

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D100/00

Salaries tax – dependent parent allowance – other claimants for the allowance – re-open assessment – section(s) 33(3)(c), 60 and 70A of the Inland Revenue Ordinance (‘IRO’) – additional assessment.

Panel: Ronny Wong Fook Hum SC (chairman), Lam Andy Siu Wing and Edmund Leung Kwong Ho.

Date of hearing: 3 August 2000.

Date of decision: 7 December 2000.

Mr A and Mrs A are husband and wife. Ms B and Ms E are the children of Mr A and Mrs A. The taxpayer is the husband of Ms E. Mr C is the husband of Ms B and Mr D is the children of Ms B. For the years of assessment 1992/93 to 1995/96, the taxpayer was assessed on the basis of a dependent parent allowance being granted in respect of the parents of each of Mr A and Mrs A. For the year of assessment 1996/97, Mr D submitted a claim for dependent grandparent allowance in respect of Mr and Mrs A. The taxpayer agreed to the claim of Mr D for the year of assessment 1996/97. The taxpayer was therefore assessed without the benefit of any dependent parent allowance for the year of assessment 1996/97.

The taxpayer protested against the withdrawal of his allowance for the year of assessment 1997/98 by letter dated 16 January 1998. By a notice of assessment dated 7 August 1998, the taxpayer was assessed on his income for the year of assessment 1997/98 with allowance being made in his favour in respect of both Mr and Mrs A. By letter dated 10 November 1998, Mr C and Ms B applied for dependent parent allowance in respect of both Mr and Mrs A for the year of assessment 1997/98. This was followed by a similar application on 18 November 1998 for the years of assessment 1992/93 to 1996/97.

The taxpayer was additionally assessed for the years of assessment 1995/96 and 1997/98 arising from withdrawal of allowance attributable to Mr and Mrs A. The taxpayer appealed and submitted that it is inequitable for the Revenue to open up his tax liability years after the relevant notices of assessment simply by virtue of the belated claims of Mr C and Ms B. Ms E also gave evidence that she and the taxpayer were the sole support of Mr A and Mrs A and that Mr C and Ms B made no contributions.

Held:

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1. The additional assessment on the taxpayer is within the jurisdiction of the Revenue by section 33(3)(c), not by section 70A of the IRO. Section 33(3)(c) provides the sequential conditions upon which additional assessment under section 60 may be raised.
2. In relation to the year of assessment 1995/96, the taxpayer was assessed by notice dated 9 December 1996 with the benefit of dependent parent allowance. Mr C and Ms B made no claim until 18 November 1998. This is well beyond the six months period as envisaged by section 33(3)(c). There is therefore no basis for the additional assessment on 25 March 1999.
3. By the notice of assessment dated 7 August 1998, the taxpayer was granted dependent parent allowance in respect of both Mr and Mrs A. Mr C and Ms B made their application on 10 November 1998. This is within six months period. The Commissioner is therefore fully entitled to call upon the taxpayer and Mr C to seek a compromise between them. Reasonable time elapsed and the parties failed to reach agreement. The Commissioner is entitled to raise additional assessment on the taxpayer.

Appeal allowed in part.

Ngan Man Kuen for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background

1. Mr A and Mrs A are husband and wife. Amongst their children are:
 - (a) Ms B who is married to Mr C. Mr D is the son of Ms B and Mr C.
 - (b) Ms E who is married to the Taxpayer.
 - (c) Ms F who is suffering from mental disabilities.

