N

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Case No. D11/15

Personal assessment – eligibility – permanent resident – meaning of ordinary residence – sections 41 and 68(4) of the Inland Revenue Ordinance and Section 2(6) of the Immigration Ordinance

Panel: Wong Kwai Huen (chairman), Julienne Jen and Stephen Suen Man Tak.

Date of hearing: 21 May 2015.
Date of decision: 2 September 2015.

Mr A appeals against the 2014 Determination by which the Deputy Commissioner of Inland Revenue determined that the Taxpayers (Mr A and Ms B) were not eligible for PA during the years of assessment 2009/10 to 2012/13.

Mr A's main contention was that the Deputy Commissioner of Inland Revenue had wrongly ruled that he did not 'ordinarily reside' in Hong Kong during the relevant tax years and disallowed his statutory right to enjoy tax benefit under Section 41 of the IRO.

Held:

1. Section 41 allows two categories of individuals to elect for PA. First, any 'permanent resident' who ordinarily resides in Hong Kong. Second, any 'temporary resident' who spends 180 or more days in Hong Kong in any tax year.

2. A person who enjoys the legal status of a 'permanent resident' with the right of abode in Hong Kong SAR does not necessarily mean that he 'ordinarily resides' in Hong Kong within the meaning of section 41 of the IRO at any given time.

3. The term 'ordinarily residing' must be given its natural and ordinary meaning. The question whether a person is 'ordinarily resident' in a place is a question of fact.

4. Given his personal background, it is only necessary for the Board to consider whether Mr A 'ordinarily resided' in Hong Kong during the relevant tax years.

5. After taking into consideration of all the circumstances of the case, this Board finds that Mr A was not ordinarily residing in Hong Kong during the relevant tax years:

    5.1 Mr A's departure from Hong Kong cannot be considered as occasional or temporary but more for a settlement purpose.

    5.2 Mr A's infrequent visits to Hong Kong did not generate a sufficient degree of continuity nor did it indicate his habitually living and conducting his daily life as any ordinary member of the community in Hong Kong.

    5.3 Mr A's intention is not always relevant in considering whether he is ordinarily residing in Hong Kong.

    5.4 Mr A's keeping his partly owned property and used it as his home whenever he was in Hong Kong, keeping his Mandatory Provident Fund account, bank and credit card accounts, telephone number, driving licence, registration as a voter as well as Hong Kong SAR passport of course demonstrate Mr A's link with Hong Kong but they are not sufficient to establish that he 'ordinarily resided' in Hong Kong.

6. Mr A has not discharged his onus to prove that the Assessments were erroneous and he was eligible to elect for PA for the years of assessment 2009/10 to 2012/13.

Appeal dismissed.

Cases referred to:

D4/12, (2012-13) IRBRD, vol 27, 213
D7/13, (2013-14) IRBRD, vol 28, 239
Reg v Barnet London Borough Council ex parte Shah [1983] 2 AC 309
Levene v Inland Revenue Commissioners [1928] AC 217
Inland Revenue Commissioners v Lysaght [1928] AC 234
Director of Immigration v Ng Shun-Loi [1987] HKLR 798
Prem Singh v Director of Immigration [2003] 1 HKLRD 550
Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173
D5/08, (2008-09) IRBRD, vol 23, 83
D45/06, (2006-07) IRBRD, vol 21, 842
D37/02, IRBRD, vol 17, 677
D24/09, (2009-10) IRBRD, vol 24, 532
D41/12, (2012-13) IRBRD, vol 27, 861

Lau San Ching v Liu Apollonia (1995) 5 HKPLR 23

Appellant in person.
Yu Wai Lim and Chan Shun Mei for the Commissioner of Inland Revenue.

Decision:

1. Mr A appeared in person at the hearing. He claimed that Ms B was not one of the appellants and he did not put forward any argument on behalf of Ms B. Mr A submitted that he had never informed the Respondent that Ms B would participate in this case.

Agreed Facts

2. (1) The following facts were agreed by the Appellant and the Respondent. Ms B and Mr A ('the Taxpayers' collectively) have objected to the Property Tax assessments for the years of assessment 2009/10 to 2012/13 ('the Assessments') raised on them. The Taxpayers claimed that they were eligible to elect for Personal Assessment ('PA') for the relevant years and thus their income from the letting of a property should be assessed to tax under PA instead of Property Tax.

(2) (a) Mr A and Ms B are husband and wife. They have three children who were born in 1987, 1992 and 1996.

(b) The Taxpayers applied for emigration to Country C in 1989. They were granted Country C Visas and landed in Country C as immigrants in 1990. Ms B moved to Country C in 1992 and returned to Hong Kong after acquiring her Country C citizenship in May 1994. The Taxpayers' children started studying in Country C in the years 2003 and 2006.

(3) (a) At all relevant times, the Taxpayers owned the following properties in Hong Kong:

Location of property	Owners	Date of assignment
Address D('Property D')	The Taxpayers (as joint tenants)	31 December 1996
Address E ('Property E')	Ms F and Mr A (as joint tenants)	6 August 2003

(b) Property E was first acquired by Ms F and Mr G, Mr A's father, as joint tenants on 28 December 1990. It was subsequently assigned

to Ms F and Mr A on 6 August 2003. Property E had been used as Mr A's parents' residence for more than 20 years.

(4) Mr A is a former Position H1 of Department H of the Hong Kong Special Administrative Region. In April 2006, he applied for retirement in October 2006 so as to 'accompany [his] children to study in [Country C]', and the application was accepted.

