

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D137/01

Salaries tax – dependent parent allowance – disabled dependant allowance – disability certified by the Pneumoconiosis Medical Board – sections 30(1), 31A and 68(4) of the Inland Revenue Ordinance ('IRO') – sections 15B(1)(a) and 27 of the Pneumoconiosis (Compensation) Ordinance ('P(C)O').

Panel: Patrick Fung Pak Tung SC (chairman), William Cheng Chuk Man and David Wu Chung Shing.

Date of hearing: 15 November 2001.

Date of decision: 14 January 2002.

In her tax return for the year of assessment 1998/99, the taxpayer claimed 'dependent parent allowance' and 'disabled dependant allowance' in respect of her father, Mr A, who was born on 15 March 1943 and was therefore under the age of 60 years. Under 'the Government's Disability Allowance Scheme administrated by the Social Welfare Department' in paragraphs 14 and 15 of her tax return, the taxpayer filled in 'No. XXX'. The assessor gave the taxpayer the benefit of the dependent parent and disabled dependant allowances claimed. In the notice of assessment and demand for salaries tax, however, there was a note to the effect that the same was subject to review. Assessment for additional salaries tax was subsequently issued and the taxpayer objected.

It transpired that Mr A suffered from pneumoconiosis and was certified by the Pneumoconiosis Medical Board in 1996 that his disability was assessed at 20%. Mr A received compensation from the Pneumoconiosis Compensation Fund ('the Fund').

From inquiry made by the Commissioner with the Director of Social Welfare, it appeared that Mr A was not on the record of the social security payment scheme. The number 'XXX' in the taxpayer's return was actually the reference number of Mr A in his application under the P(C)O.

In a memo from the Director of Social Welfare to the Commissioner, it was stated, inter alia, that a person who had been assessed to have suffering from pneumoconiosis at 20% of incapacity would not automatically be eligible for the Comprehensive Social Security Assistance Scheme or the disability allowance.

INLAND REVENUE BOARD OF REVIEW DECISIONS

The case of the Commissioner was that the term 'Government's Disability Allowance Scheme' did not mean or include the scheme of the Fund but meant the scheme operated by the Director of Social Welfare.

The taxpayer did not give evidence or call any witness. Her case basically was that she had been misled by the Inland Revenue Department ('IRD') and had thus lost the opportunity to arrange for Mr A to make a claim to the Director of Social Welfare for disability allowance.

Held:

1. Having regard to the express wording in paragraphs 14 and 15 of the tax return filled in by the taxpayer, the note accompanying the tax return form which also referred to 'Government's Disability Allowance Scheme' and the lack of any sworn evidence in support of the allegation that the taxpayer had been misled and thus lost the opportunity to establish a correct basis for her claim for dependent parent allowance and disabled dependant allowance, the Board was not convinced that the taxpayer had in fact been misled and prejudiced.
2. As a result of the communication from the Director of Social Welfare, the Board was not convinced that Mr A would have been granted a disability allowance even if he had applied for it.

INLAND REVENUE BOARD OF REVIEW DECISIONS

Appeal dismissed.

Wong Kai Cheong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against an assessment for additional salaries tax for the year of assessment 1998/99 issued by the Respondent ('the Commissioner') on 31 March 2000 ('the Assessment'). An objection was lodged by the Taxpayer against the Assessment. By his letter dated 31 July 2001, the Commissioner made a determination and rejected the Taxpayer's objection. The Taxpayer has brought this appeal against such determination.

The facts

2. The Taxpayer is a qualified nurse. The father of the Taxpayer is Mr A who was born on 15 March 1943. He is therefore under the age of 60 years.

3. In her tax return dated 3 May 1999 for the year of assessment 1998/99, the Taxpayer claimed 'dependent parent allowance' and 'disabled dependant allowance' in respect of Mr A. Under paragraphs 14 and 15 of the tax return, in giving the reference number of Mr A under 'the Government's Disability Allowance Scheme administrated by the Social Welfare Department', the Taxpayer filled in 'No. XXX'.

4. The assessor in the IRD in calculating the amount of salaries tax payable by the Taxpayer gave her the benefit of the dependent parent and disabled dependant allowances claimed in the total sum of \$120,000. In the notice of assessment and demand for salaries tax, however, there was a note to the effect that the same was subject to review.

5. It transpired that Mr A became a sufferer of pneumoconiosis at some stage in 1993. By a certificate of determination dated 28 January 1994 and issued under the P(C)O, the chairman of the Pneumoconiosis Medical Board certified that Mr A had been suffering from pneumoconiosis since 24 September 1993, that the degree of his disability was assessed at 5% and that he was able to perform the essential actions of life without the care and attention of another person. Further, by a certificate of compensation for incapacity issued under section 15B(1)(a) of the P(C)O, the Pneumoconiosis Compensation Fund Board awarded compensation to Mr A in a lump sum of \$3,253.6 and monthly sums of \$690.

INLAND REVENUE BOARD OF REVIEW DECISIONS

6. By another certificate dated 29 February 1996, the chairman of the Pneumoconiosis Medical Board certified that Mr A's degree of incapacity had increased to 20%. By another certificate dated 21 March 1996, the Pneumoconiosis Compensation Fund Board increased the award of compensation to Mr A to \$3,270 per month.