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2. Ms B and Ms E are not on good terms. The present dispute stems from their failure to reach any agreement in respect of dependent parent allowance vis-a-vis the upkeep and maintenance of Mr and Mrs A.
3. By a notice of assessment dated 20 August 1993, the Taxpayer was assessed in respect of his income for the year of assessment 1992/93 computed on the basis of a dependent parent allowance being granted in respect of each of Mr and Mrs A. Mr C had also laid claim for such allowance. By letter dated 2 December 1993, the Revenue invited the Taxpayer to reach agreement with Mr C as to who amongst them is to have the allowance. By agreement dated 12 December 1993. Mr C and the Taxpayer agreed that the dependent parent allowance in respect of the year of assessment 1992/93 be claimed by the Taxpayer.
4. By a notice of assessment dated 18 August 1994, the Taxpayer was assessed in respect of his income for the year of assessment 1993/94. This assessment was computed on the basis of the Taxpayer being granted dependent parent allowance in respect of both Mr and Mrs A.
5. By a notice of assessment dated 4 January 1996, the Taxpayer was assessed in respect of his income for the year of assessment 1994/95. This assessment was likewise computed on the basis of the Taxpayer being granted dependent parent allowance for both Mr and Mrs A.
6. By a notice of assessment dated 9 December 1996, the Taxpayer was assessed in respect of his income for the year of assessment 1995/96 which was computed on the same basis as the two preceding years.
7. By a notice of assessment dated 17 December 1997, the Taxpayer was assessed in respect of his income for the year of assessment 1996/97. Mr D had by then submitted a claim for dependent grandparent allowance in respect of Mr and Mrs A. The Taxpayer was therefore assessed without the benefit of any dependent parent allowance. By letter dated 16 January 1998, the Taxpayer protested against the withdrawal of his allowance. He pointed out that Ms B and Ms E were not on good terms and ' Promise between them appears to be highly unlikely. Thus, your decision of granting such tax allowance to him at my expenses appears to be unfair. On the other hand, I have no objection to Mr C' s claiming DPA for [Mr A] as he might contributed [sic] some for his maintenance' . By letter dated 27 February 1998, the Revenue invited the Taxpayer to reach agreement with Mr D in relation to the claim of allowance pertaining to Mrs A. They pointed out to the Taxpayer that in default of agreement, the allowance granted to Mr D ' will also be withdrawn.' The Taxpayer and Mr D came to an agreement in about mid-March 1996. The Taxpayer agreed that the allowance in respect of Mrs A be claimed by Mr D.
8. By a notice of assessment dated 7 August 1998, the Taxpayer was assessed on his income for the year of assessment 1997/98 with allowance being made in his favour in respect of both Mr and Mrs A.

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9. By letter dated 10 November 1998, Mr C and Ms B applied to the Revenue for dependent parent allowance in respect of both Mr and Mrs A for the year of assessment 1997/98. This was followed by a similar application on 18 November 1998 for the years of assessment 1992/93 to 1996/97.

10. By letter dated 10 December 1998, the Revenue pointed out to the Taxpayer that 'there are other claimants for the allowances for [Mr and Mrs A]'. The Taxpayer was asked whether he would be maintaining his claim for allowance in respect of the years of assessment 1992/93 to 1997/98. The Taxpayer was asked to forward documentary evidence to support his claim if the same be maintained. The Taxpayer informed the Revenue by letter dated 22 December 1998 that he would not abandon his claim for allowance in respect of both Mr and Mrs A for all the years of assessment in question. Ms E submitted evidence on behalf of the Taxpayer to substantiate his claim.

11. The Revenue acknowledged the evidence submitted by the Taxpayer by letter dated 10 February 1999. The Revenue informed the Taxpayer that the case officers handling the tax affairs of Mr C and Ms B had been asked to examine their eligibility of claiming the allowance in respect of Mr and Mrs A. It was pointed out to the Taxpayer that 'If they are also eligible to claim the allowance and you cannot compromise with them concerning the claims, the allowance granted may be withdrawn.'

12. By a notice dated 4 March 1999, the Taxpayer was additionally assessed for the year of assessment 1997/98 arising from withdrawal of allowance attributable to Mr and Mrs A. The Taxpayer protested against this withdrawal by letter dated 17 March 1999.

13. By notice dated 25 March 1999, the Taxpayer was additionally assessed for the years of assessment 1992/93; 1993/94; 1994/95 and 1995/96 by virtue of the withdrawal of the relevant allowances in those years of assessment. By letter dated 7 April 1999, the Taxpayer reiterated his protest against the Revenue's decision to withdraw his allowance 'with retrospective effect from the year of assessment 1992/93'. In their letter dated 10 May 1999, the Revenue adverted to the provisions in section 33 of the IRO (Chapter 112). The Revenue explained that 'As no agreement has been reached among the claimants, the dependent parent allowance or the dependent grandparent allowance ... have been withdrawn from the years of assessment 1992/93 to 1997/98.' On 12 August 1999, the Taxpayer was informed by the Revenue that the replies from the various claimants were being examined in respect of the years of assessment 1992/93 to 1995/96.

