INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D27/98

Profits tax – whether rental income or licence fee derived from car parking space – sections 5(1), 5(2)(a) and 5B(2) of the Inland Revenue Ordinance.

Panel: Benjamin Yu SC (chairman), Melville Thomas Charles Boase and Colin Cohen.

Dates of hearing: 24 and 27 February 1998.
Date of decision: 20 May 1998.

The taxpayer is the Incorporated Owners of Building A. The taxpayer objected to the property tax assessment relating to the rental income or licence fee derived from a car parking space in Building A which were deposited into the management fund of the building.

The issues raised by the taxpayer were (a) whether the taxpayer could be considered the "owner" of the car parking space within the meaning of the Inland Revenue Ordinance ("the IRO") for the charging provision under section 5(1) of the IRO to apply; (b) if the taxpayer were held to be the owner, whether it had received any money or money's worth within the meaning of section 5B(2) of the IRO; and (c) whether the taxpayer is entitled to exemption under section 5(2) of the IRO.

Held:

1. The car parking space is part of the common area to which all the owners of Building A have a right to use, it thus falls within the definition of "common parts" within the meaning of section 2 of the Buildings Management Ordinance, Chapter 344 ("BMO").

2. The rights, powers and privileges of the owners in relation to the car parking space had, by virtue of section 16 of the BMO, been vested in the taxpayer upon its incorporation to the exclusion of the owners for the purposes of the exercising of the right to let it out.

3. The definition of "owner" in section 2 of the BMO is inclusive and should be given the first construction adverted to in Lord Watson's dictum in Dilworth v The Commissioner of Stamps [1899] AC 99 (PC), this is, to enlarge the meaning of the word and must be construed in the context of section 5 of the IRO. When all the rights, privileges and powers of the owners of the common parts are exclusively exercisable and indeed exercised by the

taxpayer, it should be regarded as the owner for the purpose of a charge on property tax.

4. Alternatively, the same result could also be arrived by another route. The owners of the building are the "owners" of the car parking space within the meaning of section 5 of the IRO, the liabilities of the owners under that section would be enforceable against the taxpayer.

5. Section 5B(2) of the IRO does not limit the payment of money or money's worth for the benefit of the owner, but extends to payment to or to the order of the owner. As the taxpayer is the owner of the car parking space within the meaning of section 5 of the IRO, the rent or licence fee was certainly payable to the taxpayer.

6. The basis for an exemption under section 5(2) does not exist. Firstly, there was no application in writing to the Commissioner; and secondly, the taxpayer had to prove facts to the satisfaction of the Commissioner that if exemption were not granted, it would have been paying both profits tax as well as property tax on the same income and thus entitled to a set-off under section 25. It cannot be entitled to a set-off and thus not entitle to an exemption when it had not even been charged profits tax.

Appeal dismissed.

Case referred to:

Dilworth v The Commissioner of Stamps [1899] AC 99

Robert Andrews instructed by Department of Justice for the Commissioner of Inland Revenue.
Richard Bobb of Messrs Richard A Bobb, Chartered Accountants for the taxpayer.

Decision:

1. This is an appeal from the determination by the Commissioner of Inland Revenue ('the Commissioner') dated 31 July 1997. Under that determination, the Commissioner refused to accede to an objection by the Incorporated Owners of Building A ('Incorporated Owners') on the property tax assessment for the year of assessment 1994/95. The objection was made by Company B, a management company ('the Manager') on behalf of the Incorporated Owners. It related to the rental income or licence fee derived from a car parking space designated as Car Parking Space No X in Building A.

The Facts

2. Building A consists of two blocks of 30-storey buildings with 208 flats. The rights and obligations of the owners of the buildings are governed by the terms of a deed of mutual covenant and management agreement dated 27 July 1988 ('the DMC'). Under the DMC, there are 9 car parking spaces on the second floor, 13 spaces on the third floor and 20 spaces on the fourth floor, making a total of 42 car parking spaces. According to the evidence of Mr C, an employee of the Manager, there had always been an extreme shortage of car parking spaces for the residents. On a date unknown, the Manager, with the consent of the management committee of Building A, delineated additional car parking spaces within the blocks. For the purpose of this appeal, we are only concerned with Car Parking Space No X. According to the plan (at page 93 of the Bundle of documents), Space No X is situated on the fourth floor on the side of Road D and perpendicular to the passage on the fourth floor, marked as 'drive way'. The DMC contains, inter alia, the following definitions:

> 'Building common areas' which shall mean 'the driveway on common floor level. And the car port common areas on the car port level of the building … and any other area or areas within the building not specifically assigned to any one owner but intended to be used for the benefit of all the owners of the building.
>
> 'Car port common areas' which shall mean 'the driveways in the car port levels including the driveway leading from Road E'.
>
> Car Parking Space No X was rented or licensed out by the Manager, and the rental receipts or licence fees were deposited into the management fund.

