

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D13/90

Dependent parent allowances – meaning and application of sub-sections 42B(1)(a) and 42B(2)(a) of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Raphael Chan Cheuk Yuen and Patrick Wu Po Kong.

Date of hearing: 8 March 1990.

Date of decision: 11 May 1990.

The taxpayer claimed dependent parent allowances in respect of his father and his mother-in-law on the grounds that they were permanent residents in Hong Kong, were over the age of 60, and should be treated as being maintained by him because they either resided with him or he had contributed not less than \$1,200 in money towards their maintenance. The claim was rejected by the assessor and the Deputy Commissioner. The taxpayer appealed to the Board of Review.

Held:

To qualify for a dependent parent allowance, it is sufficient that the parent resided with the child at any time during the year. It is not necessary that the parent has so resided throughout the year. Likewise if the child has contributed not less than \$1,200 towards the maintenance of the parent, a dependent parent allowance can be claimed notwithstanding that the parent may be independently wealthy and not in fact dependent upon the child. In the case before the Board, the taxpayer had not proved to the satisfaction of the Board that the father was permanently resident in Hong Kong. Likewise the Board was not satisfied that the mother-in-law was permanently resided in Hong Kong.

Appeal dismissed.

K A Lancaster for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against the refusal by the Commissioner to allow dependent parent allowances for his father and his mother-in-law. The years of

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assessment in question were 1982/83 to 1987/88 but excluding the year 1986/87. At the commencement of the hearing, the Taxpayer indicated that he only wished to argue in favour of the dependent parent allowances for his father in respect of the two years 1986/87 and 1987/88 and for his mother-in-law in respect of the three years 1985/86, 1986/87, and 1987/88. The Taxpayer conceded that in respect of the other years, either his father or his mother-in-law as the case might be did not qualify for dependent parent allowances under the terms of the Inland Revenue Ordinance. Though he had not filed notice of appeal in respect of the year of assessment 1986/87, it was agreed by the representative for the Commissioner that there had been some confusion between the Taxpayer and the assessor in relation to the year 1986/87. The Taxpayer had indicated to the assessor that he wished to claim the allowances but the assessor had misunderstood what the Taxpayer had said. It was agreed that the Board should express their opinion with regard to the year 1986/87 both in respect of the father and the mother-in-law and that the Taxpayer and the Commissioner would then act accordingly in respect of the year 1986/87 as a genuine mistake or error that had been made.

The facts of the appeal are as follows:

1. The father of the Taxpayer ('the father') had emigrated from Hong Kong to the United Kingdom more than twenty years ago. He had established his own business and owned his own house in England where he had resided. In 1981, he retired from actively managing his business and formed the intention of returning to Hong Kong. However, he remained in England to supervise the business which he had owned and which was then managed by another member of his family. The father wanted to sell his business but could not do so because the shop where he carried on his business was going to be demolished at some unknown date in the future.
2. The father returned to Hong Kong on 31 August 1986 and remained in Hong Kong up to 23 March 1987 when he returned to England because he had a problem regarding the pension to which he was entitled in England. He resolved the problem relating to his pension and came back to Hong Kong in November 1988 and stayed in Hong Kong until June 1989.

The Taxpayer had two places of residence in Hong Kong, a flat at Tai Po and a house at Shataukok. The Taxpayer lived at Tai Po during the week and went to stay at Shataukok at the weekends. The father lived in the Taxpayer's house at Shataukok when he was in Hong Kong in 1986/87 and 1988/89.

3. In June 1989, the Taxpayer went on a long sabbatical leave from Hong Kong to England and the father accompanied the Taxpayer to England where he remained until January 1990 when the father returned to Hong Kong.
4. The father retained his house in England and lived there when he was in England. When on long sabbatical leave, the Taxpayer bought a house in

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England and after buying the house, the Taxpayer and his father lived in the Taxpayer's house. At that time, the father's house was occupied by another son of the father and the father is currently transferring or selling his house to his other son.

