Case No. D7/13

Case stated – whether questions proposed are proper questions of law – section 69(1) of the Inland Revenue Ordinance ('the IRO').

Panel: Albert T da Rosa, Jr (chairman), Lam Ting Kwok Paul and Kai Chung Thomas Lo.

Date of hearing: Stated case, no hearing.
Date of decision: 29 May 2013.

By the Decision (D41/12) dated 7 December 2012, this Board considered the Appellant's eligibility for personal assessment for 2008/09 Property Tax assessment (raised on him and his wife) in accordance with section 41 of the IRO and dismissed the appeal.

The Appellant applied on 18 December 2012 to this Board to state a case to the Court of First Instance.

The Appellant proposed a number of questions related to sections 41 and 68 of the IRO.

Held:

Questions on section 41 of the IRO

1. The Decision is not based on other Hong Kong ordinances. Question 1 does not relate to the Decision and is not a proper question of law.

2. Questions 2 to 5 are hypothetical questions, do not arise from the Decision and therefore are not proper questions of law.

3. 'Permanent resident' in section 41(4) of the IRO and status of 'permanent resident of Hong Kong' in the Immigration Ordinance deal with different matters for different governmental policies. There is no logical necessity for the two terms to have identical meanings.

Questions on section 68 of the IRO

4. The Decision was not purely decided on burden of proof. Questions 1 to 3 are academic to the outcome of the appeal and are not proper questions of law.

5. Question 4 is imprecise or ambiguous and is not a proper question of law.

Application dismissed.

Cases referred to:

CIR v Inland Revenue Board of Review and Another [1989] 2 HKLR 40
Honorcan Ltd v The 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 CIR [2010] 1 HKLRD 237
D53/11, (2012-13) IRBRD, vol 27, 99
D18/12, (2012-13) IRBRD, vol 27, 441

Decision:

Introduction

1. On 7 December 2012 this Board delivered its decision ('the Decision') on the present appeal. The Appellant Mr A ('the Appellant') is dissatisfied with our Decision and applied on 18 December 2012 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. We asked for submission from the parties and

2.1. the Appellant's submission incorporating his draft case ('the Draft Case') in pages 2 to 16 thereof was filed on 22 January 2013 ('the Appellant Submission');

2.2. the Respondent's submission was filed on 20 February 2013 ('the Respondent's Submission'); and

2.3. the Appellant's reply was filed on 26 February 2013 ('the Reply').

Relevant law

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

4. Broadly speaking, there are only three types of challenge that a party can mount against the Board's decision under section 69(1), namely: [see CIR v Inland Revenue

Board of Review and Another [1989] 2 HKLR 40 (commonly referred to as the Aspiration case) at 57F-H (Barnett J)],

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.

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 48J and 47I]

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 The 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. '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]

7.3. '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 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 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 proposed a number of questions related to sections 41 and 68 of the IRO. They are dealt with below.

Questions on section 41 of the IRO

12. Question 1: The Appellant asked 'Can other Hong Kong Ordinance(s) (for example, Immigration Ordinance) be used as a president [precedent?] rule to determine whether a Hong Kong resident is an ordinarily resident for the purpose of IRO?'.

13. In the present case, we considered the Appellant's eligibility for personal assessment ('PA') in accordance with section 41 of the IRO [see paragraphs 11 and 17 of the Decision]. Section 41(4) gives the meaning of 'permanent resident' as 'individual who ordinarily resides in Hong Kong'. We considered and analysed the relevant cases in paragraphs 18 to 23 of the Decision, which 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. We noted that the question where a person is ordinarily resident is a question of fact. We considered various factors and evidence including those adduced by the Appellant and came to the conclusion that the Appellant did not ordinarily reside in Hong Kong during the year in question [see paragraphs 60 and 61 of the Decision]. The Decision is not based on other Hong Kong ordinances, as alleged by the Appellant. Appeal

by way of case stated is an appeal on law arising from the Board's decision. Question 1 simply does not relate to the Decision.

14. Thus, this question is irrelevant, academic and wider than is warranted by the facts of the present case and that it is not a proper question of law.

15. Questions 2 to 4: The Appellant posed various hypothetical questions that is

15.1. Question 2: 'If there is any general condition(s) in ascertaining whether a person lived in Hong Kong is an ordinarily resident? Could "number of days stayed in the territory" be the main criteria among other factors in ascertaining whether a person is a permanent resident for the purpose of Section 41 of the IRO?'

15.2. Question 3: 'If no general condition(s) can be generalized under Question (2), what are those "necessary and sufficient" conditions that a Hong Kong resident will become an ordinarily resident for the purpose of Section 41 of the IRO?'

15.3. Question 4: 'In case that "necessary and sufficient" conditions for an individual, living in the territory, to becoming an ordinarily resident cannot be generalized, can environmental evidence(s), other than the number of days stayed in the territory, be used to support that an individual living in Hong Kong is an ordinarily resident in the territory for the purpose of IRO?'

16. The Appellant lamented that the number of days stayed in the territory was adopted as the main criteria and that his connecting factors with Hong Kong were ignored in ascertaining whether he was a permanent resident in Hong Kong. Quite contrary, we categorically rejected the suggestion that the Commissioner of Inland Revenue ('CIR') 'as having intended to create a hard and fast rule based simply on the relevant number of days a person spends in a particular place to determine his place of residence' and noted that 'it is a question of fact which turns on the particular circumstances of each case' and that 'none of these factors alone is determinative of the question' [See paragraphs 34, 56 and 57 of the Decision].