7. It appears that, since 29 February 1996, Mr A has not applied to the Pneumoconiosis Medical Board for another examination, although his monthly compensation had been adjusted upwards to \$7,440 based on his average wage and Government statistics.

8. It was revealed by the representative of the Commissioner that, between 1994 and 13 February 1999 (certainly between 1 April 1998 and 13 February 1999 which is the period relevant to the year of assessment 1998/99), Mr A was employed by a construction company to work on site. This has not been denied by the Taxpayer.

9. From inquiry made by the Commissioner with the Director of Social Welfare, it appears that Mr A is not on the record of the social security payment system. The number 'XXX' filled in by the Taxpayer in her tax return was actually the reference number of Mr A in his application under the P(C)O.

10. Under section 27 of the P(C)O, a Pneumoconiosis Compensation Fund ('the Fund') was established. Although the Fund can include any moneys provided by the Government, basically the source of the Fund is from moneys derived from a levy on the building industry. The scheme of the Fund is therefore basically one supervised and regulated by the Government by statute but not funded by the Government.

The law

11. The relevant part of section 30(1) of the IRO reads as follows:

'30. Dependent parent allowance

(1) An allowance ("dependent parent allowance") shall be granted under this section in any year of assessment if the person or his or her spouse, not being a spouse living apart from the person, maintains a parent or a parent of his or her spouse in the year of assessment and that parent at any time in that year was –

(a) ordinarily resident in Hong Kong; and

(b) aged 60 or more or, being under the age of 60, was eligible to claim an allowance under the Government's Disability Allowance Scheme.'

INLAND REVENUE BOARD OF REVIEW DECISIONS

12. The relevant part of section 31A of the IRO reads as follows:

'31A. Disabled dependant allowance

(1) An allowance ("disabled dependant allowance") of the prescribed amount shall be granted in any year of assessment to a person in respect of every dependant of his or hers who is eligible to claim an allowance under the Government's Disability Allowance Scheme.'

13. There is no definition of the term 'Government's Disability Allowance Scheme' anywhere. On the other hand, there is nothing anywhere which provides that 'Government's Disability Allowance Scheme' means or includes the scheme of the Fund established under the P(C)O.

14. Since Mr A is still under the age of 60 years, in order to claim dependent parent allowance and disabled dependant allowance under sections 30 and 31A of the IRO in respect of Mr A, the Taxpayer must prove that, in the year of assessment 1998/99, Mr A 'was eligible to claim an allowance under the Government's Disability Allowance Scheme'.

The case of the Commissioner

15. The case of the Commissioner is that the term 'Government's Disability Allowance Scheme' does not mean or include the scheme of the Fund under the P(C)O but means the scheme operated by the Director of Social Welfare.

16. In a memo dated 19 March 2001 from the Director of Social Welfare to the Commissioner, the following is stated:

'2. The Comprehensive Social Security Assistance (CSSA) Scheme provides cash assistance to those in need on a means-tested basis, and the Disability Allowance (DA) under the Social Security Allowance provides a flat rate grant allowance for the severely disabled. A person who has been assessed to have suffering from pneumoconiosis at 20% of incapacity will not automatically be eligible for CSSA or DA. The eligibility for CSSA depends on the family's financial resources and their recognized needs under the Scheme. To be eligible for DA, a person must be medically certified by a public medical officer to be severely disabled, in a position broadly equivalent to a person with a 100% loss of earning capacity.'

17. Hence, even if Mr A had applied to the Director of Social Welfare for a disability allowance, he would not have been granted one because he was not disabled 100%. Thus, the

INLAND REVENUE BOARD OF REVIEW DECISIONS

Taxpayer was and is not in a position to claim dependent parent allowance or disabled dependant allowance in respect of Mr A.

The case of the Taxpayer

18. The Taxpayer did not give evidence or call any witness, including Mr A. She and Madam B, her mother who assisted her in the appeal elected not to give sworn evidence. Her case basically is that she had been misled by the IRD and had thus lost the opportunity to arrange for Mr A to make a claim to the Director of Social Welfare for disability allowance.

It is to be noted that, other than an inquiry made in May 2001 with some social welfare officer, even up to now Mr A has not made an application for disability allowance.

Conclusion

19. Having regard to the express wording in paragraphs 14 and 15 of the tax return filled in by the Taxpayer, the note accompanying the tax return form which also refers to 'Government's Disability Allowance Scheme' and the lack of any sworn evidence in support of the allegation that the Taxpayer had been misled and thus lost the opportunity to establish a correct basis for her claim for dependent parent allowance and disabled dependant allowance, we are not convinced that the Taxpayer had in fact been misled and prejudiced.

20. Further, as a result of the communication from the Director of Social Welfare referred to in paragraph 16 above, we are not convinced that Mr A would have been granted a disability allowance even if he had applied for it.

21. Under section 68(4) of the IRO, in an appeal, the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. We are not convinced that the Taxpayer has discharged that onus.

22. In the circumstances, we must dismiss the appeal.