Relevant provisions

3. Section 5(1) of the Inland Revenue Ordinance (the IRO) provides

> *'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 5(2)(a) provides:

> *'Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this*

> *subsection, would be paid by the corporation, and the property shall be and remain exempted from property tax for each year of assessment in which the circumstances are such as to qualify the property for such exemption for that year.'*

Section 5B(2) provides:

> *'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.'*

The Issues

4. Mr Bobb, on behalf of the Incorporated Owners, raised the following issues on this appeal:

(a) whether the Incorporated Owners can be considered the 'owner' of Car Parking Space No X within the meaning of section 5(1) of the IRO, for that charging provision to apply,

(b) if, contrary to his contention, the Incorporated Owners were to be held to be the owner, whether the Incorporated Owners has received any money or money's worth within the meaning of section 5B(2).

(c) whether the Incorporated Owners is entitled to exemption under section 5(2).

Section 5(1): Is the Incorporated Owners the owner of Car Parking Space No X?

5. Car Parking Space No X is either part of the 'car port common area' or the 'building common area'. In either case, there can be no doubt that it is part of an area within the building not specifically assigned to any one owner but intended to be used for the benefit of all the owners of the Building. In other words, it is part of the common area to which all the owners (including owners of car park spaces) of Building A have a right to use. It thus falls within the definition of 'common parts' within the meaning of the Buildings Management Ordinance (''BMO'), Chapter 344. See section 2 which defines 'common parts' to mean:

> *'the whole of a building, except such parts as having been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner'.*

6. Section 16 of the BMO provides:

> *'Where the owners of a building have been incorporated under section 8, the rights, powers, privileges and duties of the owners in relation to the common*

> *parts of the building shall be exercised and performed by, and the liabilities of the owners in relation to the common parts of the building shall, subject to the provisions of this Ordinance, be enforceable against, the corporation to the exclusion of the owners …'*

Accordingly, the rights, powers and privileges of the owners in relation to car Parking Space No X had, by virtue of section 16 of the BMO, been vested in the Incorporated Owners upon its incorporation.

7. Under the IRO, an 'owner' in respect of land or buildings or land and building 'includes a person holding directly from the Government, a beneficial owner, a tenant for life, a mortgagor, a mortgagee in possession, a person with adverse title to land receiving rent from buildings … and includes an executor of the estate of an owner'. Does that expression encompass someone like an incorporated owner? In so far as section 16 vests in the Incorporated Owners the rights powers and privileges of the owners in the common parts *to the exclusion of the owners*, the Incorporated Owners must, in our view, be recognized as the owner of the common parts for the purposes of the exercising of rights in question, that is,, the right to let it out. There is in law no person other than the Incorporated Owners who can exercise the right to let out Car Parking Space No X. The definition of 'owner' in section 2 is inclusive. In Dilworth v The Commissioner of Stamps [1899] AC 99 at 105, Lord Watson delivering the opinion of the Privy Council said:

> *'The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statutes; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clauses declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariable be attached to these words or expressions.'*

Having regard to the words used in the inclusive definition of the word 'owner', we are of the view that it should be given the first construction adverted to in Lord Watson's dictum, that is, to enlarge the meaning of the word. Furthermore, the word 'owner' must be construed in the context of section 5 of the IRO. When all the rights privileges and powers of the owners of the common parts are exclusively exercisable and indeed exercised by the Incorporated Owners, it should in our view be regarded as the owner for the purpose of a charge on property tax.

8. The same result could also be arrived at by another route. Under section 16 of the BMO, the liabilities of the owners in respect of the common parts are enforceable against the Incorporated Owners to the exclusion of the owners. Thus, if one takes the view

that the owners of the building are the 'owners' of the car parking space within the meaning of section 5, the liabilities of the owners under that section would be enforceable against the Incorporated Owners.

Section 5B(2): Did the Incorporated Owners receive money or money's worth?

9. Mr Bobb submitted that since all the rental receipts/licence fees were ploughed back to the management fund, the Incorporated Owners did not receive any money or money's worth for there to be an assessable value. However, section 5B(2) does not limit the payment of money or money's worth for the benefit of the owner, but extends to payment to or to the order of the owner. If, as we concluded above, the Incorporated Owners is the owner of the car parking space within the meaning of section 5, the rent or licence fee was certainly payable to the Incorporated Owners.

Mutual Trading

10. We have been referred to a number of authorities on mutual trading, that is, cases where persons carrying on a trade do so in such a way that they and the customers are the same persons. In those cases, no profits or gains are yielded for tax purposes and therefore no assessment in respect of trade profits can be made. In our view, these cases do not assist. The question in those cases was whether there were profits derived from a trade. We are not concerned with trade profits, but with the applicability or otherwise of the charging provisions for property tax.

Section 5(2): Can the Incorporated Owners claim exemption?

11. We agree with Counsel for the Commissioner that the basis for an exemption under section 5(2) does not exist. There must firstly be an application in writing to the Commissioner. There was none. Secondly, the taxpayer has to prove facts to the satisfaction to the Commissioner that if exemption were not granted, it would have been paying both profits tax as well as property tax on the same income and thus entitled to a set-off under section 25. It cannot be entitled to a set-off (and thus not entitled to an exemption) when it had not even been charged profits tax.

Conclusion

12. For the reasons given above, we dismiss the appeal and confirm the assessment.