(5) In July/August 2006, the Taxpayers and their youngest son moved to Property E so that Property D could be vacated for renovation. In August/September 2006, the Taxpayers put up Property D for letting. A leasing agreement was signed in October 2006 and Property D was let out in November 2006.

(6) Mr A commenced his pre-retirement leave on 16 October 2006 and retired from the civil service on 13 May 2007. On 14 October 2006, which was the Saturday immediately before the commencement of Mr A's pre-retirement leave, the Taxpayers left Hong Kong. Since then, they had returned to Hong Kong 1 to 4 times a year during the years of assessment 2007/08 to 2013/14, with the period of stay for 3 to 23 days on each occasion. Counting the days of arrival and departure each as one day, the numbers of days that the Taxpayers stayed in Hong Kong during the relevant years are as follows:

Year	Number of days in Hong Kong	
	Mr A	Ms B
2007/08	23	28
2008/09	29	14
2009/10	35	12
2010/11	29	15
2011/12	38	11
2012/13	40	9
2013/14	38	10

Summaries of Mr A and Ms B's movement records for the years of assessment 2006/07 to 2013/14 have been prepared and sent to Mr A by the Respondent.

(7) (a) Mr A claimed deduction of home loan interest in respect of Property D up to the year of assessment 2006/07.

Mr A claimed dependent parent allowances and additional dependent parent allowances which had been allowed in assessments up to the year of assessment 2005/06. Mr A is the

only son of his parents. He lived with his parents when he was in Hong Kong.

(b) Ms B submitted her 2006/07 Tax Return – Individuals on 29 May 2007. In the return, Ms B amended the postal address from Property D to Address J.

(c) Mr A submitted his 2007/08 Tax Return – Individuals on 31 May 2008. In the return, Mr A amended the postal address from Property D to Address J.

(8) In the 2007/08 to 2009/10 Property Tax returns in respect of Property D, the Taxpayers declared their residential addresses during the relevant years as follows:

Year	Residential address of owners	Return signed by
2007/08	Address K	Ms B
2008/09	Address L	Mr A
2009/10	Address K	Mr A

(9) During the years of assessment 2008/09 to 2012/13, Mr A:

(a) received pension and rental income from Hong Kong;

(b) lived in his partly owned Property E whenever he returned to Hong Kong;

(c) subscribed various banking services (including mortgage loan facility, account maintenance, credit card and safe deposit box services) from banks in Hong Kong;

(d) held shares listed in the Stock Exchange of Hong Kong; and

(e) maintained the same mobile phone number and the same personal Octopus card in Hong Kong as he had kept in the years before 2006.

(10) Same as the years before his retirement, Mr A had continued to be a member of an MPF scheme in Hong Kong and held an investment account throughout the years of assessment.

Mr A is a holder of a valid Country X passport (expiry date in November 2014) with a Country C Visa. This visa was granted on 29 May 2009 and would expire on 28 May 2014.

(11) (a) In his 2008/09 Tax Return – Individuals, Mr A declared that he and Ms B were eligible and wished to elect for PA. The Assessor considered that Mr A and Ms B were not eligible to so elect and raised on the Taxpayers a Property Tax assessment for the year of assessment 2008/09 to assess the rental income they derived from letting out Property D. Mr A objected to the Property Tax Assessment on the ground that he and Ms B were eligible to elect for PA for the relevant year.

(b) By a Determination dated 29 November 2010 ('the 2010 Determination'), the Deputy Commissioner of Inland Revenue determined that the Taxpayers were not eligible to elect for PA for the relevant year and confirmed the Property Tax Assessment.

(c) By a notice of appeal dated 26 December 2010, Mr A appealed against the 2010 Determination to the Board of Review ('the Board') and requested the IRD to change his correspondence address to Property E. The Board by its decision dated 7 December 2012 (Decision D4/12, (2012-13) IRBRD, vol 27, 213) dismissed the appeal and held that Mr A was not ordinarily resident in Hong Kong in the year of assessment 2008/09 and that Mr A had not discharged his onus to prove that he and Ms B were eligible to elect for PA.

(d) Mr A was dissatisfied with the Board's decision and, on 18 December 2012, requested the Board to state a case on a question of law for the opinion of the Court of First Instance.

(e) On 20 February 2013, the Commissioner wrote to the Board and raised objection to stating a case to court on the ground that there were no proper questions of law raised by Mr A and requested the Board to refuse his application.

(f) The Board by its decision dated 29 May 2013 (Decision D7/13, (2013-14) IRBRD, vol 28, 239) refused to state a case to court because it considered that the questions raised by Mr A were not proper questions of law.

(12) (a) In the 2009/10 to 2012/13 Property Tax returns in respect of Property D, the Taxpayers reported the following details:

Year of assessment	2009/10	2010/11	2011/12	2012/13
Period of letting :	01-04-09 – 31-03-10	01-04-10 – 10-10-10	01-04-11 – 31-03-12	01-04-12 – 31-03-13
Rental income :	$246,000	$150,113	$270,000	$270,000
Rates paid by owner :	$2,400	[Blank]	$4,500	$4,500
Assessable Value :	$243,600	$150,113	$265,500	$265,500

(b) In his 2009/10 to 2012/13 Tax Returns – Individuals, Mr A declared that he and Ms B were eligible and wished to elect for PA.