14. In the meantime, Ms E made various efforts to meet Ms B with the view of settling their dispute. Ms B made no response to these approaches.

15. By letter dated 27 January 2000, the Revenue told the Taxpayer that:

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- (a) He was additionally assessed for the years of assessment 1992/93 to 1995/96 and 1997/98 as Mr C and Ms B made application for allowance within the six years period prescribed by section 70A of the IRO.
- (b) ‘ ... the Deputy Commissioner is however prepared to exercise her powers under section 33(4) of the Ordinance by granting the dependent parent allowance to you for the years of assessment 1992/93 to 1994/95.’
- (c) In respect of the year 1992/93, ‘ Both you and Mr C have reached an agreement on 12 December 1993 ... In claiming back the allowance for that year, Mr C should produce a fresh agreement jointly signed with you for replacing the previous one made in 1993. In the absence of the new agreement, the Deputy Commissioner is prepared to accept the allowance previously granted to you pursuant to the agreement made on 12 December 1993 should not be disturbed.’
- (d) In respect of the years of assessment 1993/94 and 1994/95, ‘ Although [Mr C and Ms B] are eligible to claim the allowance ... information now available shows that the allowance has not been given to more than one person even if allowance is given to you. It is therefore decided that you are allowed to keep the allowance ...’
- (e) The Revenue maintains its stance in relation to the years of assessment 1995/96 and 1997/98.

16. The issue before us is whether the additional assessments levied on the Taxpayer for the years of assessment 1995/96 and 1997/98 are valid or invalid. This in turn depends on whether the Taxpayer is entitled to dependent parent allowance for those years in default of any agreement with Mr C and Ms B.

The hearing before us

17. At the hearing before us, the Taxpayer submitted that it is inequitable for the Revenue to open up his tax liability years after the relevant notices of assessment simply by virtue of the belated claims of Mr C and Ms B. Ms E also gave evidence before us. She asserted that she and her husband were the sole support of Mr A, Mrs A and Ms F and that Mr C and Ms B made no contribution.

18. The Revenue maintains that, in respect of the two years of assessment, both the Taxpayer and Mr C are entitled to claim dependent parent allowance. In view of the claim by Mr C and the absence of any agreement between the Taxpayer and Mr C, they are entitled to raise additional assessments on the Taxpayer.

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The relevant provisions in the IRO

19. Part V of the IRO regulates allowances that shall be granted to persons chargeable to salaries tax under Part III of the IRO.

20. Section 27(2) of the IRO provides that:

‘ Every person who claims an allowance under this Part shall make his claim in the specified form and an allowance shall be granted only if the claim contains such particulars and is supported by such proof as the Commissioner may require.’

21. Section 30 of the IRO provides:

‘ (1) An allowance (“dependent parent allowance”) shall be granted under this section in any year of assessment if the person ... maintains a parent ... of his ... spouse in the year of assessment ...

(2) A dependent parent allowance may be granted in respect of each such parent who is so maintained.

(3) ...

(4) For the purposes of this section

(a) a parent shall only be treated as being maintained by a person ... if

(i) ...

(ii) the person ... contributes not less than the prescribed amount in money towards the maintenance of that parent in the year of assessment.

(5) Where a deduction has been allowed to a person under section 26D for any year of assessment in respect of a parent ... of his ... spouse, no person shall be granted a dependent parent allowance under this section for that year of assessment in respect of the some person.’

22. Section 30A of the IRO contains like provisions in relation to dependent grandparent allowance.

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23. Section 33 of the IRO provides that:

(1) ... a dependent parent allowance, a dependent grandparent allowance ... shall not be given to more than one person in any year of assessment in respect of the same parent, grandparent ...

(1A) In any year of assessment –

(a) a dependent parent allowance and a dependent grandparent allowance; or

(b) ...

shall not both be given for the same dependent person.

(2) ...

(3) Where a dependent parent allowance, a dependent grandparent allowance ... has been granted –

(a) ...

(b) ...

