

**Case No. D5/17**

**Salaries tax** – single parent allowance – section 32 of the Inland Revenue Ordinance ('IRO') – meaning of 'sole or predominant care' – burden of proof

Panel: Wong Kwai Huen Albert (chairman), Shun Yan Edward Fan and Tse Ming Yee.

Date of hearing: 15 March 2017.

Date of decision: 9 May 2017.

The Appellant has objected to the Salaries Tax Assessment for the year of assessment. The Appellant claimed that he should be granted single parent allowance for his 3 children. In the appeal, he was pursuing his claim for single parent allowance in respect of his son only.

The issue was whether the Appellant should be entitled to claim single parent allowance under section 32 of the Inland Revenue Ordinance on the ground that during the year of assessment he had the sole and predominant care of the children.

**Held:**

1. The taxpayer was entitled to Child Allowance in respect of the Children. However, in order to succeed the claim of single parent allowance, a taxpayer must satisfy section 32(1) of the Inland Revenue Ordinance that at any time during the year of assessment he or she had the sole or predominant care of a child.
2. 'Sole or predominant care' relates to the custodial responsibility for a child. It refers to actual care, guidance, protection, supervision and control of the child for the well-being of the child on a day-to-day basis. It is not a case of financial responsibilities. In fact, section 32(2)(b) of the IRO specifically states that a person shall not be entitled to single parent allowance by reason only that he made contributions to the maintenance and education of the child. The word 'sole' mean 'one and only' while the concept of 'predominant care' involves a comparison of the respective roles played by the parents. Whether a parent can be regard as having the sole or predominant care of his or her child is a question of fact to be decided on the facts and merits of each case.
3. It is not sufficient just to make reference to financial provision or certain decisions for the child's daily welfare. In this respect, the Appellant bears the burden of proving that his care for the children in all aspects of the

day-to-day living of them is predominating and supreme over that of the Mother's (Sit Kwok Keung v Commissioner of Inland Revenue [2002] 5 HKTC 647, D67/05 (2005-06) IRBRD, vol 20, 929 and D140/01 IRBRD, vol 17, 28 followed)

4. From the evidence adduced, the Board is not satisfied that the Appellant had discharged his burden of proving that he had the predominant care of the Son in the relevant year of assessment.

**Appeal dismissed and costs order in the amount of \$10,000 imposed.**

Cases referred to:

Sit Kwok Keung v Commissioner of Inland Revenue [2002] 5 HKTC 647  
D67/05, (2005-06) IRBRD, vol 20, 929  
D140/01, IRBRD, vol 17, 28

Lam Sing Hung of Lam, Kwok, Kwan & Cheng Secretaries Limited, for the Appellant  
Ong Wai Man Michelle and Ng Sui Ling Louisa, for the Commissioner of Inland Revenue.

**Decision:**

**1. Introduction**

The facts in this paragraph were agreed between both parties:

- (1) Mr A ('the Appellant') has objected to the Salaries Tax Assessment for the year of assessment 2013/14 raised on him by an assessor of the Respondent ('the Assessor'). The Appellant claims that he should be granted single parent allowance ('SPA').
- (2) In his Tax Return – Individuals for the year of assessment 2013/14, the Appellant claimed, among others, child allowance ('Child Allowance') in respect of his three children, namely Child B, Child C ('the Son') and Child D ('the Daughter') with dates of birth 8 January 2002, 29 May 2007 and 6 May 2013 respectively.
- (3) The Assessor raised on the Appellant the following 2013/14 Salaries Tax Assessment:

|                             |               |
|-----------------------------|---------------|
|                             | \$            |
| Income                      | 1,040,000     |
| Value of residence provided | <u>85,764</u> |
|                             | 1,125,764     |

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

|                                       |                  |
|---------------------------------------|------------------|
|                                       | \$               |
| <u>Less:</u> Charitable donations     | (369,550)        |
| Retirement scheme contributions       | <u>(15,000)</u>  |
|                                       | 741,214          |
| <u>Less:</u> Basic allowance          | (120,000)        |
| Child allowance – Born in other years | (140,000)        |
| – Born in the year                    | <u>(140,000)</u> |
| Net Chargeable Income                 | <u>341,214</u>   |
| Tax Payable thereon                   | <u>36,006</u>    |