5. In each of the years in question, the Taxpayer gave to his father sums of money in excess of \$1,200.
6. The father's wife who was the Taxpayer's mother remained in Hong Kong and did not go to live with the father in England though she periodically visited him in England. She continued to live in Hong Kong and when the father came to Hong Kong in 1986/87 and 1988/89, the father's wife stayed together with him in the Taxpayer's house at Shataukok.
7. The mother-in-law of the Taxpayer ('the mother-in-law') was born in Hong Kong and went to join the Taxpayer's father-in-law in England a long time ago in the 1960s. The father-in-law died in May 1985. The father-in-law had also had his own business in England and before he died he gave his business to his son. The mother-in-law came to Hong Kong in November 1985 and stayed in her own apartment in Tai Po. In April 1986, she returned to England and lived with her son and daughter. In November 1986 she returned to Hong Kong and lived in her flat till April 1987 when she returned to England. She came back to Hong Kong in January 1988 and returned from Hong Kong to England in March 1988. She again came back to Hong Kong at the end of 1988 and returned to England in March 1989. In January 1990, she came to Hong Kong and returned to England in February 1990.
8. In about 1987, the Taxpayer sold his own flat in Tai Po and moved to live in the flat in Tai Po owned by his mother-in-law and he paid her rent each month of \$2,000. The Taxpayer gave to his mother-in-law not less than \$1,200 in each of the years in question.
9. The Taxpayer has claimed that in respect of his father since August 1986 and in respect of his mother-in-law since November 1985, he is entitled to dependent parent allowances because in accordance with section 42B(1)(d) of the Inland Revenue Ordinance, his father and his mother-in-law are permanent residents in Hong Kong, over the age of 60, and to be treated as being maintained by him because they either reside with him or he has contributed not less than \$1,200 in money towards their maintenance. The assessor refused to accept the claim by the Taxpayer and the Taxpayer objected to the Commissioner. In his determination dated 29 November 1989, the Deputy Commissioner found in favour of the assessor and the Taxpayer duly appealed to this Board.

As stated above, the Taxpayer at the hearing of the appeal stated that he was only proceeding with his appeal in respect of his father for the years 1986/87 and 1987/88

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and in respect of his mother-in-law for the years 1985/86, 1986/87 and 1987/88. Accordingly, it is not necessary for us to consider the other years of assessment which were originally the subject matter of the appeal and we dismiss the Taxpayer's appeal in relation to the years of assessment 1982/83, 1983/84 and 1984/85.

The Taxpayer submitted that he was entitled to the dependent parent allowances because he had complied with all of the requirements set out in section 42B(1)(d) of the Inland Revenue Ordinance.

The representative for the Commissioner submitted that on the facts before us, the Taxpayer was not entitled to any of the allowances claimed because he had not fulfilled the requirements of section 42B(1)(d).

It is convenient for us to first of all set out the provisions of section 42B(1)(d) and 42B(2)(a) as follows:

‘ 42B(1)(d) an allowance of \$9,000, if the individual or his wife, not being a wife living apart from her husband, maintains a parent of the individual or his wife in the year of assessment and that parent at any time in that year –

- (i) was a permanent resident in Hong Kong; and
- (ii) was aged 60 or more or, being under the age of 60, was eligible to claim an allowance under the Government's disability allowance scheme;

and allowance under this paragraph may be granted in respect of each such parent of the individual or his wife so maintained;’

‘ 42B(2) for the purposes of sub-section (1)(d) –

- (a) a parent shall only be treated as being maintained by an individual or his wife if -
 - (i) the parent resides, otherwise than for full valuable consideration, with the individual for a continuous period of not less than six months in the year of assessment; or
 - (ii) the individual or his wife contributes not less than \$1,200 in money towards the maintenance of that parent in the year of assessment;
- (b) ...’

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The question for us to decide is whether or not the father and the mother-in-law qualify under all of the provisions which we have just set out.

First of all, we wish to remove completely a common misunderstanding. This relates to permanent identity cards and the right of abode in Hong Kong. It may well be that for a person permanently to reside in Hong Kong, he must have the appropriate immigration status. This may involve holding a permanent identity card and may also mean that the individual has the permanent right of abode in Hong Kong. However, permanent right of abode or the holding of a permanent identity card does not make a person a permanent resident in Hong Kong. To be a permanent resident a person must be physically present in Hong Kong on a permanent basis or having been physically in Hong Kong and having established permanent residence and the duration of absence from Hong Kong is on a temporary basis only.

There is no statutory definition of 'permanent resident in Hong Kong'. Each case must depend upon its own facts and there are clearly two extremes. For example, it is unlikely that a person who is physically present throughout a year and never leaves Hong Kong would not be permanently resident in Hong Kong during that year. Likewise a person who is physically absent from Hong Kong throughout a year is unlikely to be counted as a permanent resident. In such cases, it would need to be the clearest evidence to prove the contrary. No doubt it is possible for a person to temporarily visit Hong Kong for more than twelve months without establishing permanent residence and likewise it is no doubt possible for a person to be absent from Hong Kong for temporary purposes for more than twelve months without breaking permanent residence but in such cases there would have to be clear evidence to substantiate the temporary nature of the residence or absence.