(13) The Assessor ascertained the following information:

(a) The Country C Visa granted to Mr A on 29 May 2009 showed that he was 'permitted to remain in [Country C] indefinitely'.

Homepage of the Department of Immigration and Border Protection of Country C

(b) The full name of the Country C Visa is 'Resident Return Visa'.

(c) This visa is for current or former Country C permanent residents and former Country C citizens who want to travel overseas and return to Country C as permanent residents. The visa allows the holder to keep or regain his/her status as a Country C permanent resident. Only Country C citizens have an automatic right of entry to Country C. All non-citizens need a visa that allows them to enter and remain in Country C.

Rating and Valuation Department

(d) The amount of rates paid in respect of Property D for the period from 1 April 2012 to 31 March 2013 was as follows:

	$
Quarterly rates payable	3,033.75
Less: Rates concession per quarter	2,500.00
Net quarterly rates payable (A)	533.75
No of quarters in the period (B)	4
Net rates paid in the period (A) x (B)	2,135.00

(14) (a) The Assessor raised on the Taxpayers the following 2009/10 to 2012/13 Property Tax Assessments in respect of Property D:

Year of assessment	2009/10	2010/11	2011/12	2012/13
	$	$	$	$
Rental Income [Fact (12)(a)]	246,000	150,113	270,000	270,000
Less: Deductions [Facts (12)(a)/(13)(d)]	2,400	-	4,500	2,135
Assessable Value	243,600	150,113	265,500	267,865
Less: 20% statutory allowance	48,720	30,023	53,100	53,573
Net Assessable Value	194,880	120,090	212,400	214,292
Tax Payable thereon	29,232	Nil	Nil	32,143

Mr A complained to the 'Ombudsmen office' alleging that the Commissioner did not respect the legal procedures in handling objection cases by continuing to demand tax for the year of assessment 2009/10 while the case was under appeal.

In view of the Taxpayer's election for PA and pending the results of the appeal and case stated in Facts (11)(c) and (d), no Property Tax was demanded for the 2010/11 and 2011/12 assessments.

(b) The Assessor subsequently considered that the Taxpayers were not eligible to elect for PA for the years of assessment 2010/11 and 2011/12. Accordingly, the Assessor issued the Taxpayers the following 2010/11 and 2011/12 notices of demand for Property Tax:

Year of assessment	2010/11	2011/12
	$	$
Net Assessable Value [Fact (14)(a)]	120,090	212,400
Tax Payable thereon	18,013	31,860

(15) Mr A objected to the Assessments on the ground that he was eligible to elect for PA for the years of assessment 2009/10 to 2012/13.

(16) The Assessor maintained that Mr A was not eligible to elect for PA for the years of assessment 2009/10 to 2012/13. He wrote to Mr A explaining the reasons for not accepting his and Ms B's PA election and inviting him to withdraw the objections. The Assessor at the same time

requested Mr A to provide the following information if he did not agree to withdraw the objections:

(a) The address of his place of residence in Country C and Hong Kong during each of the years of assessment 2009/10 to 2012/13 when he stayed there; and

(b) The purpose of his and Ms B's stays in Hong Kong during each year of assessment 2009/10 to 2012/13.

(17) Mr A claimed that the following factors showed that he was a resident and 'ordinarily resident' in Hong Kong during the years of assessment 2009/10 to 2012/13:

(a) 'My visa to [Country C] was first obtained as early as in year 1990 and I hold this type of visa up for more than 20 years. The visa is to be renewed every 5 years and I hold the same visa up to present.'

(b) 'In 2006, [Ms B] wanted my youngest kid to study in [Country C] ... In [Country C], school term starts in beginning of every year. To study in school, new application must be made well before November if a child is to be enrolled in next school year. So I applied for early retirement. What is so called early retirement was just 3 months earlier than scheduled [15 January 2007]. I did it in order that I could accompany [Ms B] to find a primary school in [Country C] for my youngest son.'

(c) [Property D] was let on condition that some furniture had to be remained in the premises. The furniture would be used when he returned.

(d) 'I elected for PA for the purpose to reduce my total tax liability on my yearly income from [Property D] as well as from my pension.'

(e) 'For the last 25 years, I keep my residence flat (partly owned property) as my home in Hong Kong. Taxpayer has a settled place of abode in Hong Kong. The residence is adopted for a settled purpose. The same home was used before and after 16 October 2006.'

(f) 'I always stayed in that same residence flat whenever I was in Hong Kong for the last 8 years. This means that taxpayer has a usual place of abode and lived there every year concern. The place of abode has been adopted regularly and habitually.'

(g) 'I still maintain my Mandatory Provident Fund Account in Hong Kong knowing that a person can close the account and withdraw all money if go aboard for good. This indicates that the taxpayer has no intention to go aboard for good. I remain settled in Hong Kong voluntarily.'

(h) 'The same telephone number and the same personal "Octopus card" are used to maintain and to facilitate ease access to my social network. My connection with Hong Kong has not changed anyway. My regular habitual mode of life in the territory remains the same for the past 20 years.'

(i) 'I have renewed my 10 years driving license and updated my address in LEGCO voter registry during the years. It proved that my intention to settle here is long-termed and is beyond foreseeable future.'

(j) 'I maintained over 80 percent in value of wealth in Hong Kong. It proves that my stay in Hong Kong remains as for a settled purpose and I adopt it voluntarily.'