17. Again, Questions 2 to 4 do not arise from the Decision and therefore are not proper questions of law.

18. Question 5 (erroneously written as question 4 in page 4, paragraph 10 of the Appellant's Submission): 'If environmental evidences can be accepted as a proof in proving that a resident is a permanent resident for the purpose of Section 41 of the IRO, then whether CIR's determination on the stated case that Appellant ceased to become an ordinarily resident on 15 October 2006, that is on the day immediately he left Hong Kong, is correct?'

19. An appeal to the Board under sections 66 and 68 of the IRO is not against the determination but the assessment in question. 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 CIR [2010] 1 HKLRD 237]. An appeal is from a determination but is against an assessment. Thus, whether the CIR's determination that the Appellant ceased to become an ordinarily resident in Hong Kong on 15 October 2006 is correct or not is neither here nor there. As such, Question 5 is misconceived and clearly not a question of law proper for the Board to state for the opinion of the CFI.

20. This again is also a hypothetical question and therefore is not a proper question of law.

21. In his Reply, the Appellant further amplified his arguments on section 41 by saying

> 21.1. 'Section 41 by itself has deficiency in nature that it cannot ensure a uniform application in practice. It is a basic rule in Common Law system that the authority as to the interpretation of law should remain and be restricted to be the job of a judge. However, this right to interpret has now been given to the hand of individual IRD officer in the performance of his duty under Section 41. It is this breach in basic principle that my application for a judicial review is based.'
>
> 21.2. 'CIR has already denied the possibility of using Immigration Department criteria to determine "permanent residence". In accepting this, we shall have at least two different meanings of a "permanent resident" among laws of Hong Kong. It is a question of law for which the Court's directive needs to be called.'

22. These questions are plainly misconceived.

> 22.1. In section 41(4) the term 'permanent resident' is defined to mean 'an individual who ordinarily resides in Hong Kong' and there is no further amplification of the term 'permanent residence' in the ordinance itself.
>
> 22.2. In the Immigration Ordinance Chapter 115 the status of 'permanent resident of Hong Kong' is dealt with by lengthy provisions in Schedule 1 thereof.
>
> 22.3. They deal with different matters for different governmental policies and there is no logical necessity for the two terms to have identical meanings.

Questions on section 68 of the IRO

23. Questions 1 to 3: The Appellant posed the following questions:

23.1. Question 1: 'Does Section 68(4) applies to P.A. eligibility under Part 7, Section 41(4)?'

23.2. Question 2: 'Does a taxpayer need to prove himself to be a permanent resident for the purpose of IRO before he is eligible to elect for P.A.?'

23.3. Question 3: 'Does the "onus of proof" under Section 68 apply to cases where the P.A. election had once been accepted and is later cancelled by the CIR?'

24. In the Reply, the Appellant tried to amplify on these questions by asking

' Is this the intended purpose of the IRO that when a taxpayer needs to prove himself a permanent resident before an application for personal assessment is accepted? Unlike the requirement of a "temporary resident" under IRO, by counting the number of day stayed in Hong Kong, the resident status can be easily ascertained. Why in determining the "permanent resident" status it is purposely by omitting the number of day stayed in the territory to make it more difficult to apply?

If this is not the intended purpose of IRO, then it is an err in law for the purpose of Section 68(4) every time when an election for Personal Assessment is being rejected and under objection.

If it is the intended purpose of IRO, judicial review is called for to determine whether it is fair and justice for the revenue laws to place the burden on a taxpayer to prove himself is an individual who ordinarily resides in Hong Kong for the purpose of Personal Assessment application.'

25. The Appellant's appeal arose out of the 2008/09 property tax assessment raised on the Appellant and his wife. The Appellant claimed that he was eligible to elect for PA for the relevant year. The Assessor considered that he was not eligible and raised on the couple the assessment in question. The Deputy Commissioner held the same view as the Assessor's and issued a determination to the same effect to the couple. The Appellant gave notice of his appeal to the Board. Section 68 of the IRO governs how an appeal to the Board is to be heard and disposed of. As such, we do not see any reason section 68(4), which provides that 'the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant', is not applicable to the Appellant's appeal.

26. In D53/11, (2012-13) IRBRD, vol 27, 99, the Appellants argued that the PA should not be withdrawn once it has been accepted by the CIR. In dismissing the appeal, the

Board held that under section 60(1) of the IRO, the assessor may withdraw any assessment previously done by way of PA, and assess the taxpayers at the amount or additional amount at which they ought to have been assessed within six years after the expiration of the relevant year of assessment. The Appellants disagreed with the Board's decision and requested the Board to state a case for the opinion of the CFI. They asserted that the PA should not be withdrawn from them the earlier decision of allowing them to elect for PA. In refusing to state a case as the proposed question is not an arguable question of law, the Board held in D18/12, (2012-13) IRBRD, vol 27, 441 that it relied on Board cases as a precedent and the power given to the assessor under section 60(1) of the IRO to arrive at its decision which cannot be disputed.

27. More importantly, our Decision was not purely decided on burden of proof. In dismissing the Appellant's appeal, we had considered the agreed fact as well as the evidence adduced by the Appellant and, based on the legal principles laid down in various governing case laws, positively found as a fact that the Appellant did not ordinarily reside in Hong Kong during the year of assessment 2008/09 [see paragraphs 60 and 61 of the Decision]. As such, the questions on section 68(4) of the IRO are academic to the outcome of the appeal and are not proper questions.

28. These questions are plainly and obviously unarguable.

29. Question 4: He the Appellant formulated his question as follows: 'The definition of "permanent resident" under Section 41(4) of IRO is not so well defined as to distinguish an individual from not being a "permanent resident". Is IRO in requiring a taxpayer to prove himself to be an ordinarily resident before he can elect for P.A. is a violation of basic legal principal?'

