Case No. D151/01

Property tax – whether tenancy of a property ceased to operate during part of the years of assessment – definition of the word 'payable' – surrender, cancellation or suspension of tenancy by conduct – fact of life was not the precise legal basis – sections 5(1), 5B, 7C and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Paul Chan Mo Po and David Lee Tai Wai.

Date of hearing: 7 December 2001.
Date of decision: 6 February 2002.

The appellant, an elderly woman of about 70 years old, appealed against a determination of property tax assessments for the years of assessment 1995/96 and 1996/97 of a flat at Building A ('the Property') on the ground that no rent had been received from 1 September 1995 to 31 August 1996.

The appellant was represented by her daughter on appeal.

The facts appear sufficiently in the following judgment.

Held:

1. Section 68(4) of the IRO provides that the onus of proving that the assessment against is excessive or incorrect is on the appellant.

2. Sections 5(1), 5B and 7C of the IRO are relevant for the assessment of property tax.

3. The Board found the evidence of the appellant's daughter credible and accepted it.

4. The Board did not think there was any difference between the English version of 'payable' and the Chinese version as the relevant words are「**須是……付出的代價**」.

5. In assessing the agreement by the daughter that she had a responsibility to pay rent, the Board borne in mind that the mother and daughter relationship was on top of the landlord and tenant relationship.

6. Had the mother (the appellant) and daughter been properly advised, they might have made a written agreement to surrender, cancel or suspend the operation of the tenancy agreement for 1 September 1994 to 31 August 1996.

7. Had the mother and daughter been properly advised, the mother might have agreed by deed to waive the rent for September 1995 to August 1996.

8. But they were mother and daughter and mother and daughter would not rush off to see lawyers when the daughter was in matrimonial disharmony and financial difficulty.

9. The Board was of the view that the mother and daughter had by conduct agreed to the surrender, cancellation or suspension of the tenancy agreement for the remaining term or the waiver of the rent for the remaining term.

10. The fact of life was not the precise legal basis, but the consensus between mother and daughter that rent ceased to be 'payable' for the remaining term.

11. For the reasons given, the appellant had discharged the onus of proof. The assessable value from September 1995 to August 1996 was nil.

Appeal allowed.

Ngan Man Kuen for the Commissioner of Inland Revenue.
Taxpayer represented by her daughter.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 26 July 2001 whereby:

(a) Property tax assessment for the year of assessment 1995/96 under charge number 7-3862233-96-8, dated 26 June 1998 showing net assessable value of $72,000 with tax payable thereon of $10,800 was confirmed.

(b) Property tax assessment for the year of assessment 1996/97 under charge number 7-2131456-97-A, dated 26 June 1998 showing net assessable value of $74,800 with tax payable thereon of $11,220 was confirmed.

2. The subject property was a flat at Building A ('the Property').

3. The Appellant appealed on the ground that she had not received any rent from 1 September 1995 to 31 August 1996.

4. The Appellant, about 70 years of age, did not attend the hearing of the appeal. She was represented by her daughter, Miss B.

5. Miss B told us that she had moved out from the Property by the end of August 1995; that she resided at Charity Organization C for about three months after which she moved to a flat at Building D in about November 1995; that she moved back to the Property in September 1996 after her ex-husband had left the Property; and that she had not paid any rent to her mother for the period from September 1995 to August 1996. She confirmed on oath what she said and was cross-examined by Miss Ngan Man-kuen who represented the Respondent at the hearing of the appeal.

6. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant. Section 5(1) provides that:

> '*Property tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person being the owner of any land or buildings or land and buildings wherever situate in Hong Kong and shall be computed at the standard rate on the net assessable value of such land or buildings or land and buildings for each such year.*'

Section 5B provides that:

> '*The assessable value of land or buildings or land and buildings for each year of assessment shall be the consideration, in money or money's worth, payable in that year to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or land and buildings.*'

Section 7C provides that:

> '*In ascertaining the assessable value of any land or buildings or land and buildings under this Part for any year of assessment commencing on or after 1 April 1983, there shall be deducted any consideration in money or money's worth, payable or deemed to be payable on or after 1 April 1983 to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or that land and buildings and proved to the satisfaction of the assessor to have become irrecoverable during that year of assessment.*'

7. With the exception of the last sentence in paragraph 1(3), the facts stated in paragraphs 1(1) to 1(12) of the determination were admitted by the Appellant and we find them as facts.