(k) 'I maintained the same three active credit cards with Banks in HK during the last 15 years.'

    (a) [Bank M] credit card for payment of family insurance premium,

    (b) [Bank N] credit card for normal purchases; and,

    (c) [Bank P] credit card for easy access to ATMs

    My regular habitual mode of life in the territory remains unchanged.'

(l) 'I have maintained 7 active bank accounts in HK for the last 15 years. Namely,

    (a) [Bank N] (account opened since 1996) for monthly direct credit/debit for management fee, salaries and other charges.

    (b) [Bank Q] (account opened in 1996) for monthly repayment on outstanding former home mortgage and rental income since 2006.

(c) [Bank R] (account opened when I worked in [Building S], [Place T] sometime in 1984) to keep my personal saving.

(d) [Bank U], saving and security accounts where my [Bank N] shares are kept for years (since 2007). I keep a safe box with this bank for over 30 years.

(e) [Bank M] saving accounts with which monthly premium paid on my 3 [Company V] life insurance policies are arranged.

(f) [Bank P] current account with an overdraft facility.

(g) [Bank W] with mainly [Country C] dollar deposit. I use it to transfer money to [Country C] whenever necessary.

My regular habitual mode of life in the territory remains unchanged.'

(m) 'I have applied and been granted a Hong Kong SAR Passport in 2012 by the Hong Kong government. My intention to settle in Hong Kong is beyond present moment.'

(n) 'There has been no change in these social connections with Hong Kong community for the last 20 years. The only change is the number of 'days of stay' in Hong Kong during each of the year of assessment.'

(18) Mr A put forward the following contentions:

(a) '... [IRD] is particularly targeting my case in challenging my PA eligibility by counting the number of days stayed in the territory [as in the Immigration Ordinance Cap.115] (the 'IO' Approach) and have not taken into consideration of other available objective evidences to prove contrary.'

(b) 'Under S41(4) of the Inland Revenue Ordinance ("IRO"), permanent resident （永久性居民）means an individual who ordinarily resides in Hong Kong ... Clearly, there is no requirement in number of days stayed in Hong Kong before a taxpayer is eligible.'

(c) 'IRO also allows a person who is not permanent resident to elect for PA. However, it imposes a strict prerequisite requirement on period of stay in the territory before such a person has the right to

elect PA. IRO classifies this kind of resident as temporary resident ...'

(d) 'The use of "IO Approach" to ascertain a temporary resident's eligibility to PA is perfect. However, it would be err in law if "IO Approach" is used as a board brush approach to evaluate whether a Hong Kong citizen has ceased to be an ordinary resident ... although it could point to the fact that a particular taxpayer might have residence elsewhere; it cannot conclude that this taxpayer will no longer be an ordinary resident in Hong Kong. To use IO approach as a decisive measure on ordinary residence would lead to the fact that any taxpayer, who has his total number of "day of stay" lesser than the setting under temporary resident in IRO, can never elect PA.'

(e) It will be necessary to consider the approach of the courts and, in particular the decision of the House of Lords in Barnet LBC v Shah [1983] AC 309. Shah's case is notable for Lord Scarman's definition (at 343) that ordinary residence refers to a person's 'abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration'.

(f) 'Using "IO Approach" to determine a permanent resident's eligibility to PA is immortal'.

(i) 'There is no setting of limitation on period of stay under section 41(4) of the IRO. IRO never requires that a permanent resident must stay in Hong Kong for at [least] a certain number of days. If "period of stay" in Hong Kong is so important in determining his ordinarily residence, the law should have stated so.'

(ii) 'Legal proposition accepts the fact that a person can be ordinarily resident in two countries at the same time. This implies that a person who has an ordinarily residence outside a territory is not equivalent to the fact that his ordinarily residence in that territory ceased automatically. In using "IO Approach" to prove that a permanent resident ceased to become an ordinarily resident is an irrelevant test and has no legal stand in assessing a person's ordinary resident status.'

(g) 'The degree of "continuity" and "habitual" in stay is not well-defined term'.

(i) 'If they are of important elements in determining a permanent resident's eligibility to PA; why no such setting in IRO like a temporary resident has. If there is a benefit of doubt, it belongs to taxpayers, not the authority.'

(ii) 'CIR needs evidence to prove that a person's ordinarily residence in Hong Kong ceased and not his state of mind to judge that a taxpayer's residence should have been changed.'

(iii) 'Ordinance is not a matter of art. Every word or sentence needs to be well defined and strictly followed in its application, no less and no more. CIR, as an administrator of the Ordinance, cannot deprive taxpayer's right to obtain tax benefits simply by adding a condition that number of days stayed in Hong Kong is not 'substantial', and does not constitute a degree of "continuity" in his perception of "ordinarily residence" in determining whether or not a taxpayer is a permanent resident within IRO perspectives.'

(iv) 'What is "substantial" and under what "conditions" that it will exhibit a degree of "continuity"? CIR has no authority to impose "conditions" unless it is approved under LEGCO. It is always the Judge in Court has the right to interpret laws and CIR has not been assigned with this duty.'

Preliminaries Issues

3. By a determination dated 28 November 2014 ('the 2014 Determination'), the Deputy Commissioner of Inland Revenue determined that the Taxpayers were not eligible for PA during the years of assessment 2009/10 to 2012/13 and confirmed the Assessments. It is against the 2014 Determination that Mr A is appealing.