30. Regarding the first part, it is not a question but simply the Appellant's comment on the IRO.

31. For the second part, it is not clear what the 'basic legal principle' the Appellant is referring to. It is also incomprehensible how the onus of proof required in an appeal to the Board violates such 'basic legal principle'. An applicant for a case stated cannot rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what material is to be marshalled in support of the Appellant's case [see Aspiration case].

32. This question is not a proper question of law for the CFI's consideration.

Additional point in the reply submission

33. In point 1 of the second paragraph of the Appellant's Reply submission, he made reference to a number of facts and made the point that '… the 2 necessary features in determining "ordinarily residence" namely Appellant has a residence adopted voluntarily and for settled purpose in Hong Kong had never been discussed or mentioned during the whole hearing process.' and submitted 'The Board's decision has misdirected itself in law

upon the burden of proof. It is on this point that the Board's decision is being challenged under Section 69(1).'

34. Suffice to say that the onus is on the Appellant and we have considered all the points he made.

35. We do not find that we have misdirected ourselves.

Disposition of the case

36. In the result, we dismiss the application of the Taxpayer to state a case for the opinion of the Court of First Instance.

ANNEXURE A
D41/12

BOARD OF REVIEW

Appeal by Mr A

(Date of Hearing: 20 July 2011)

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D E C I S I O N

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Case No. D41/12

Property tax – personal assessment – election – whether the appellant was ordinarily resident or temporarily resident in Hong Kong to allow him to elect personal assessment – Inland Revenue Ordinance ('the Ordinance') section 41.

Panel: Albert T da Rosa, Jr (chairman), Lam Ting Kwok Paul and Kai Chung Thomas Lo.

Date of hearing: 20 July 2011.
Date of decision: 7 December 2012.

In 1996, the Appellant and his wife purchased a property ('the Property') in Hong Kong as their residence. The Appellant worked as a civil servant in Hong Kong up to October 2006 when he started his pre-retirement leave. He and his wife left Hong Kong to join their children abroad, where they emigrated to in 1990. Since then, they only came back 1 to 4 times each year for 3 to 17 days each. After he retired, the Appellant's family moved out of the Property, which was renovated and leased out subsequently. The Appellant and his wife also amended their postal address to various other addresses since then. The Appellant received pension and rental income from Hong Kong, maintained various bank accounts and investments in Hong Kong. He would stay with his parents when he returned to Hong Kong. For 2008/09 year of assessment, the assessor raised property tax assessment on the rental income the Appellant received from the Property. In his tax return, the Appellant declared that he and his wife were eligible and desired to elect for personal assessment. The assessor considered that the Appellant and his wife were not eligible to so elect, which was confirmed by the Determination by the Deputy Commissioner of Inland Revenue. The Appellant appealed.

Held:

1. According to section 41(1) of the Ordinance, a taxpayer may elect personal assessment if either he or his spouse is a permanent resident or temporary resident as defined therein, provided under section 41(1A) that if both of them are living together and are eligible to elect personal assessment, they must both make such an election.

2. A permanent resident under section 41(1) of the Ordinance means someone who ordinarily resides in Hong Kong. Ordinary residence bears a natural and ordinary meaning as words of common usage in English. It means a person habitually and normally resident in a place, apart from temporary or occasional absence of long or short duration. 'Habitually' means the

residence was adopted voluntarily and for settled purposes. All that was necessary to establish settled purpose is that the purpose of living had a sufficient degree of continuity to be properly described as settled (Reg v Barnet London Borough Council, ex parte Shah [1983] 2 AC 309; Director of Immigration v Ng Shun-Loi [1987] HKLR 798; Prem Singh v Director of Immigration [2003] 1 HKLRD 550 followed).

3. Ordinary residence is a question of fact. Source of income is just one of the factors to be taken into consideration (Re Vassis, ex parte Leung 64 ALR 407 considered), but someone who returned to Hong Kong for a very short duration every year provided the strongest possible evidence to rebut any claim of ordinary residence in Hong Kong (Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173 approved). Alternatively, the approach set out in section 2(6) of the Immigration Ordinance can be considered ('the IO approach').

4. The Appellant was not ordinarily resident in Hong Kong. Whilst a person may in special circumstances retain his ordinary residence in Hong Kong despite his non-presence in the territory (Lau San Ching v Liu, Apollonia (1995) 5 HKPLR 23 approved), and one may have more than one residence both in and outside Hong Kong, but the facts showed that the Appellant did not regard his departure from Hong Kong in October 2006 as occasional or temporary. He clearly adopted a new place of residence abroad. His subsequent returns to Hong Kong, and his other connections with Hong Kong, did not provide sufficient degree of continuity for him to be considered as ordinarily resident in the territory (D5/08, (2008-09) IRBRD, vol 23, 83 considered). Under normal circumstances, the Board should be slow in accepting one's ordinary residence in Hong Kong if he stays abroad substantially for settled purposes during the relevant period (Re Kok Hiu Pan, ex parte Wing Lung Bank Ltd [2002] 3 HKLRD 20; Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173; D37/02, IRBRD, vol 17, 677; D7/05, (2005-06) IRBRD, vol 20, 262, D45/06, (2006-07) IRBRD, vol 21, 842; D5/08, (2008-09) IRBRD, vol 23, 83; D24/09, (2009-10) IRBRD, vol 24, 532 followed). The Appellant's case was not a special case.

5. Similarly, the Appellant was not ordinarily resident in Hong Kong in the 2008/09 year of assessment by adopting the IO approach. His family members all resided abroad. He only returned to Hong Kong for insubstantial periods of time. The Property was let out, and he had to stay with his parents. He was not employed by any Hong Kong-based company (Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173 followed).