On the facts before us, we are satisfied that when the father came to Hong Kong in August 1986, he did so intending to live in Hong Kong permanently with his wife and his son, the Taxpayer. He remained in Hong Kong until 23 March 1987 when he returned to England, not because that was his original intention, but because he had to go back to England to sort out his pension problem. During the period August 1986 to March 1987 the father was a permanent resident in Hong Kong. The relevant provision of the Inland Revenue Ordinance does not state that the parent must be permanently resident in Hong Kong throughout the year of assessment but only that the parent must be so resident 'at any time in that year'. Accordingly, for the year of assessment 1986/87, we find that the Taxpayer has complied with the requirement of section 42B(1)(d) subject to his having maintained his father according to the provisions of section 42B(2)(a).

In the course of the hearing, there was some discussion as to whether or not the father was residing with the Taxpayer within the meaning of section 42B(2)(a)(i) because the Taxpayer maintained two homes, one at Tai Po and one at Shataukok. It would appear to us that there is no restriction in the Inland Revenue Ordinance stating that the parent must follow the Taxpayer round Hong Kong where the Taxpayer is living in more than one location. On the facts we find that the father was residing with the Taxpayer for a continuous period of not less than six months in that year of assessment.

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In the course of the hearing, submissions were also made as to the contribution of not less than \$1,200 in money towards the maintenance of a parent within the meaning of section 42B(2)(a)(ii). We find as a fact that the father did not require maintenance from his son and that the father was independently wealthy and had the financial ability to maintain himself. However, it would appear to us that there is no restriction in the Inland Revenue Ordinance to the situation that if a son does contribute in cash a sum of not less than \$1,200 towards the maintenance of a parent, that parent becomes a dependent parent and the child is entitled to claim the allowance. The fact that the parent did not require the money to be given towards the parent's maintenance does not appear to us to be material. Our finding in this regard is in line with the words of the previous part of the sub-section which relates to a parent residing 'otherwise than for full valuable consideration'. Here again, there is no suggestion that a parent who is able to maintain himself or herself is not a dependent parent unless 'full valuable consideration' is provided.

The onus of proof is on the Taxpayer to prove that he is entitled to the dependent parent allowance and in respect of the next year 1987/88, the Taxpayer has not proved to our satisfaction that the father was permanently resident in Hong Kong. The father returned to England in March 1987 because he had a problem with his pension. At that time, he still had his house in England where he lived and we are not satisfied that he just went to England temporarily to sort out the problem relating to his pension. He stayed in England for more than one year which would appear to us to be a long time just because of his pension and when he did come back to Hong Kong, he did so for a few months only and must then have known that his son was intending to go to England for a long sabbatical leave. He then returned to England with his son, all of which indicates to us that the father had broken his permanent residence in Hong Kong. Accordingly, in respect of the year of assessment 1987/88, we find that the Taxpayer was not entitled to a dependent parent allowance in respect of his father.

We now turn to consider the situation in relation to the mother-in-law. Here again, we apparently have the situation of a parent who is independently wealthy and who has the ability to maintain herself. However, we accept the statement made by the Taxpayer that in each year of assessment in question, he contributed not less than \$1,200 towards the maintenance of his mother-in-law. The sum of \$1,200 is extremely small and it would appear that it has not been reviewed by the Financial Secretary for many years. It is no more than a nominal sum. However, with regard to the mother-in-law being permanently resident in Hong Kong, we are not satisfied with the explanations and facts put forward by the Taxpayer. The mother-in-law had her own children in England and was now visiting Hong Kong on a temporary basis in each year and staying with the Taxpayer. From the frequent visits which she made to and from Hong Kong, it appears to us that she did not establish permanent residence in Hong Kong and was doing no more than visiting Hong Kong with her permanent home being England.

Accordingly, we dismiss the Taxpayer's appeal so far as it relates to claims for dependent parent allowances in respect of the mother-in-law.

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For the reasons given, we dismiss all parts of the Taxpayer's appeal before us. As the year 1986/87 is not before us, we can do no more than to indicate to the Commissioner and the Taxpayer that if the matter did come before us, we would be prepared to accept that in that year the father was permanently resident in Hong Kong and the Taxpayer was entitled to claim a dependent parent allowance in respect of his father.

As a rider to this decision we suggest that the Financial Secretary should review the provisions of the Inland Revenue Ordinance relating to dependent parent allowances because under the present wording of section 42B(2)(a)(ii) the element of dependency is nominal if not minuscule and has no relevance to the allowance of \$9,000 and also has no relevance as to whether the parent needs maintenance or not.