- (4) The Appellant objected to the 2013/14 assessment on the ground that he should be granted SPA. Copies of birth certificates of the three children showed that the mother of Child B was Ms E and the mother of the Son and the Daughter was Ms F ('the Mother').
- (5) In response to the Assessor's enquiries, Lam, Kwok, Kwan & Cheng Secretaries Limited ('the Representative') stated that the Appellant had the predominant care of the Son and the Daughter (collectively referred as 'the Children'). To support the Appellant's objection, the Representative on behalf of the Appellant put forward the following contentions:
- (a) The Appellant was never married with the Mother nor Ms E.
  - (b) The Mother was not a Hong Kong resident and she did not hold any Hong Kong Identity Card. She held a Mainland Identity Card.
  - (c) The Mother had never stayed in Hong Kong. She was residing with the Children all the time throughout the period.
  - (d) The Mother and the Appellant were responsible for the care and supervision of the Children.
  - (e) The residential address of the Children was Address G ('the Mainland Property') during the relevant year.
  - (f) The Appellant's residential address in the relevant year of assessment when he stayed in the Mainland was the same as that of the Children. The Mainland Property was jointly owned by the Appellant and the Mother.
  - (g) The Appellant stayed with the Children every weekend and every consecutive holiday of over 2 days whenever possible. He would help the Children to study, especially English, of which the Mother was not good at. He would bring the

Children for outings while he stayed with them. He would also pick up the Children after lessons.

- (h) The statement of travel records obtained from Immigration Department showed that the Appellant had over 600 times of going back to stay with the Children during the period from 1 April 2008 to 31 March 2016 (“the Period”), which meant the Appellant spent more than 90 days in average in each of the years. 90 days in a year represented almost the whole of his life time during the Period other than that spent to work in Hong Kong. That proved the Appellant had predominant care of Children during the Period.
- (6) In support of the Appellant’s contentions, the Representative supplied copies of the following documents:
- (a) The Mainland identity card of the Mother.
  - (b) 房地權證 of the Mainland Property.
  - (c) 學生接送卡 and 學生手冊 of the Son and the health examination report of the Daughter.
  - (d) Statement of travel records obtained from the Immigration Department, the Assessor ascertained from the statement of travel records that the Appellant had been present in Hong Kong for 275 days during the year of assessment 2013/14.
  - (e) Remittance advices to the Mother and the relevant bank statements. The dates shown on the remittance advices were incomplete. The purported dates of remittance highlighted in the bank statements fell in the year 2015.

**2. Additional Facts**

- (1) For the purpose of this appeal, the Appellant included the following additional facts:
- (a) The Mother worked in an optical shop and she needed to work all days in a week including Saturdays, Sundays and holidays;
  - (b) The Son studied in a boarding school and he would only stay at home on Saturdays, Sundays and holidays; and

- (c) At the time when the Son was allowed to stay at home, the Appellant would leave Hong Kong to stay with him in mainland China.
- (2) In support of these additional facts the Appellants submitted a declaration made by the Mother dated 24 February 2017, a certificate of the Mother's completion of a training course for senior optical technician and three receipts issued by School H for boarding fees of the Son for the academic years 2013/14 and 2014/15 together with a note stating that the Son had reported for schooling on 16 February 2014.

### 3. The Relevant Statutory Provisions

#### (1) Child Allowance

Section 31 of the Inland Revenue Ordinance ('IRO') provides that :

*'(1) An allowance (child allowance) shall be granted under this section in the prescribed amount in any year of assessment if the person had living and was maintaining at any time during the year of assessment an unmarried child who was-*

*(a) under the age of 18; ...'*

#### (2) Single Parent Allowance

Section 32 of the IRO provides that:

*'(1) An allowance (single parent allowance) of the prescribed amount shall be granted if at any time during the year of assessment the person had the sole or predominant care of a child in respect of whom the person was entitled during the year of assessment to be granted a child allowance.*

*(2) A person shall not be entitled to claim single parent allowance-*

*(a) if at any time during the year of assessment the person was married and not living apart from his or her spouse;*

*(b) by reason only that the person made contributions to the maintenance and education of the child during the year of assessment; or*