6. The Appellant was not a temporary resident in Hong Kong for the 2008/09 year of assessment, because he did not stay in Hong Kong for more than 180 days during that year, or for more than 300 days in any 2 consecutive years of assessment between 2007/08 and 2009/10.

7. Thus, the assessor was correct to conclude that the Appellant was not eligible to elect personal assessment for the 2008/09 year of assessment.

Appeal dismissed.

Cases referred to:

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
Re Vassis, ex parte Leung 64 ALR 407
Lau San Ching v Liu, Apollonia (1995) 5 HKPLR 23
Re Kok Hiu Pan, ex parte Wing Lung Bank Ltd [2002] 3 HKLRD 20
D37/02, IRBRD, vol 17, 677
D7/05, (2005-06) IRBRD, vol 20, 262
D45/06, (2006-07) IRBRD, vol 21, 842
D24/09, (2009-10) IRBRD, vol 24, 532

Taxpayer in person.
Chan Sze Wai and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by the Mr A (the 'Appellant') arising out of the 2008/09 Property Tax assessment ('the Assessment') raised on the Appellant and his wife, Ms B, in respect of their property at Address C ('the C Property').

2. In his Tax Return – Individuals for the year of assessment 2008/09, the Appellant declared that he and Ms B were eligible and wished to elect for personal assessment ('PA') for the relevant year.

3. The Assessor considered that the Appellant and Ms B were not eligible to elect for PA for the year of assessment 2008/09. He raised on the couple the Assessment in respect of the C Property. The determination ('the Determination') by the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') to the same effect dated 29 November 2010 was issued to the taxpayers.

4. By his letter dated 26 December 2010 signed by the Appellant alone and sent by his email of the same date, the Appellant gave notice of his appeal alone. However, the copy of the Determination was only received by the office of the Clerk to the Board on 30 December 2010.

5. Initially the Respondent treated the appeal as a late appeal. However, noting that the Determination only left Hong Kong for delivery to Country D on 3 December 2010 the Respondent submitted that the appeal was not late in the circumstances and we so find.

6. The Appellant's wife, Ms B, did not appeal. However, the case papers listed both the Appellant and Ms B as appellants. At the direction of the chairman, the clerk wrote to the Appellant on 7 July 2011 and enquired as follows: 'The appellant, [Mr A], should also confirm if [Ms B] is intended to be another appellant of this case. If the answer is affirmative, please confirm if [Ms B] will attend the hearing or if she will authorise any other person to attend the hearing on her behalf.'

7. In reply to the enquiry from the Chairman prior to the hearing, the Appellant by email dated 15 July 2011 'I would like to confirm on her [Ms B's] behalf that she would not object to the Property Tax assessment in question'.

Grounds of appeal

8. The Appellant's grounds of appeal are as follow:

> ' 1 A permanent residence and place of abode in HK has been totally ignored.
>
> 2. CIR accepted the fact that I returned to HK regularly but rejected that I was an ordinarily resident in the territory.
>
> 3. CIR does not accept that a residence can exist in HK without owner's physical presence.
>
> 4. IRD fails to recognize that I had been habitually and ordinarily resident in HK during the year.
>
> 5. IRD was not correct in taking a different 'Residential Address' in a tax return form, which was completed by other property co-owner, as proof

that [the Appellant] is no longer ordinarily resided in Hong Kong.

6. IRD rejects the possibility of more than one residence, where one of which is outside HK, in determining a person's eligibility for PA.

7. IRD creates its own rule to determine whether it is a long or short duration of absence.

8. In his determination, [the Respondent] casts unequal weight on a number of facts such as what an ordinary resident will do in the territory and what an immigrant, out of the territory, would normally do, in the territory. More importantly he fails to consider their respective behaviour while staying in HK to determine whether a person is a permanent resident of HK or just a visitor.

9. For the purpose of "settle", it is unfair and unjust for CIR to rule that I lived with my parent during my stay in HK was not with the family.

10. My case has characteristics that are different from majority of the Board cases.'

Hearing

9. At the hearing,

9.1. the Appellant confirmed that he was the only appellant in the appeal and his wife Ms B was not a party to the appeal in question;

9.2 the parties confirmed their agreement

(a) that the hearing be conducted in the Cantonese dialect of the Chinese language;

(b) that written submission be in English;

(c) that there was no need to translate any documents from one of the official languages to the other; and

(d) that the decision should be rendered in English

9.3 the parties agreed to the facts as stated in Paragraph 1 (1) to (10) of the Determination (the 'Agreed Facts' as in Board Bundle B1 pages 21 to 28); and

9.4 the Appellant elected to give evidence by affirmation.

10. With the consent of the Respondent, the Appellant also filed further documentary evidence included in bundle A1 pages 16 to 41.

Section 41

11. Section 41 of the Inland Revenue Ordinance ('the IRO'), insofar as it is relevant to the eligibility for personal assessment, provides that:

> ' *(1) Subject to subsection (1A), an individual –*
>
> *(a) of or above the age of 18 years, or under that age if both his or her parents are dead; and*
>
> *(b) who is **or**, if he or she is married, whose spouse is either a permanent or temporary resident,*
>
> *may elect for personal assessment on his or her total income in accordance with this Part.*
>
> *(1A) where –*
>
> *(a) an individual is married and not living apart from his or her spouse; and*
>
> *(b) both that individual and his or her spouse –*
>
> *(i) have income assessable under this Ordinance; and*
>
> *(ii) are eligible to make an election under subsection (1),*
>
> *then that individual may not make such an election unless his or her spouse does so too.*
>
> …
>
> *(4) In this section –*
>
> *"permanent resident" (永久性居民) means an individual who ordinarily resides in Hong Kong;*
>
> *"temporary resident" (臨時居民) 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 in respect of which the election is made or for a period or periods amounting to more than 300 days in 2*

> *consecutive years of assessment one of which is the year of assessment in respect of which the election is made.*'

12. Thus, the Appellant may be eligible to elect for PA if either he himself or his spouse qualifies as a permanent resident or temporary resident but if both he himself and his spouse are eligible, he may only do so if his spouse also elects to do so.