4. Mr A's main contention was that the Respondent had wrongly ruled that he did not 'ordinarily reside' in Hong Kong during the relevant tax years and disallowed his statutory right to enjoy tax benefit under Section 41 of the IRO. He further argued that this Tribunal, being a fact finding body, would not be appropriate to determine whether a person 'ordinarily resides in Hong Kong'.

5. Mr A also maintained that 'without judicial review by court, he would never be able to prove that this Tribunal had made a mistake in law'. He submitted that he was not appealing against the Respondent's tax assessment as such but rather 'the Respondent's right to interpret the same Ordinance of which he administers'. One major concern Mr A seemed to have was the fact that since he was not objecting any assessment, an appeal to this Tribunal would make him bear the onus of proof under Section 68 of the IRO. He submitted that he should not bear the onus of proof.

6. This Tribunal reminded Mr A that if he would prefer to apply for judicial review, he should withdraw the appeal at any time before commencement of the hearing. Mr A was particularly concerned about the meaning and implications of 'ordinarily resides in Hong Kong' as stated in section 41 of the IRO which would determine whether he was entitled to elect for PA and in turn would vary the amount of assessment. In his written and oral submissions, Mr A repeatedly contended that there was a need to differentiate between 'ordinarily resides' and 'ordinary resides'. He seemed to worry about a review by this Tribunal leading only to a finding whether the Assessments were excessive or erroneous without exploring the meaning of 'ordinarily residing'. This Tribunal took the view that in the process of determining whether the Respondent's tax assessment should be confirmed, annulled or varied, it would have to decide as a matter of fact whether Mr A was either a permanent resident who ordinarily resided in Hong Kong or a temporary resident who stayed 180 or more days in Hong Kong in the relevant tax years so as to entitle him to elect for PA. During the course of finding such a fact, this Tribunal would have to find evidence to support whether Mr A 'ordinarily resided' in Hong Kong at the material time. Mr A decided to proceed with this appeal.

The Law

7. ***Section 41 of the IRO***

(1) Section 41, insofar as it is relevant to the eligibility for electing for PA, provides that '*an individual … (b) who is … either a permanent or temporary resident, may elect for personal assessment on his or her total income…*'

'*"permanent resident" means an individual who ordinarily resides in Hong Kong;*'

'*"temporary resident" means an individual who stays in Hong Kong for a period or a number of periods amounting to more than 180 days during the year of assessment …*'

(2) The law therefore allows two categories of individuals to elect for PA. First, any 'permanent resident' who ordinarily resides in Hong Kong. Second, any 'temporary resident' who spends 180 or more days in Hong Kong in any tax year. It is therefore very clear that there is one condition which must be fulfilled by each category of individuals before they may elect for PA. In other words, a 'permanent resident' who does not ordinarily reside in Hong Kong or a 'temporary resident' who spends less than 180 days in Hong Kong in a tax year may not elect for PA.

(3) This Tribunal considers that given the personal background of Mr A and the agreed facts stated above, Mr A's case should fall within the

'permanent resident' category and be considered as such. It is not necessary for this Tribunal to consider if he is a temporary resident. This Tribunal therefore need only consider whether Mr A 'ordinarily resided' in Hong Kong during the relevant tax years.

(4) This Tribunal is at a loss of Mr A's contention that there is a difference between what he referred to as 'ordinary resides' and 'ordinarily resides'. This Tribunal cannot find any material difference in these two references; especially where the reference to 'ordinary resides' does not seem to be correct English and is not referred to in section 41. This point is further discussed in paragraph 19 below.

The Law On 'Ordinarily Resides In Hong Kong'

8. (1) It is necessary to analyse some established legal definitions of the term 'ordinarily resides' and its variations such as 'ordinarily residing', 'ordinarily resident' and 'ordinary residence'.

(2) In Reg v Barnet London Borough Council ex parte Shah [1983] 2 AC 309, a decision by the House of Lords, Lord Scarman held that the term 'ordinary residence' should be construed as bearing its natural and ordinary meaning as words of common usage in the English Language. Adopting the approach in the tax cases Levene v Inland Revenue Commissioners [1928] AC 217 and Inland Revenue Commissioners v Lysaght [1928] AC 234, Lord Scarman explained the concept as follows:

(i) '*I agree with Lord Denning M.R. that in their natural and ordinary meaning the words mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration." The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Summer in Lysaght's case, namely residence adopted voluntarily and for settled purposes*'.

(ii) '*Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.*'

(iii) '*There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary*

residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is'.

(iv) '*And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.*'

(v) '"*Immigration status," unless it is be that of one who has no right to be here, in which event presence in the United Kingdom is unlawful, means no more than the terms of a person's leave to enter as stamped upon his passport. This may not be a guide to a person's intention in establishing a residence in this country; it certainly cannot be the decisive test … Moreover, in the context with which these appeals are concerned, i.e. past residence, intention or expectations for the future are not critical; what matters is the course of living over the past three years.*'

(3) In Hong Kong, the Shah case was applied by the Court of Appeal in Director of Immigration v Ng Shun-Loi [1987] HKLR 798 and the Court of Final Appeal in Prem Singh v Director of Immigration [2003] 1 HKLRD 550 to construe the term 'ordinarily resident' for the purpose of the IO.