*(c) in respect of any 2nd or subsequent child.*

(3) *Where 2 or more persons are entitled to claim single parent allowance in respect of the same child for the same year of assessment, the allowance due shall be apportioned on such basis as the Commissioner may decide-*

(a) *having regard to the respective periods for which each person had the sole or predominant care of the child during the year of assessment; or*

(b) *if, in the opinion of the Commissioner, those periods are uncertain, on such basis as the Commissioner may decide as being just.'*

(3) Burden of proof

Section 68(4) of the IRO places the burden of proof on the Appellant as follows:

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

#### **4. The Issue**

'The issue before this Board is whether the Appellant should be entitled to claim SPA under section 32 of the IRO on the ground that during the year of assessment 2013/14 he had the sole and predominant care of the Children.'

#### **5. The Law**

(1) The Taxpayer was entitled to Child Allowance in respect of the Children. However, in order to succeed the claim of SPA, a taxpayer must satisfy section 32(1) of the IRO that at any time during the year of assessment he or she had the sole or predominant care of a child.

(2) As has been clarified in many past decisions, 'sole or predominant care' relates to the custodial responsibility for a child. It refers to actual care, guidance, protection, supervision and control of the child for the well-being of the child on a day-to-day basis. It is not a case of financial responsibilities. In fact, section 32(2)(b) of the IRO specifically states that a person shall not be entitled to single parent allowance by reason only that he made contributions to the maintenance and education of the child. The word 'sole' mean 'one and only' while the concept of 'predominant care' involves a comparison of the respective roles played by the parents. Whether a parent can be regarded as having the sole or predominant care of his

or her child is a question of fact to be decided on the facts and merits of each case.

- (3) In Sit Kwok Keung v CIR [2002] 5 HKTC 647, the Court of First Instance endorsed the view of the Board of Review that the concept of ‘predominant care’ involved a comparison of the respective roles played by the two parents. The Court found support of this view from the dictionary meaning of the word ‘predominant’, i.e. ‘having supremacy or ascendancy over others; predominating’ or ‘constituting the main or strongest element; prevailing’.
- (4) In Board of Review decision D67/05, (2005-06) IRBRD, vol 20, 929, the taxpayer continued to live together with his ex-wife and son after divorce. The taxpayer was the sole breadwinner of the family and paid for all household expenses including all outgoings and maintenance in respect of the son. Notwithstanding the fact that the taxpayer was the sole financial provider of the family, the Board concluded that he did not have the sole or predominant care of the son and hence was not entitled to claim SPA.
- (5) In another Board of Review decision D140/01, IRBRD, vol 17, 28, the taxpayer and his former wife were separated. The former wife had the custody of their child who was 12 years old. The taxpayer would have access to the child every Wednesday and one Sunday morning in each month as well as staying access to the child three times in each month. He should pay a monthly sum for the maintenance of his former wife and child. The taxpayer claimed that he had been the sole provider of the child’s maintenance and education. He had shown great care and concern over the child’s living, education and development. He relied on a letter signed by his former wife confirming that apart from finance, the actual day-to-day care, supervision, well being and control of the child was shared equally between her and the taxpayer. The taxpayer also produced a letter written by the child confirming that he talked to her every day on telephone and cared for her well being and overall development. The Board pointed out that:
  - (a) whether a parent can be regarded as having the sole or predominant care of his or her child is a question of fact to be decided on the facts and merits of each case and that ‘care’ is not necessarily the same as ‘custody’.
  - (b) being a good father and having effective (shared) custody, care and control over the child is not sufficient for the taxpayer to obtain single parent allowance. He must also satisfy section 32(1) of the IRO which provides that at any

time during the year of assessment he had the predominant care of the child.

- (6) The Respondent referred this Board to numerous other decided cases on the 'sole and predominant care' point. They all point towards the need for the board or the court to make reference to all relevant facts in a case. It is not sufficient just to make reference to financial provision or certain decisions for the child's daily welfare. In this respect, the Appellant bears the burden of proving that his care for the Children in all aspects of the day-to-day living of them is predominating and supreme over that of the Mother's.

## **6. The Evidence**

Although the Appellant was present at the hearing, he elected not to give evidence. He instructed his representative to put forward his case by relying on all the documents the Appellant had previously submitted to the Respondent and this Board.