13. The fact that his spouse has been ruled not eligible only means that section 1(A) has no application. In other words, since the condition set out in section 1(A)(ii) is not satisfied, section 1(A) has no application and the Appellant can make the application for personal assessment even his spouse does not do so.

14. However, from the notice of appeal and written submissions, the Appellant does not seem to argue any ordinary residence on the part of his spouse. Indeed, as clearly spelt out in his letter dated 6 August 2010, his spouse 'has never claimed that she is an ordinarily resident in HK'. His case is merely that he was ordinarily residing in Hong Kong during the year of assessment 2008/09, and this enables him (and his spouse as well) to elect for PA for the relevant year.

Whether the Appellant and Ms B were temporary residents?

15. The Appellant commenced his pre-retirement leave on 16 October 2006 and retired from the civil service on 13 May 2007. On 14 October 2006, which is that Saturday immediately before the commencement of the Appellant's pre-retirement leave, the Appellant and Ms B left Hong Kong and since then, they had returned to Hong Kong 1 to 4 times a year during the years of assessment 2007/08 to 2009/10, with the period of stay for 3 to 17 days on each occasion. Counting the days of arrival and departure each as one day, the numbers of days on which the couple stayed in Hong Kong during the relevant years are as follows:

Year	Number of days in Hong Kong	
	Ms B	Mr A
2007/08	28	23
2008/09	14	29
2009/10	12	35

16. As shown in paragraph 15 herein, neither Ms B nor the Appellant stayed in Hong Kong for more than 180 days during the year of assessment 2008/09, or for more than 300 days in any two consecutive years of assessment between 2007/08 and 2009/10. Quite obvious, the couple were not temporary residents as defined under section 41(4) of the IRO.

The law on ordinarily resides in Hong Kong?

17. Section 41(4) gives the meaning of 'permanent resident' as 'individual who ordinarily resides in Hong Kong'.

18. 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:

18.1 '*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*'

18.2 '*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.*'

18.3 '*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.*'

18.4 '*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.*'

18.5 '*"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.*'

19. 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 purposes of Immigration Ordinance (Chapter 115) ('the IO').

20. In the Ng Shun-loi case, Cons, VP 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.*'

21. 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 approach set out in section 2(6) of the IO[1] ('the IO Approach'), by which he came to the same conclusion that the debtor was not resident in Hong Kong during the relevant period.

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[1] 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).

22. 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.

23. The Appellant referred to Re Vassis, ex parte Leung 64 ALR 407 for the proposition that 'if that person has an income source in that territory, his ordinarily residence would be accepted by court even he was absence in that territory'. We do not agree. Source of income is just one of the factors to be taken into consideration. In Re Vassis the bankrupt was a solicitor who misapplied money entrusted to him by his clients. Upon learning that a receiver was about to be appointed to his practice, the bankrupt left Country D and hid in Greece for two years. Burchett J held that the bankrupt remained ordinarily resident in Country D during the period of absence because there was no suggestion that he established any other ordinary residence in Greece during his absence, and his journey overseas was regarded as no more than a temporary interruption of his ordinary residence in Country D. We note the following observations in the judgement of Burchett J.

> '*… The question where a person is ordinarily resident is a question of fact: Levene v IRC [1928]AC 217 ... It is a question of fact and degree at what point a temporary absence might, if sufficiently prolonged, prevent its being proper to continue to regard him as ordinarily resident in Country D. ... There is no suggestion that during his absence he established any other ordinary residence at any particular place in Greece...*'

Primary Facts

24. Based on the Agreed Facts, and the various documents in bundles B1, A1 and R1, we find that the material facts relevant to this appeal are as follows:

24.1 the Appellant and Ms B applied for emigration to Country D in 1989. they were granted Country D Visas ('Class D Visa') and landed in Country D as immigrants in 1990. Ms B moved to Country D in 1992 and returned to Hong Kong after acquiring her Country D citizenship in May 1994. Their three children started studying in Country D in the years 2003 and 2006.

24.2 the Appellant and Ms B purchased the C Property for residence in late 1996. The Appellant was also one of the owners of the property at Address E ('the E Property'), which had been used as his parents' residence for more than 20 years.

24.3 The Appellant is an ex-employee of the Hong Kong Special Administrative Region. In April 2006, he applied for an early retirement in October 2006 so as to 'accompany [his] children in [Country D]', and the application was accepted.

24.4 In about July/August 2006, the Appellant, Ms B and their youngest son moved to the E Property so that the C Property could be vacated for renovation. In August/September 2006, the Appellant and Ms B put up the C Property for letting. They succeeded to let out that property in October 2006.

24.5 The Appellant commenced his pre-retirement leave on 16 October 2006 and retired from the civil service on 13 May 2007. On 14 October 2006, which is that Saturday immediately before the commencement of the Appellant pre-retirement leave, the Appellant and Ms B left Hong Kong and since then, they had returned to Hong Kong 1 to 4 times a year during the years of assessment 2007/08 to 2009/10, with the period of stay for 3 to 17 days on each occasion. Counting the days of arrival and departure each as one day, the numbers of days on which the couple stayed in Hong Kong during the relevant years are as follows:

Year	Number of days in Hong Kong	
	Ms B	The Appellant
2007/08	28	23
2008/09	14	29
2009/10	12	35

24.6 In their respective Tax Returns – Individuals for the years of assessment 2006/07 and 2007/08, the Appellant and Ms B amended their postal address from the C Property to Address F.

