

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D1/00

**Personal Assessment Tax** – deductions claimed in respect of mortgage interest incurred in relation to a flat – loan allegedly borrowed for purpose of producing rental income – factors to consider – section 42(1) of the Inland Revenue Ordinance.

Panel: Andrew Halkyard (chairman), Herbert Liang Hin Ying and Kenneth Graeme Morrison.

Date of hearing: 23 March 2000.

Date of decision: 6 April 2000.

Notice of appeal was filed at least four weeks after the Commissioner's determination was delivered to the taxpayer. The taxpayer's reason for his lateness in filing was that he had pressure at work and had forgotten.

As to the substantive issue, the taxpayer argued that he had borrowed money from Bank C in order to keep Property A as a long-term rental investment. He had not used the said money to purchase Property B.

#### **Held** by the Board :

1. No convincing reason had been advanced for the delay. Hence, there was no proper appeal before the Board. The determination would stand.
2. As to the substantive issue, the facts showed that the taxpayer obtained the loan prior to purchasing Property B. He had requested Bank C to draw the loan to pay the balance of the purchase price of Property B and the funds were so used.
3. Even though the method of financing adopted by the taxpayer had led to rental income being generated by Property A, this was merely the effect or consequence of the transaction. It was not the purpose for which the loan was borrowed (D50/96, IRBRD, vol 11, 547 applied).

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### **Appeal dismissed.**

Case referred to:

D50/96, IRBRD, vol 11, 547

Chan Siu Ying for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

1. The Taxpayer has appealed against the Commissioner's determination of personal assessment tax for the year of assessment 1995/96. He claims that under the proviso to section 42(1) of the Inland Revenue Ordinance he should be granted a deduction for mortgage interest he incurred in relation to a flat ('Property A').

### **The facts**

2. The facts, which we so find, are not in dispute. They are set out at pages 1 and 2 of the Commissioner's determination and are supplemented by the facts set out at paragraph 3.2 of the Commissioner's submission before us. We also find certain facts relevant to the late appeal (see below).

### **Late appeal**

3. The Commissioner's determination was dated 26 August 1999. It was received by the Taxpayer on 1 September 1999. The Taxpayer's notice of appeal was dated 22 October 1999. It was received by the Board of Review on 29 October 1999. At best, therefore, the appeal was lodged four weeks late.

4. The Taxpayer told us that his appeal was late because of pressure of work. He gave us details of tenders and contracts in which his employer was involved at or around the relevant time. The value of these projects was considerable, both separately and in total. We have no doubt that the Taxpayer was extremely busy during the month of September 1999. However, the Taxpayer also stated that the pressure of his work was such that, in the result, he 'forgot' to lodge a timely appeal.

5. In our view, there is a marked difference between preparing for an appeal and simply lodging an appeal. Although we can appreciate the work pressure to which the Taxpayer was subjected, we cannot agree in terms of section 66(1A) that his ultimate 'forgetfulness', or indeed

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pressure of work generally, was a reasonable cause preventing him from giving a timely notice of appeal. In our view, the Taxpayer has allowed his work to take precedence over the requirements for lodging a valid appeal.

6. Although we can sympathise with the Taxpayer's plight, that sympathy does not extend to allowing an extension of time in circumstances that simply do not fit the statutory provision we must apply. We thus conclude that we cannot extend the time under section 66(1A) for giving a proper notice of appeal.

### **The substantive issue**

7. The proviso to section 42(1) allows a deduction from:

*' that part of the total income arising from paragraph (a) [paragraph (a) essentially speaks of net rental income for property tax purposes] the amount of any interest payable on any money borrowed for the purpose of producing [rental income] where the amount of such interest has not been deducted [under the provisions relating to profits tax]' . (emphasis added)*

8. The Taxpayer argued that, in terms of this proviso, his purpose for borrowing the disputed loan funds from Bank C (' the Loan' ) was to keep Property A as a long-term rental investment. We accept that the Taxpayer had every intention to keep Property A as such an investment and that, indeed, he did so. But this intention does not mean we must therefore conclude that the purpose of the Loan was to produce rental income from Property A.

9. Rather, the facts before us show that the Loan was used to purchase Property B (the Taxpayer's residence). We find that this loan was necessary to finance the purchase of this property. Without this loan, or some substitute therefore, the Taxpayer did not have sufficient equity to purchase Property B, unless he sold Property A (which he did not). In other words, the loan was used to cover the shortfall in the purchase price of Property B after the Taxpayer had mortgaged the property in favour of the mortgagee, Bank D.

10. The Taxpayer argued that he had sufficient funds to purchase Property B without recourse to the Loan. In his statement of appeal, and during the Board hearing, the Taxpayer gave us details of what he could have done in this regard, such as by selling Property A. But, as pointed out to the Taxpayer at the hearing, ' Although it is no consolation to the Taxpayer, we can only state that tax is imposed upon what he did; it is not imposed upon what he could have done' .

11. In summary, the facts before us show that prior to the purchase of Property B, Property A was free of any encumbrances; the Taxpayer obtained the Loan just before the acquisition of Property B; he requested Bank C to draw the loan funds to pay the balance of the

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purchase price of Property B; and the funds were so used. All these objective facts point to the conclusion that the Loan was borrowed by the Taxpayer for the purpose of acquiring Property B.

12. Like the taxpayers in D50/96, IRBRD, vol 11, 547 the method of financing adopted by the Taxpayer may have led to the creation of a rental stream when the use of Property A was changed from self-residence to letting. But this is only the effect or consequence of the transaction. It could not have been the purpose for which the loan was borrowed.

### **Order**

13. For the above reasons, we order:

1. The appeal was out of time and there are no grounds to extend the time limit as provided by section 66(1A); and
2. In any event, the interest incurred by the Taxpayer cannot be deducted under the proviso to section 42(1).

14. The appeal is hereby dismissed.