## **7. Findings**

- (1) Although the Appellant was entitled to be granted Child Allowance in respect of all three children mentioned in paragraph 1(2) above, he was pursuing his claim for SPA in respect of his Son only.
- (2) According to the Appellant's submissions, it was clear that he did not contend that he had the 'sole care' of the Son. Rather, he was putting forward his case on the premise that he had the 'predominant care' of the Son during the relevant year of assessment.
- (3) The Appellant seemed to argue that the best person to testify that he had the predominant care of the Son over the Mother was the Mother herself. Hence, the Mother made a declaration that she had to work during the period 1 April 2013 and 31 March 2014, and she had only one day off in each week which might not fall on a Saturday or a Sunday. The Son was studying in a boarding school and returned home on weekends or holidays. The duty of caring for the Son therefore fell principally on the Appellant.
- (4) This Board takes note of the fact that the declarant was not called to give evidence at the hearing even though the declaration was made in Hong Kong two and a half weeks before the hearing. Nor can the Board accept all the contents in what appeared to be a self-serving declaration when some of the alleged facts are not supported by evidence.



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

- (5) Despite that the Mother claimed to be working during the relevant period of time, no evidence was adduced to support this fact other than a certificate stating that she had completed a training course for optical technicians in 2009. Since the Mother did not provide any details of her job including the nature and the place of work etc., the certificate is simply irrelevant to her case. That calls into question of the veracity of the declaration.
- (6) It is also unclear how many days between the period from 1 April 2013 to 31 March 2014, the Mother had actually worked. It should be noted that the Daughter was born on 6 May 2013, it was only natural for her to have taken some time off after giving birth to the Daughter.
- (7) The Mother declared that she had only one day off a week which did not necessarily fall on a Saturday or Sunday or public holiday. The Appellant had to take care of the Son when he was not at school. The Immigration Department's record revealed that during the relevant year of assessment, the Appellant was present in Hong Kong on 14 Saturdays and 10 Sundays. There was no explanation on who took care of the Son during these 25 days perhaps, less those days the Mother's days off which did fall on a Saturday or Sunday. This fact was also inconsistent with the Appellant's contention that he would stay with the Child every weekend as mentioned in paragraph 1(5)(g) above.
- (8) As pointed out by the Respondent, according to the Son's student handbook, there was a term break between 16 January 2014 and 16 February 2014. During these 32 days, the Appellant actually spent 23 days in Hong Kong. Even if it is assumed that the Appellant spent the entire balance of 9 days with the Son, this fact does not assist the Appellant's case that he would leave Hong Kong to look after the Son whenever the latter was not attending school for more than two consecutive days.
- (9) The Board also takes note that the documents produced at the hearing revealed that the Mother paid the school fee and boarding fee for the Son in July 2013. The Son's student pick up card and student handbook also contained the name and the telephone number of the Mother.
- (10) It is not disputed that the Appellant did make financial provisions for the Children. It is not sure if the Appellant could claim to be the sole breadwinner for the family as the Mother claimed to have worked during the relevant year when she gave birth to her second child. Equally, it is not disputed that the Appellant would have spent time in taking care of the Children including spending some

weekends with them and teaching the Son English. This is what one would expect any parents should do to their children but it is not sufficient to establish a case that the Appellant had the predominant care for the Children.

- (11) The Appellant might like to think that he had played a predominant role in the family including making financial provisions and certain important decisions on the Children relating to their education, welfare and the like. It should be clear that playing a predominant role in a family does not necessarily mean having the predominant care of a child. The Board needs to look at all the circumstances objectively by taking into consideration all the factors mentioned in decided cases including the day-to-day custodial care and supervision over the child, and in this case, the number of days the Appellant could have stayed with his Son. Making some decisions for the Son's welfare and spending time with him and teaching him English every now and then constitute only part of the normal parental care. This is not sufficient for the Appellant to claim to have predominant care over the Mother.
- (12) From the evidence adduced, the Board is not satisfied that the Appellant had discharged his burden of proving that he had the predominant care of the Son in the relevant year of assessment. This appeal must fail.

**8. Costs**

This is a hopeless case, the Appellant is hereby ordered to pay a sum of HK\$10,000 as costs for the hearing.