(c) to a person and, within 6 months of such allowance being granted, another person appears to the Commissioner to be eligible to be granted that allowance in respect of the same parent, grandparent ... for the same year of assessment ...

the Commissioner shall invite the persons to whom the allowance has been granted and any other individual who appears to the Commissioner to be eligible to be granted the allowance to agree which of them is to have the allowance ... and the Commissioner may in consequence of such agreement, or if the individuals do not so agree within a reasonable time, within the period specified in section 60, raise additional assessments under that section.

(3A) Where the Commissioner has reason to believe that there are persons eligible to claim, respectively –

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(a) *a dependent parent allowance and a dependent grandparent allowance; or*

(b) *...*

in respect of the same dependent person for the same year of assessment, the Commissioner shall not consider any claim until he is satisfied that the claimants have agreed which of the allowances shall be claimed in that year.'

We pause here to observe that the Revenue made no reference to the provisions in section 33(3)(c) in the course of their submissions to us. This is a highly relevant section. The omission of the Revenue is misleading and regrettable.

24. Section 60 of the IRO provides that :

'(1) Where it appears to an assessor that for any year of assessment any person chargeable with tax ... has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed ...'

25. Section 70A of the IRO provides that :

'(1) Notwithstanding the provisions of section 70, if, upon application made within 6 years after the end of a year of assessment or within 6 months after the date on which the relative notice of assessment was served, whichever is the later, it is established to the satisfaction of an assessor that the tax charged for that year of assessment is excessive by reason of an error or omission in any return or statement submitted in respect thereof ... the assessor shall correct such assessment.'

Our decision

26. We have considerable reservation as to the stance of the Revenue for the year of assessment 1992/93 as outlined in its letter of 27 January 2000. In view of the agreement between the parties dated 12 December 1993, we find it difficult to see how the issue can be re-opened by subsequent agreement superseding the agreement of 12 December 1993. However, as the matter is not before us, we do not wish to express any concluded view on it.

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27. It is not within our jurisdiction to adjudicate on the competing claims between the Taxpayer and Mr C. The Taxpayer agreed to the claim of Mr D for the year of assessment 1996/97. Quite apart from the issue of jurisdiction, it would not be right for us to act on the emotional evidence of Ms E and made pronouncement without hearing Mr C, Ms B and Mr D. The present appeal is not an occasion for the vindication of personal grudge.

28. The Revenue says that Mr C and Ms B were entitled to re-open their assessment by virtue of section 70A. We are, however, not concerned with the liability of Mr C and Ms B. What we are concerned with is whether the additional assessment on the Taxpayer is within the jurisdiction of the Revenue. In our opinion, that additional assessment fails to be tested, not by section 70A, but by section 33(3)(c). Section 33(3)(c) provides that additional assessment under section 60 may be raised upon compliance with the following sequential conditions:

- (a) a dependent parent allowance has been granted to Mr I;
- (b) within 6 months of such allowance being granted to Mr I, Mr II appears to be eligible to be granted that allowance in respect of the same parent for the same year of assessment.
- (c) the Commissioner shall invite Mr I and Mr II to agree which of them is to have the allowance.
- (d) the Commissioner may raise additional assessment under section 60 either
 - (i) in consequence of such agreement between Mr I and Mr II or
 - (ii) if Mr I and Mr II do not so agree within a reasonable time.

29. In relation to the year of assessment 1995/96, the Taxpayer was assessed by notice dated 9 December 1996 with the benefit of dependent parent allowance. Mr C and Ms B made no claim until 18 November 1998. This is well beyond the six months period as envisaged by section 33(3)(c). The second condition outlined above has not been complied with. There is therefore no basis for the additional assessment on 25 March 1999.

30. The position is different for the year of assessment 1997/98. By the notice of assessment dated 7 August 1998, the Taxpayer was granted dependent parent allowance in respect of both Mr and Mrs A. Mr C and Ms B made their application on 10 November 1998. This is within the six months period outlined above. The Commissioner is therefore fully entitled to call upon the Taxpayer and Mr C to seek a compromise between them. Reasonable time elapsed and the parties failed to reach agreement. The Commissioner is entitled to raise additional assessment on the Taxpayer.

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31. For these reasons, we allow the Taxpayer's appeal in relation to the year of assessment 1995/96. We dismiss his appeal in relation to the year of assessment 1997/98.