

Case No. D6/20

Salaries tax – appellant purchasing a residential property – whether interest paid by the appellant on a loan secured by a residential property purchased by the appellant was home loan interest – loan interest arising from a loan after full repayment of mortgage loan – sections 26E(1) and 26E(9) of Inland Revenue Ordinance (Chapter 112) (‘IRO’)

Panel: Elaine Liu Yuk Ling (chairman), Cheng Wing Keung Raymond and George Lam Ting Wah.

Date of Hearing: 12 June 2020.

Date of Decision: 28 August 2020.

The Appellant lodge an appeal against the determination made by the Board that the interest paid on three loans (i.e. Loan D, Loan E and Loan F, as defined below) were not home loan interest and not deductible pursuant to section 26E(1) of the IRO. There were in total six loans were made secured by the subject property. Loan A and Loan B were borrowed on the date of acquiring the property. Loan C was a replacement of Loan A. Loan A to C were paid by 14 December 2009 and the property was thus mortgage-free. Loan D was borrowed on 26 January 2012, Loan E and F on 8 August 2017.

The Appellant contended that Loan E and F, which were transferred from Loan D and were for the repayment of the purchase price of the Property and for investment purpose In respect of Loan D, the appellant submitted in the hearing that it was for re-selling the property to himself.

The Board needs to consider whether interest paid under Loan D, Loan E and Loan F were home loan interest as defined under section 26E(9) of IRO and deductible pursuant to section 26E(1) of IRO.

Held:

1. The loans made for the purpose of acquiring the property were repaid by 14 December 2009. When Loan D was made on 26 January 2012, it has already been more than 2 years when the property was not subject to any mortgage loan. Loan D could not be a loan made wholly or partly for the acquisition of the property.
2. Since the appellant admitted that Loan E and Loan F were a transfer from Loan D, accordingly Loan E and Loan F could not be considered as loans made wholly or partly for the acquisition of the property.

3. The appellant raised for the first time in hearing that Loan D was obtained for the purpose of re-selling the property to himself. The reasons of self-purchase argument cannot stand are two-fold. First, the property was mortgage-free since December 2009. Second, there was no record of such transaction registered with the Land Registry, as prescribed under section 3 of the Conveyancing and Property Ordinance. It follows that interest paid under Loan D, Loan E and Loan F cannot be deductible under section 26E of IRO. The appellant was ordered to pay costs under section 68(9) of IRO.

Appeal dismissed and costs order in the amount of \$8,000 imposed.

Appellant in person.

Yu Wai Lim and Chan Wun Fai, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. The issue in this appeal is whether interest paid by the Appellant on a loan secured by a residential property ('the Property') purchased by the Appellant in 1999 was home loan interest deductible under section 26E of the Inland Revenue Ordinance ('the Ordinance'). The tax assessments concerned are the Salaries Tax Assessment and the Personal Assessment of the Appellant for the year 2017/18.

2. By the Determination dated 4 October 2019 ('Determination'), the Deputy Commissioner of Inland Revenue maintained the decision that interest paid on Loan D, Loan E and Loan F (as defined below) could not be deducted as home loan interest because these loans were obtained after the full repayment of Loan B and Loan C in 2009 and 2008 respectively, and they were not loans borrowed for the acquisition of the Property.

3. The Appellant lodged his appeal to the Board by a letter dated 3 December 2019 in which the scope of appeal was restricted to the determination in respect of Loan F. The ground of appeal was that according to the Appellant, the interest paid on Loan F satisfied all the requirements for deduction of the home loan interest from the taxable income, including the requirement that the interest was paid on a loan for the acquisition of the dwelling. In the beginning of the hearing, the Appellant also confirmed that he only appealed against the determination in respect of Loan F.

4. During the Appellant's oral testimony, he was referred to the Mortgage Loan Application Form submitted by him to Bank G dated 3 June 2017 ('Mortgage Loan Application Form'), wherein the Appellant described Loan E as a transfer of mortgage (轉接) and Loan F as an additional financing secured by mortgage (加按). The Appellant then changed his case. He abandoned his appeal against the determination regarding Loan F,

instead, he pursued the appeal against the determination regarding Loan E. He said that he made a mistake earlier.

Relevant Statutory Provisions

5. Section 26E(1) of the Ordinance provides that

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

6. Section 26(E)(9) of the Ordinance defines ‘home loan’ to be a loan of money which is

6.1. applied wholly or partly for the acquisition of a dwelling; and

6.2. secured by a mortgage or charge over that dwelling or any other property in Hong Kong.

7. Hence, to qualify for deduction of home loan interest under section 26E of the Ordinance, it is not sufficient to show that the Property was used as the Appellant’s residence and that interest was paid on loans secured by the Property. The Appellant must also show that the loans were applied wholly or partly for the acquisition of the Property.

8. Section 68(4) of the Ordinance provides that the Appellant bears the onus of proving that the assessment appealed against is incorrect or excessive.

Facts

9. The Appellant purchased the Property by an assignment dated 3 July 1999 at a consideration of \$2,180,000.

10. The Appellant made 5 loans at different times, all of which were secured by the Property. These loans are:

10.1. Loan A: a loan of \$990,000 borrowed from Bank H on 3 July 1999, which was repaid on 30 November 2001.

10.2. Loan B: a loan of \$600,000 borrowed from Hong Kong Housing Society on 3 July 1999, which was repaid on 14 December 2009.

10.3. Loan C: a loan of \$968,412.59 borrowed from Bank H on the same date when Loan A was fully repaid, that is on 30 November 2001. This Loan C was fully repaid on 28 November 2008.