24.7 In the Property Tax returns in respect of the C Property for the years of assessment 2007/08 to 2009/10, the Appellant and Ms B declared their residential addresses during the relevant years as follows:

Year	Residential address of owners	Return signed by
2007/08	Address G	Ms B
2008/09	Address H	the Appellant
2009/10	Address G	the Appellant

24.8 During the year of assessment 2008/09, the Appellant:

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

(b) Lived in the E Property with his parents when 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 a mobile phone number and Octopus in Hong Kong.

25. At the hearing, the Appellant also gave evidence to the following effect:

25.1 that the Appellant has maintained a number of MPF and investment accounts before his departure for Country D;

25.2 that after he departed to Country D, he caused the correspondence address of all these accounts to be changed to the address of his sister at Area J in Hong Kong so that she could take care of these matters and could alert him if the statements would show any obvious errors.

26. The documents presented as evidence in support of the matters in Paragraph 25 herein are as follows:

Date	Description
14 July 2010	Insurance Company K Anniversary Statement re policy XXXXXXXXXX
17 July 2010	Insurance Company K Anniversary Statement re policy XXXXXXXXXX
18 October 2010	Insurance Company K Anniversary Statement re policy XXXXXXXXXX
19 June 2011	'Insurance Company L' Premier Unit Switch Confirmation

Grounds of appeal

27. We now deal with the Appellant's various grounds of appeal.

Legal contentions

28. Various legal contentions are made in Grounds 3, 5, 6 and 7.

Ground 3:

29. In Ground 3, the Appellant complains that the Respondent did not accept that a person could ordinarily reside in Hong Kong without physical presence in the territory.

30. Like the Respondent, we accept the Appellant's legal proposition that a person may in special circumstances retain his ordinary residence in Hong Kong despite his non-presence in the territory. For example, in Lau San Ching v Liu, Apollonia (1995) 5 HKPLR 23 (a case which was cited by the Appellant in his written submissions) . It is a question of fact whether one is in fact so.

Ground 5:

31. In Ground 5, the Appellant contends that the IRD erroneously took the residential address provided by Ms B in the Property Tax return as a proof that the Appellant was no longer ordinarily resident in Hong Kong.

32. In so far as it is ever intended that the address provided by Ms B in the Property Tax could never be taken as evidence against the Appellant, we reject such contention. Otherwise, it is just a matter of weigh to be attributed in the overall assessment of evidence.

Grounds 6 and 7:

33. In Grounds 6 and 7 the Appellant contends that the IRD rejected the possibility that a person could have more than one residence both in and outside Hong Kong, and created its own rule to determine whether it was a long or short absence.

34. Like the Respondent, we accept the Appellant's legal proposition that a person may be ordinarily resident in two countries at the same time: see the Shah case at page 342F. It is a question of fact whether one is in fact so. We do not see the Respondent as having intended to create a hard and fast rule based simply on the relative number of days a person spends in a particular place to determine his place of residence.

Factual Assessment Issues

35. The Appellant complained in his Grounds 1, 2, 4 and 8 that the Respondent failed to recognize certain facts which demonstrated the Appellant's link with Hong Kong during the year of assessment 2008/09. Similar assessments also permeate the other Grounds namely Grounds 3, 5, 6 and 7.

36. A number of factors call for special attention:

Class D Visa

37. The Appellant submitted that the Respondent was wrong in saying that the Appellant had settled in Country D as the Respondent failed to recognize the fact the Appellant had stayed in Country D by a Class D Visa since 1991.

38. According to the information pronounced by the Country D Immigration Authority, the purpose of the Class D Visa is to 'allow current or former Country D permanent residents, or former Country D citizens to re-enter Country D after travelling overseas'.

39. The Class D Visa held by the Appellant also stated that he was permitted to stay in Country D indefinitely.

40. The relevant visa only indicates the immigration status of the Appellant in Country D, and it is not decisive in determining his ordinary residence: per Lord Scarman in the Shah case (paragraph 0 herein) and does not by itself be positive evidence to show that the Appellant had not stayed in Country D for settled purposes during the relevant year of assessment; if other evidence tend to show that he did stay in Country D for settled purposes.

Residence in Country D?

41. In the 2007/08 Property Tax return, Ms B provided an address in Country D as her and the Appellant's residential address during the relevant year, and declared that the information given in that tax return was 'true, correct and complete'. In the 2008/09 and 2009/10 Property Tax returns, the Appellant also stated that his and Ms B's residential address during the relevant years was in Country D, and declared that the information given in those tax returns was 'true, correct and complete'. The Respondent thus rightly took such reported addresses as one of the factors for determining the situ where the Appellant ordinarily resided during the year of assessment 2008/09. In any case, we do not consider that the relevant addresses are by themselves conclusive of the locality of the Appellant's ordinary residence.

42. The Appellant submitted that if a person has a fixed residence in a territory and that residence has been used with some degree of continuity, that person can be regarded as ordinarily resident in that territory.

43. The Respondent submitted that according to the Shah case, a person will be regarded as ordinarily residence in a territory if he voluntarily resides in that territory for settled purposes, apart from temporary or occasional absences (paragraph 0 herein). In order to be a settled purpose, the purpose of residing must have a sufficient degree of continuity (paragraph 0 herein). Therefore, a person who has a fixed residence in a territory and merely uses it with some degree of continuity may not satisfy the conditions of being ordinarily resident in that territory.

44. To us it all boils down to the degree of continuity.

Dual Residence?