8. We approached the evidence of Miss B with circumspection. We considered the submission of Miss Ngan Man-kuen with care. We find the evidence of Miss B summarised in paragraph 5 credible and accept it. The relevant period for the purpose of this appeal is from 1 September 1995 to 30 August 1996.

(a) She could not afford to pay rent to her mother at $7,500 per month. In the action commenced by her ex-husband against the Appellant, it was common ground between the ex-husband and the Appellant that payments by the ex-husband into her bank account ceased in about November 1995. She was responsible for maintaining the child of the family, including paying for a person to look after the child on a 24-hour basis on weekdays. Moreover, by a document dated 27 July 1996 she did not accept the legal aid offer to take divorce proceedings against her ex-husband because she could not afford to pay contribution of $18,000 by paying $2,000 on acceptance of the legal aid offer and $2,000 each month commencing on 18 July 1996.

(b) We find some support in the numbering of the rent receipt counterfoils. The numbering started with number 1 for September 1990 and ended with number 60 for August 1995. The next counterfoil was for September 1996 and its numbering was number 1. If the numbering had continued, and if rent had been paid from September 1995 to August 1996, it should have been number 73. We accept her explanation that a new rent receipt book was used when she resumed paying rent in September 1996.

(c) We also find some support in the letter (the authenticity of which had not been challenged by the Respondent) dated 4 December 2001 from the registered owner of the flat at Building D stating that Miss B had been sharing that flat during late 1995 to mid-1996 for about ten months.

(d) Miss Ngan Man-kuen relied on the documents in two proceedings. The first was the High Court action commenced by the ex-husband against the Appellant claiming to be a co-owner of the Property. The second was the divorce proceedings commenced by Miss B against her ex-husband. In this context, it should be borne in mind that the contest in the High Court action was whether the Appellant lent the purchase price to the ex-husband or whether the Appellant merely rented the Property to the ex-husband and Miss B. More importantly, as the payments by the ex-husband ceased in about November 1995, there was thus no issue about the nature of any payment from November or December 1995 to

> August 1996, for the simple reason that there was no payment. Thus, there was also no issue about whether rent had been paid from November or December 1995 to August 1996. We do not think that the residential addresses given in matrimonial proceedings are conclusive. At any rate, the documents placed before us were by no means complete, and having given them the best consideration, we conclude that they do not preclude us from finding as a fact, which we do, that no rent had been paid from September 1995 to August 1996.

9. Miss Ngan Man-kuen submitted that the Appellant would still fail in this appeal even if no rent had been paid. She relied on the agreement by Miss B that she had a responsibility to pay rent. She contended that rent was still 'payable' within the meaning of section 5B and had not become 'irrecoverable during that year of assessment' within the meaning of section 7C.

10. Having given the matter further thought, we do not think there is any difference between the English version of 'payable' and the Chinese version as the relevant words are **「須是……付出的代價」**.

11. We return now to the submission of Miss Ngan Man-kuen. In assessing the agreement by Miss B that she had a responsibility to pay rent, we bear in mind the mother and daughter relationship on top of the landlord and tenant relationship. Had they been properly advised, they might have made a written agreement to surrender, cancel or suspend the operation of the tenancy agreement for 1 September 1994 to 31 August 1996. Had they been properly advised, the Appellant might have agreed by deed to waive the rent for September 1995 to August 1996. But they were mother and daughter and mother and daughter would not rush off to see lawyers when the daughter was in matrimonial disharmony and financial difficulty. In our view, the mother and daughter had by conduct agreed to the surrender, cancellation or suspension of the tenancy agreement for the remaining term or the waiver of the rent for the remaining term. The fact of life was not the precise legal basis, but the consensus between mother and daughter that rent ceased to be 'payable' for the remaining term.

12. For the reasons given above, the Appellant had discharged the onus of proof. The assessable value from September 1995 to August 1996 is nil. We allow the appeal and remit the case to the Commissioner to revise the assessments to give effect to our decision.