(4) In the Ng Shun-loi case, Cons, V.P. emphasised that in deciding whether a person was ordinarily residing in a certain place, his or her intention had very limited weight. The intention merely affected the question of voluntary adoption or settled purpose:

'*That argument, as I understand it, is inevitable predicated upon the suggestion that ordinarily resident is a legal status which, having once been acquired, remains with its possessor until he or she abandons it. In that circumstance it would be a matter exclusively of his or her intention. With every respect, the speech of Lord Scarman in [Shah] is emphatic that that is not the case.*

> *Intention plays a very minor part in the determination of ordinary residence, being limited to such light as it may shed upon the question of voluntary adoption or settled purpose. Ultimately it is no more than a question of fact. Absence, enforced or otherwise, will not necessarily disrupt a period of ordinary residence.*'

(5) In Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173, the petitioner sought to defend a bankruptcy order on the ground that the debtor was ordinarily resident in Hong Kong during the relevant three-year period, having regard to the facts that the debtor (i) held Hong Kong identity card; (ii) had a residential address in Hong Kong registered at the Companies Registry; (iii) was only temporarily absent from Hong Kong for the purpose of acquiring citizenship in Canada; and (iv) maintained a bank account with sizeable balance in Hong Kong. Barma J., however, held that immigration records which showed the debtor had only returned to Hong Kong only 19 times for just 20 days during the relevant period provided the strongest possible evidence to rebut any claim on her ordinary residence in Hong Kong. Alternatively, his Lordship considered the issue by adopting the IO Approach by which he came to the same conclusion that the debtor was not resident in Hong Kong during the relevant period.

(6) It should be noted that Section 2(6) of the IO provides that the circumstances which are relevant in determining whether a person has ceased to be ordinarily resident in Hong Kong include: (a) the reason, duration and frequency of any absence from Hong Kong; (b) whether he has habitual residence in Hong Kong; (c) employment by a Hong Kong based company; and (d) the whereabouts of the principal members of his family (spouse and minor children).

(7) Over the years, the Board has made many decisions on the question of 'ordinarily residing' for the purpose of PA. Mr A saw the need to remind this Tribunal that these past Board decisions carried no binding effect on us. This Tribunal is aware of the persuasive value of and has referred to the following Board decisions.

(8) In D5/08, (2008-09) IRBRD, vol 23, 83, the appellant and his family emigrated to Country A in 1995. He considered that he was eligible to elect for PA because he was a member of Hong Kong and did not become a foreign national. He claimed that his emigration to Country A was quite a reluctant decision and it was just to satisfy his wife's desire to reunion with her family and to enable their children to study abroad. As his parents, brothers and sisters were all in Hong Kong, he came back to Hong Kong two or three times every year and stayed in the territory for more than one month on each occasion. During his stay in Hong

Kong, he resided in the family property of his grandfather. Having considered all the circumstances, the Board held that the appellant was not ordinarily resident in Hong Kong during the relevant years of assessment. The Board considered that the appellant's return to Hong Kong for family visit did not have sufficient continuity to be considered as ordinarily residing in Hong Kong. The fact that he emigrated to Country A for family sake, though reluctantly, was far from meaning that he was forced to do so.

(9) In D45/06, (2006-07) IRBRD, vol 21, 842, the appellants (husband and wife) emigrated to England in December 1997. During the relevant years of assessment, they lived with their children in England and returned to Hong Kong when the husband took annual leave from his employment. Whenever they got back to Hong Kong, they were invited to stay at their relatives' flat. The appellants contended that they were ordinarily resident in Hong Kong by virtue of the facts that (i) they held Hong Kong identity cards; (ii) they had been educated and worked in Hong Kong; (iii) their parents and relatives were all Hong Kong permanent residents and ordinarily resided in Hong Kong; (iv) their move to England had been prompted by the plan of sending their children there for studies, and their stays abroad should be regarded as temporary absence from Hong Kong. The Board, having considered all the circumstances and authorities before them, decided that the appellants did not ordinarily reside in Hong Kong and their election for PA failed.

(10) The Board in other cases held that the appellants were not ordinarily resident in Hong Kong even though they (i) maintained a business in Hong Kong: D37/02, IRBRD, vol 17, 677; (ii) did not become a foreign national: D5/08, (2008-09) IRBRD, vol 23, 83; (iii) intended to return to Hong Kong after completing the medical treatment: D24/09, (2009-10) IRBRD, vol 24, 532; (iv) had no other income apart from rental income from Hong Kong: D24/09; (v) lived in their own or family properties whenever they came back to Hong Kong: D37/02 and D5/08.

(11) In the Board's decision D41/12, (2012-13) IRBRD, vol 27, 861, the Appellant, who was Mr A in this present case, appealed to the Board on the grounds that he was eligible for PA for the year of assessment 2008-09. The Board, following the legal principles in the Shah case and other legal authorities, held that the question whether the Appellant was ordinarily resident in Hong Kong was a question of fact depending on the particular circumstances of the case. The Board further took into account factors including the Appellant's circumstances before and after his early retirement, his course of income and other connecting factors in Hong Kong, the number of days he was present in Hong Kong, the

reported foreign address in tax returns concluded that the Appellant adopted a new place of residence abroad voluntarily and his subsequent returns to Hong Kong did not have sufficient degree of continuity to be considered as ordinarily residing in Hong Kong. The Board decided that the Appellant was not a 'permanent resident'.

(12) Although Mr A attempted to distinguish most of the above decisions from his case, this Tribunal found them all to be useful references and relevant to the instant appeal. One basic principle to be derived from these cases is that the term 'ordinarily residing' must be given its natural and ordinary meaning. The question whether a person is 'ordinarily resident' in a place is a question of fact and can only be answered after taking into consideration of all the circumstances of the case.