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10.4. Loan D: a loan of \$2,160,000 borrowed from Bank J on 26 January 2012, which was fully repaid on 8 August 2017.

10.5. Loan E: a loan of \$1,800,000 borrowed from Bank G on the same date when Loan D was repaid, that is on 8 August 2017.

10.6. Loan F: a loan of \$1,921,410 borrowed from Bank G on 8 August 2017, the same date when Loan D was repaid and Loan E was obtained.

11. Loans A and B were borrowed on the date when the Property was acquired by the Appellant. The Respondent accepted that Loans A and B were made for the acquisition of the Property in 1999. Loan C was made on the same date when Loan A was fully repaid and is considered to be a replacement of Loan A.

12. Loan A, Loan B and Loan C were fully repaid on 30 November 2001, 14 December 2009 and 28 November 2008 respectively. When the Appellant obtained Loan E and Loan F from Bank G in August 2017, Loans A, B and C had been fully repaid for at least two years before the Appellant borrowed Loan D in January 2012.

13. The Appellant admitted that between 14 December 2009 (the date when Loan B was fully repaid) and 26 January 2012 (the date when Loan D was obtained), the Appellant was the legal owner of the Property without any mortgage attached to it.

14. As stated in the Mortgage Loan Application Form, the Appellant applied for a loan from Bank G in a total sum of HK\$3,780,000, which was made up of two parts: (a) a sum of HK\$1,800,000 (Loan E) that the Appellant described as a transfer of mortgage (轉接); and (b) a sum of HK\$1,980,000 (Loan F) that the Appellant described as an additional finance secured by mortgage (加接). The Appellant further declared that the purposes of the entire loan were for (a) payment of the balance of the purchase price of the Property / full payment of the existing mortgage loan; and (b) for purchase of certain investment products. (用作購買保本投資產品)。

15. In his oral testimony at the hearing, the Appellant said that Loan E was a transfer from Loan D. When he was asked why he took out Loan D, he said that he needed the money at that time. Instead of paying real estate agents and legal fee, he decided to re-sell the Property to himself. The Appellant admitted that this re-selling the Property to himself was raised for the first time in the hearing.

16. The Appellant further submitted that the loan was lent by a recognized financial institution, secured by a mortgage on the Property used as his residence, and he had repaid the loan in accordance with the repayment schedule stipulated by the banks. The Appellant maintained that he is entitled to deduct the home loan interest on Loan E.

Decision

17. The Appellant admitted that the loans made for the purchase of the Property in 1999 had been fully repaid by 14 December 2009. The Appellant also admitted that there was a period of more than 2 years (that is between 14 December 2009 and 26 January 2012) during which the Appellant was the legal owner of the Property without mortgage.

18. When the Appellant obtained Loan D on 26 January 2012, there was no unpaid balance of purchase price of the Property, nor any existing mortgage loan due to be repaid. Accordingly, Loan D could not be a loan made wholly or partly for the acquisition of the Property.

19. The Appellant's own evidence was that Loan E and Loan F were a transfer from Loan D. Accordingly, Loan E and Loan F could not be a loan made wholly or partly for the acquisition of the Property.

20. The Appellant's statement in the Mortgage Loan Application Form does not assist him. Although he stated that one of the purposes for obtaining Loan E and Loan F was for payment of balance of purchase price or full payment of the existing mortgage loan, as a matter of fact, there was no outstanding purchase price payable at the time. The only existing mortgage loan at that time was Loan D, which was not obtained for acquisition of the Property.

21. In an attempt to justify Loan D was made for the acquisition of the Property, the Appellant suggested at the hearing that he resold the Property to himself at the time when he made Loan D, and he alleged that Loan D was obtained for the purpose of this re-selling of the Property to himself.

22. We do not accept this assertion of self-repurchase which the Appellant raised for the first time in the middle of the hearing.

22.1. First, the Property was solely owned by the Appellant since 1999, his ownership in the Property was not subject to any mortgage since December 2009. We found his assertion of self-repurchase is devoid of common sense.

22.2. Secondly, under section 3 of the Conveyancing and Property Ordinance, a contract for sale or other disposition of land is not legally enforceable unless it is in writing and signed by the parties or there is some memorandum or note of the contract. There is no documentary evidence at all in support of the Appellant's assertion of self-repurchase. There was also no record of such transaction registered with the Land Registry.

23. The evidence clearly showed that at the time when Loan D was made, the consideration for the acquisition of the Property had been paid in full by the Appellant. Loan E was made subsequent to and as a transfer from Loan D, thus it was also not obtained for

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the acquisition of the Property. We found that the interest paid on Loan E was not a home loan interest deductible under section 26E of the Ordinance.

24. This appeal has no merits. We unanimously dismiss this appeal and confirm the Salaries Tax Assessment and Personal Assessment of the Appellant, both for the year of assessment 2017/18.

Costs

25. Under section 68(9) of the Ordinance, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5 of the Ordinance (i.e. \$25,000), which shall be added to the tax charged and recovered therewith.

26. The Appellant chose to conduct this appeal on the basis of his bare assertions set out in his letter dated 3 December 2019 without documentary evidence in support. The Appellant chose to ignore the two letters written to him by the Respondent on 18 February 2020 and 6 May 2020 respectively enquiring if the Appellant agrees to the uncontroversial facts set out in the Determination for the purpose of this hearing. The Appellant simply made no reply. We also found that at the hearing, the Appellant made up evidence to suit his own purpose. The way that the Appellant conducted this appeal caused a waste of public resources. We order that the Appellant shall pay the costs of this appeal in the sum of \$8,000, which shall be added to the tax charged and recovered therewith.