45. The Respondent submitted that the Appellant's case does not fall within the category of 'dual residence'; his ordinary residence was solely in Country D during the year of assessment 2008/09, whilst his returns to Hong Kong in that year were merely temporary or occasional. Furthermore, the Respondent submitted that the Commissioner has not created his own rule to determine whether the Appellant's absence from Hong Kong is long or short. What the Respondent submits is that given the various actions taken by the Appellant before and after his move to Country D, and his absence from the territory for 336 days in the year of assessment 2008/09 (which is a fact), it can hardly be accepted that the aforesaid absence was of temporary or occasional nature.

Hong Kong Income

46. On the authority of Re Vassis, ex parte Leung 64 ALR 407, the Appellant submitted that if a person has income source in a territory, he will be accepted as ordinarily resident in that territory even when he is absent from there.

47. The Respondent replied that in the Vassis case, [the bankrupt was a solicitor who misapplied money entrusted to him by his clients. Upon learning that a receiver was about to be appointed to his practice, the bankrupt left Country D and hid in Greece for two years. Burchett J held that the bankrupt remained ordinarily resident in Country D during the period of absence because there was no suggestion that he established any other ordinary residence in Greece during his absence, and his journey overseas was regarded as no more than a temporary interruption of his ordinary residence in Country D.]

48. We agree with the Respondent's submission that the Vassis case is not, as the Appellant contends, an authority which supports the determination of one's ordinary residence by reference to the locality of his income source.

Stays with Family (Ground 9)

49. The Respondent does not deny that the Appellant has lived with his parents when he stayed in Hong Kong during the year of assessment 2008/09 (paragraph 24.8(b) herein). The Respondent's submission is that the Appellant's returns to Hong Kong lacked the sufficient continuity and therefore he should not be regarded as ordinarily residing in the territory.

Nature of Stays in Hong Kong

50. The Appellant asserted that Lord Scarman's explanation in the Shah case (paragraph 18.2 herein) implies that the Court will accept the existence of ordinary

residence if a person habitually and normally resides in the territory, no matter it is of a short or long period.

51. The Respondent submitted that whilst a person may remain ordinarily resident in a territory albeit his minimal stays in that territory, such a case should be rare and should only be accepted under special circumstances (like the Lau San Ching case where the applicant was sentenced to imprisonment for 10 years in the Mainland). Generally in order to establish an ordinary residence, a person has to prove that he voluntarily resides in a territory for purposes with a sufficient degree of continuity, and that his absence from the territory is temporary or occasional in nature. Under normal circumstances, we should be slow in accepting one's ordinary residence in Hong Kong if he stays abroad substantially for settled purposes during the relevant period: see the following Court's and the Board's decisions: Re Kok Hiu Pan, ex parte Wing Lung Bank Ltd [2002] 3 HKLRD 20; Re Wong Lei Kwan Joanne, ex parte Bank of China (Hong Kong) Ltd [2009] 3 HKLRD 173; D37/02, IRBRD, vol 17, 677; D7/05, (2005-06) IRBRD, vol 20, 262; D45/06, (2006-07) IRBRD, vol 21, 842; D5/08, (2008-09) IRBRD, vol 23, 83; D24/09, (2009-10) IRBRD, vol 24, 532.

52. Again, the question is still that of the degree of continuity.

Special Case?

53. The Appellant submitted that Cons, VP's statement in the Ng Shun-loi case (paragraph 19 herein) implies that the Court will accept no disruption of ordinary residence even though a person is absent from the territory concerned, irrespective of whether the absence is long or short and whether it was taken by the person voluntarily or involuntarily.

54. The Respondent submitted that in the Ng Shun-loi case, Cons, VP only commented that absence would not 'necessarily' disrupt a period of ordinary residence (paragraph 19 herein). His Lordship did not say that absence of whatever nature would cause no disruption of one's ordinary residence. Following the Shah case, the Respondent submitted that the acceptable absence for the purposes of ordinary residence should be that temporary or occasional nature. Indeed, in the Ng Shun-loi case, the Court of Appeal held that the respondent, who had been taken his Hong Kong identity cards by the Mainland authorities and confined a commune there for ten years, was not ordinarily resident in Hong Kong during the relevant 10-year period.

55. Whether the Appellant was ordinarily resident in Hong Kong during the year of assessment 2008/09 is a question of fact which turns on the particular circumstances of his case. The various Board's decisions referred to us by the Respondent only serves to demonstrate how the legal principles in relation to 'ordinary residence' have been applied to various circumstances, and there is no implication that the conclusions arrived by the Board in those cases would be applicable in the present case.

56. 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.

Summary on Factors to be considered

57. We note the Appellant's connecting factors with Hong Kong in his submissions especially those set out in paragraph 24.8 herein those facts should be balanced against the fact that the Appellant had not spent substantial proportion of his time in Hong Kong during the year of assessment 2008/09. None of these factors alone is determinative of the question of whether the Appellant is or is not ordinarily resident.

58. In the Respondent's view, a person who is not ordinarily resident in Hong Kong may still maintain his bank accounts, assets, contact phone numbers and even accommodation here because of his choice and circumstances (for example in the Appellant's case, he may need a bank account in Hong Kong for receiving his monthly pensions). Because of cost and convenience, the person may also choose to travel in and out of Hong Kong by return air tickets.

59. Barma J in the Wong Lei Kwan Joanne case 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. We agree.

Is the Appellant ordinarily resident in Hong Kong in the tax year?

60. We agree with the following submissions of the Respondent that the Appellant did not ordinarily reside in Hong Kong during the year of assessment 2008/09:

60.1 The Appellant did habitually and normally reside in Hong Kong up to 14 October 2006. In those days, he worked in Hong Kong (paragraphs 24.3 and 24.5 herein). At most of the relevant times, Ms B and his children also resided with him in Hong Kong (paragraph 24.1 herein). He only left Hong Kong occasionally and the length of each departure was less than one week.