Factors To Be Considered

9. This Tribunal has taken into consideration all the Agreed Facts together with documents submitted by both parties as well as evidence adduced at the hearing. A number of relevant factors required special attention of this Tribunal. They also form the principal contentions of Mr A in this appeal.

Number of Days spent in Hong Kong

10. Mr A contended that the Respondent was 'particularly targeting' his case by counting the number of days he spent in Hong Kong by adopting the IO Approach. As mentioned above, this Tribunal considers that Mr A falls within the first category of individuals i.e. 'permanent resident' as stated in section 41 of IRO. That being the case, there is no need to count the number of days of stay in Hong Kong as would have been the case if Mr A fell within the second category of 'temporary resident'. That said, the number of days of stay in Hong Kong remains one of the relevant factors in determining whether Mr A did 'ordinarily reside' in Hong Kong during the tax years in question. In this connection, this Tribunal does not find that if the Respondent did adopt the IO Approach in assessing Mr A's case, it would create any unjust results. In any event, there is no evidence that the Respondent did not consider other relevant factors in the case.

11. According to the Shah case as applied by the Hong Kong courts and the Board, the term 'ordinarily resident' should be construed in its natural and ordinary meaning, which connotes the following attributes:

(a) The person must be habitually and normally residing in the relevant place, apart from temporary or occasional absence;

(b) The residence must be adopted voluntarily and there must be a degree of settled purpose;

(c) For a settled purpose, it is not to say that the person intends to stay in the relevant place indefinitely. A settled purpose may be for a limited period. All that is necessary is that the purpose of living has a sufficient degree of continuity. Education, employment and family are common reasons for a choice of regular abode and can be settled purpose; and

(d) Ordinary residence is not a legal status which, having once been acquired, remains with its possessor until he or she abandons it. Ultimately, it is a question of fact which turns on the particular circumstances of each case.

12. Needless to say, it is not sufficient just to count the number of days a person has stayed in Hong Kong. It involves the consideration of the full picture and all other circumstances. All the factors have to be balanced against once another so as to arrive at a conclusion of whether a person 'ordinarily resides' in Hong Kong. There is no single factor which is decisive but the number of days spent in Hong Kong cannot be disregarded.

Hong Kong or Country C Residence

13. This Tribunal has noticed that Mr A applied for an early retirement. He left Hong Kong on 14 October 2006 which was before the commencement of his pre-retirement leave on 16 October 2006. He vacated Property D for renovation and let it out since October 2006. Mr A and Ms B lived in Country C to accompany his children to study in Country C. Mr A received a pension and was not employed in Hong Kong after his retirement. During the relevant years of assessment, Mr A returned to Hong Kong three or four times a year with each stay ranged from 3 to 23 days. The total number of days of stay in Hong Kong was no more than 40 days in each of those years of assessment.

14. Since October 2006, Mr A spent most of his time with his wife, Ms B and his children, in fact, his whole family in Country C. His stay in Country C was voluntary and the purpose of his stay was to accompany his children to pursue their education in Country C. These facts indicated that Mr A's departure from Hong Kong cannot be considered as occasional or temporary but more for a settlement purpose at least during the relevant tax years. His infrequent visits to Hong Kong did not generate a sufficient degree of continuity nor did it indicate his habitually living and conducting his daily life as any ordinary member of the community in Hong Kong. His contention that he intended to treat Hong Kong as a place for settlement after the completion of his children's secondary school education in Country C is unconvincing given that Mr A has already spent over eight years in Country C. Further, as discussed below a person's intention is not always relevant in considering whether he is ordinarily residing in a place.

15. Mr A contended that he had maintained a close connection with Hong Kong as evidenced by the fact that he had kept his partly owned property and used it as his home whenever he was in Hong Kong. He had also kept his Mandatory Provident Fund account, bank and credit card accounts, telephone number, driving licence, registration as a voter as

well as Hong Kong SAR passport. The above factors are certainly relevant but not decisive in determining Mr A's ordinary residence. People who are not ordinarily residing in Hong Kong may still make these arrangements for personal convenience purposes. These arrangements of course demonstrate Mr A's link with Hong Kong but they are not sufficient to establish that he 'ordinarily resided' in Hong Kong at the material time. It should be borne in mind that Mr A was still receiving his pension and rental income in Hong Kong. Maintaining bank accounts in Hong Kong appeared necessary and convenient, quite apart from ordinarily residing in the Territory.

Permanent Resident and Ordinary Resident

16. At the hearing, Mr A spent a lot of time making submissions on the legal principles relating with 'permanent resident' and 'ordinary resident'.

17. Mr A argued that he enjoyed his permanent resident status in Hong Kong which was protected by the Basic Law. This status could not be taken away from him. His occasional absence from Hong Kong would not deny him of this status; hence; 'once a permanent resident; always a permanent resident.'

18. Mr A has confused the concept of 'permanent resident' under section 41 of the IRO with that of 'permanent resident of Hong Kong SAR' under the IO. The latter is defined in Paragraph 2 in Schedule 1 of the IO to include certain categories of persons who are given certain rights and privileges including the right of abode in Hong Kong. A person who enjoys the legal status of a 'permanent resident' with the right of abode in Hong Kong SAR does not necessarily mean that he 'ordinarily resides' in Hong Kong within the meaning of section 41 of the IRO at any given time.

