

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D144/00**

**Salaries tax** – married person's allowance – child allowance – section 29 of the Inland Revenue Ordinance ('IRO') – whether the taxpayer had the predominant care of his two sons.

Panel: Ronny Wong Fook Hum SC (chairman), David Lam Tai Wai and Gidget Lun Kit Chi.

Date of hearing: 13 November 2000.

Date of decision: 22 March 2001.

The marriage between the taxpayer and Madam A was dissolved on 13 November 1997. Madam A was given custody of her two sons. The taxpayer was also ordered to pay periodical payments to Madam A and his two sons. In his tax return for the year of assessment 1998/99, the taxpayer claimed married person's allowance and child allowance in respect of his two sons.

It was the taxpayer's contentions that he was still maintaining Madam A and at no time did he relinquish responsibility towards his two sons. The issue was whether the taxpayer was entitled to married person's allowance and child allowance.

**Held:**

1. The taxpayer is not within section 29(1) as he was not married at any time within the year of assessment 1998/99. His case is not within section 29(4) as the taxpayer and Madam A were not 'husband and wife' and the taxpayer was not a 'spouse' within the meaning of the IRO in that year of assessment.
2. In relation to single parent allowance, it is clear that the taxpayer did not have 'sole' care of his two sons in the relevant year of assessment. The issue is whether he had the 'predominant care'. However the Board is not persuaded that the taxpayer has succeeded in discharging his onus of proof in relation to 'predominant care'. Having heard and observed the evidence as a whole, the taxpayer made no attempt to compare his role with the role of Madam A. No explanation was given to the Board as to why in the circumstances of this case his care of the two boys should be regarded as the predominant one.

**Appeal dismissed.**

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Fung Ka Leung for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

### **Background**

1. The Taxpayer and Madam A were husband and wife. The Taxpayer is a town planner. Madam A is a housewife. They have two sons – Mr B born on 28 September 1982 and Mr C born on 20 April 1986.

2. The marriage between the Taxpayer and Madam A was dissolved on 13 November 1997. By the Order of Deputy Judge Day dated 25 September 1997, the Taxpayer was ordered to pay Madam A periodical payments of \$15,000 per month, of which \$5,000 is payable to Madam A and \$5,000 to each of Mr B and Mr C. Madam A was also given custody of both Mr B and Mr C. The three of them resided in a flat in District D whilst the Taxpayer resided in a flat in District E.

3. Mr B completed his Form V with a secondary school in District D in July 1999. In April 1999, the Taxpayer approached two schools in Country F for Mr B's further education. He liaised with Mr B's principal for admission tests to be taken by Mr B in Hong Kong. The Taxpayer also succeeded in his claim for civil service fringe benefits in relation to both Mr B and Mr C on the basis that they both were his 'dependants'.

4. In his tax return for the year of assessment 1998/99, the Taxpayer claimed, inter alia, married person's allowance and child allowance in respect of his two sons. The issue before us is whether the Taxpayer is entitled to these two heads of allowances.

### **The relevant provisions in the IRO**

#### **Regarding married person's allowance**

5. Section 29(1) provides:

*'(1) An allowance ("married person's allowance") shall be granted under this section in any year of assessment if a person is, at any time during that year, married and –*

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(a) *the spouse of that person did not have assessable income in the year of assessment; ...'*

(4) *Where husband and wife are living apart a married person's allowance shall only be granted where the spouse claiming the allowance is maintaining or supporting the other.'*

6. Section 2 provides:

*' "Marriage" means –*

(a) *any marriage recognized by the law of Hong Kong; or*

(b) *any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so ...*

*and "married" shall be construed accordingly.'*

*"spouse" means a husband or wife.*

*"wife" means a married woman whose marriage is a marriage within the meaning of this section.'*

### **Regarding single parent allowance**

7. Section 32 provides:

*'(1) An allowance ("single parent allowance") of the prescribed amount shall be granted if at any time during the year of assessment the person had the sole or predominant care of a child in respect of whom the person was entitled during the year of assessment to be granted a child allowance.'*

### **Case of the Taxpayer**

8. In relation to 'married person's allowance': the Taxpayer placed substantial reliance on section 29(4) of the IRO. He argued that the subsection recognised a degree of flexibility and he adverted to the fact that he was still maintaining Madam A.

9. In relation to 'single parent allowance': the Taxpayer told us that he and Madam A had lived apart for a long time prior to their divorce. He did not ignore his two sons. He craved

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reliance on efforts that he made in locating schools for his two sons in Country F. His two sons regularly contacted him in relation to their home work. At no time did he relinquish responsibility towards his two sons.

### **Our decision**

10. In relation to married person's allowance: The Taxpayer is not within section 29(1) as he was not married at any time within the year of assessment 1998/99. His case is not within section 29(4) as the Taxpayer and Madam A were not 'husband and wife' and the Taxpayer was not a 'spouse' within the meaning of the IRO in that year of assessment.

11. In relation to single parent allowance: It is clear that the Taxpayer did not have 'sole' care of his two sons in the relevant year of assessment. The issue is whether he had the 'predominant care'. We accept that the Taxpayer was the sole provider of Mr B and Mr C. We further accept that the Taxpayer did not ignore his moral obligations as the father of the two boys. However we are not persuaded that the Taxpayer has succeeded in discharging his onus of proof in relation to 'predominant care'. His case centred on his own role. It is however not disputed that Madam A, at the material times, had the custody of the two boys and was living with both of them in District D. There can be no doubt that she too had the care of both boys. The Taxpayer made no attempt to compare his role with the role of Madam A. No explanation was given to us as to why in the circumstances of this case his care of the two boys should be regarded as the predominant one.

12. For these reasons, we dismiss the Taxpayer's appeal.