60.2 However, the circumstances changed when the Appellant was about to take his pre-retirement leave and left Hong Kong on 14 October 2006. Since then, he spent most of his time in Country D to accompany his children who were studying there (paragraph 24.3 herein), and only came back to Hong Kong three or four times a year with the period of each stay less than 20 days (paragraph 24.5 herein). The above change clearly shows that the Appellant has adopted Country D, rather than Hong Kong, as his place of ordinary residence since the commencement of his pre-retirement leave. His adoption of a new place of residence is voluntary (not enforced by reason of kidnapping or imprisonment with

no opportunity of escape), and the purpose of such adoption (that is accompanying children to study) is settled purpose. His subsequent returns to Hong Kong, thought for family visit, did not have sufficient continuity to be considered as ordinary residing in the territory: see D5/08 (paragraph 22 herein).

60.3 Before leaving Hong Kong to Country D, the Appellant had applied for an early retirement (paragraph 24.3 herein). He also vacated the C Property for renovation and letting three months before his departure (paragraph 24.4 herein). In his own tax return and the relevant Property Tax returns, he provided the addresses in Country D as his postal and residential addresses (paragraphs 24.6 and 24.7 herein). It can be inferred from these facts, and we so infer, that the Appellant did not regard his departure from Hong Kong as occasional or temporary, otherwise there would be no need for him to apply for early retirement, let out his then residence and amend his postal and residential addresses to those in Country D. As a matter of fact, the Appellant was absent from Hong Kong for 336 days (paragraph 24.5 herein) during the year of assessment 2008/09. Such a substantial absence can hardly be accepted as occasional or temporary.

61. In coming to the conclusions in paragraph 60 herein, we are mindful of

61.1 Grounds 1, 2, 4 and 8 of the Appellant's grounds of appeal: We have taken into consideration the various matters on which the Appellant relies to establish his link with Hong Kong (paragraph 24.8 herein) including his written submission. However, those matters were not decisive in determining the Appellant's ordinary residence, and should be balanced against the very fact that he had not spent substantial proportion of his time in Hong Kong during the relevant year of assessment: see the Kok Hiu Pan and Wong Lei Kwan Joanne cases (paragraph 51 above). Indeed, in various previous decisions, the Board held that the appellants were not ordinarily resident in Hong Kong even though they (i) had Hong Kong identity cards: D45/06; (ii) did not become foreign national: D5/08; (iii) had parents and relatives who ordinarily resided in Hong Kong: D37/02, D45/06 and D5/08; (iv) maintained bank accounts in Hong Kong: D45/06; (v) had no other income apart from the rental income from Hong Kong: D24/09; (vi) lived in their own or family properties whenever they came back to Hong Kong:D37/02 and D5/08.

61.2 Ground 3 of the Appellant's grounds of appeal (that the Respondent did not accept that a person could ordinarily reside in Hong Kong without physical presence in the territory): In this connection, we accept that a person may in special circumstances retain his ordinary residence in

Hong Kong despite his non-presence in the territory. For example, in Lau San Ching v Liu, Apollonia (1995) 5 HKPLR 23 However, the Appellant is not in such extreme situation.

61.3 Ground 5: (that the IRD erroneously took the residential address provided by Ms B in the Property Tax return as a proof that the Appellant was no longer ordinarily resident in Hong Kong) but we only took that as one of the factors to be considered.

61.4 Grounds 6 and 7: (that the IRD rejected the possibility that a person could have more than one residence both in and outside Hong Kong, and created its own rule to determine whether it was a long or short absence).

61.5 Ground 9: It is unfair and unjust for the Respondent to rule that the Appellant's living in Hong Kong was not with his family.

61.6 Ground 10: the Appellant's case has characteristics that are different from the cases previously decided by the Board.

62. Same as Barma J in the Wong Lei Kwan Joanne case (paragraph 21 herein), the Respondent has also considered adopting the IO Approach to evaluate whether the Appellant has ceased to be ordinarily resident in Hong Kong since his move to Country D – Having left Hong Kong on 14 October 2006, the Appellant has not returned for any appreciable length of time because he had to accompany his children to study in Country D (paragraphs 24.3 and 24.5 herein). He usually came back to Hong Kong in January and July / August each year when there were school holidays in Country D, and the period of his stay ranged from 3 to 17 days on each occasion (paragraph 24.5 herein). His residence before departure (that is the C Property) was let out (paragraph 24.4 herein) and when he returned to Hong Kong, he lived in his parents' home at the E Property (paragraph 0 herein). The Appellant was a retired civil servant and was not employed by any Hong Kong-based company. His wife, Ms B, and his children were all in Country D. Applying the IO Approach to the above circumstances, the Respondent comes to an inescapable conclusion that the Appellant has ceased to be ordinarily resident in Hong Kong since his move to Country D.

63. We accept that a person may in special circumstances retain his ordinary residence in Hong Kong despite his non-presence in the territory. Indeed, Lau San Ching v Liu, Apollonia (1995) 5 HKPLR 23 would be one such situation. We are also mindful of Ground 3 of the Appellant's Grounds of Appeal. However, all along the Appellant has argued that he remained ordinarily residing in Hong Kong during the year of assessment 2008/09, and his absences from the territory were merely temporary or occasional. On the Agreed Facts and further findings by us, we find that his case was just the opposite: During the relevant year, the Appellant's ordinary residence was in Country D, and it was his stays in Hong Kong which were of temporary and occasional nature.

Conclusion

64. We find that the Appellant has not discharged his onus to prove that he and Ms B were eligible to elect for PA for the year of assessment 2008/09. Accordingly, his appeal is dismissed and the Assessment stands.