19. Another purported legal point put forward by Mr A which this Tribunal had found little merit was the Respondent's definitions of 'ordinarily resident', 'ordinary resident' and 'ordinary residence'. He contended that 'ordinarily resident' did not require the physical presence of a person in the territory while 'ordinary resident' required the presence of 'a person claiming to have lived in his real home'. He further said that 'ordinary residence refers to the place of living such as a house making it home'. Suffice to say, the legal definition of the term 'ordinarily resides' has already been canvassed elsewhere in this decision and it is quite unnecessary to differentiate these terminologies which are not used in section 41 of the IRO. This Tribunal cannot see how these submissions can assist Mr A's case.

20. Mr A has kept his properties in Hong Kong. He tried to equate 'ordinary residence' in the Shah case with 'having a dwelling place to live in'. The issue in the Shah case was whether certain overseas students were ordinary residents in the United Kingdom. Lord Scarman's view on 'ordinary resident' referred to a person rather than a dwelling place. A person who keeps a dwelling place in Hong Kong does not necessarily mean that the person 'ordinarily resides' here. This Tribunal finds no merit in Mr A's contention that

because he had kept his partly-owned Property E, he had 'a settled place of bode in Hong Kong'. That contention does not have any bearing with 'ordinarily residing in Hong Kong'.

Dual Residence

21. Mr A argued that a person could have more than one residence both within and outside Hong Kong and a person may be ordinarily resident in two places at the same time as mentioned in the Shah case. It is a question of fact whether one is indeed residing in two places. It is necessary to take into consideration the considerable time Mr A spent in Country C, the pattern of his visit to Hong Kong and the length of each stay before one can establish if he has adopted a 'dual residence' status. This Tribunal cannot find any evidence which showed that Mr A had adopted such a dual residence at the material time.

22. Mr A's contention that a person could ordinarily reside in Hong Kong without being physically present in the Territory could only happen under extraordinary circumstances such as those happened in the case of Lau San Ching v Liu Apollonia (1995) 5 HKPLR 23 where someone was detained in a place outside Hong Kong. This Tribunal cannot see how such circumstances existed in this appeal case.

Conclusion

23. 'Ordinary residence' is not a legal status which having once been acquired, remains with its possessor forever. It is a fluid condition and can change from time to time according to the circumstances. Hence, a person can be ordinarily residing in one place in one year but in another place the next year. Put it another way, a Hong Kong permanent resident may not be ordinarily residing in Hong Kong during a certain period of time. That may not affect his right of abode in Hong Kong but that will make him not eligible for electing for PA under Section 41 of the IRO.

24. Mr A's connecting factors with Hong Kong especially those set out in paragraph 2(17) above should be balanced against the substantial proportion of his time spent out of Hong Kong during the years of assessment 2009/10 to 2012/13. No one single factor is determinative of the question of whether Mr A is or is not ordinarily residing in Hong Kong. However, as in the Wong Lei Kwan Joanne ex parte Bank of China case, Barma J said that the short period in Hong Kong provided the 'strongest possible evidence' to rebut any claim that a person was ordinarily resident in Hong Kong.

25. It is not disputed that until October 2006, Mr A did habitually and normally reside in Hong Kong. This Tribunal finds that the circumstances changed when Mr A took his pre-retirement leave and left Hong Kong on 14 October 2006. Since that day, he spent most of his time in Country C and only visited Hong Kong sporadically. The irregular pattern of Mr A's return to Hong Kong and the length of each visit clearly indicated that he could not be said to be habitually and normally residing in Hong Kong during the relevant tax years.

26. Mr A's letting out Property D, which he had obviously used as his home in Hong Kong for ten years before 2006, and his repeated declarations of residential addresses in Country C in his own tax returns can be inferred as his settling down in Country C. His prolonged absence from Hong Kong could not be considered occasional or temporary.

27. The Tribunal also rejected the argument that the Respondent should have stated the requisite number of days of stay in Hong Kong if it chose to adopt the IO Approach. As already mentioned above, in determining whether any individual is ordinarily residing in Hong Kong, one has to consider all the circumstances. The number of days of stay is only one of the factors to be taken into consideration. There is no evidence that in determining whether Mr A was ordinarily residing in Hong Kong, the Respondent relied solely on the number of days of Mr A's stay in Hong Kong.

28. In view of the above, this Tribunal finds that Mr A was not ordinarily residing in Hong Kong during the relevant tax years. Despite that Mr A claimed to be continually resident in Hong Kong or he intended to be ordinarily residing in Hong Kong, all the surrounding circumstances pointed towards the inescapable conclusion that he had settled in Country C at the material time. It mattered not whether Mr A intended to settle in Country C indefinitely. Nor did it matter whether Mr A intended to ordinarily reside in Hong Kong as intention plays a very minor part in deciding whether a person was ordinarily residing in a certain place.

29. This Tribunal concludes that Mr A has not discharged his onus to prove that the Assessments were erroneous and he was eligible to elect for PA for the years of assessment 2009/10 to 2012/13. Mr A's submission that since there was no other channel for him to seek a review on the meaning of 'ordinarily residing in Hong Kong' other than lodging an appeal to this Tribunal and that his burden of proof under Section 68(4) of the IRO should be waived cannot be entertained. Mr A chose to proceed with this appeal and the law did not allow him to escape the onus of proof.

30. This appeal is dismissed.