

**Case No. D31/05**

**Salaries tax** – dependent parent allowance – more than one person eligible for it – no agreement who is entitled to it – Inland Revenue Ordinance ('IRO') sections 24D (4)(b) and 33.

Panel: Patrick Fung Pak Tung SC (chairman), Anthony So Chun Kung and Dianthus Tong Lau Mui Sum.

Dates of hearing: 8 March and 5 May 2005.

Date of decision: 26 July 2005.

The taxpayer wanted to claim dependant parent allowances in respect of Mr D and Madam H. However, Mr J also wanted to claim the allowances.

The Commissioner determined that both the taxpayer and Mr J were eligible to claim the allowances but he decided not to grant the allowances to either of them because they could not reach any agreement according to section 33 of the IRO.

The taxpayer gave evidence before the Board to support his case while the Commissioner did not call Mr J to give evidence.

**Held:**

1. Reading the bank record book, the Board found that every time Mr J deposited money into Madam H's saving account, his mother would withdraw the same amount the same day. The money was deposited into the account and withdrawn immediately just for creating an impression that money was put into Madam H's account for her expenditure. Thus, the tax benefit should be given to the taxpayer but not Mr J.

**Appeal allowed.**

Taxpayer in person.

Lai Wing Man and Wong Kai Cheong for the Commissioner of Inland Revenue.

**Decision:**

**The appeal**

1. The Inland Revenue Department issued notices of assessment and demand for salaries tax or additional salaries tax for the years of assessment 2000/01, 2001/02 and 2002/03 against the Taxpayer. The Taxpayer objected to such assessment.

2. By a determination made by the Commissioner of Inland Revenue ('the Commissioner') by one of her deputies dated 12 November 2004 ('the Determination'), the Commissioner revised the said assessments to the following:

- (i) For the year of assessment 2000/01, the assessable income was \$23,900 with tax payable thereon being \$4,063.
- (ii) For the year of assessment 2001/02, the assessable income was \$335,994 with tax payable thereon being \$43,618.
- (iii) For the year of assessment 2002/03, the assessable income was \$13,700 with tax payable thereon being \$2,329.

3. The Taxpayer is not satisfied with the Determination and has brought the present appeal.

**The facts**

4. The basic relevant facts are set out below.

5. The Taxpayer has a father, Mr A, born in 1914, who during the relevant years of assessment lived in the Old People's Home B.

6. The wife of the Taxpayer is Madam C ('the Taxpayer's Wife').

7. The father of the Taxpayer's Wife is Mr D, born in 1914. During the relevant years of assessment, he lived in the Old People's Home E, then the Old People's Home F and eventually (as from 11 April 2002) the Care and Attention Home G.

8. The mother of the Taxpayer's Wife is Madam H, born in 1919. During the relevant years of assessment, she was living in the Care and Attention Home G.

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9. The Taxpayer's Wife has a number of brothers and sisters, including Madam I. Madam I has a son called Mr J.

10. For the relevant years of assessment, the Taxpayer and the Taxpayer's Wife claimed exemption from tax liability in respect of expenditure incurred for their parents as follows:

<b>Year of assessment</b>	<b>Nature of claim</b>	<b>Mr A</b>	<b>Mr D</b>	<b>Madam H</b>
2000/01	(i) dependent parent allowance	>\$12,000	>\$12,000	>\$12,000
	(ii) residential care expenses	\$26,000	\$14,000	\$14,000
2001/02	(i) dependent parent allowance	nil	nil	nil
	(ii) residential care expenses	\$28,000	\$14,000	\$26,000
2002/03	(i) dependent parent allowance	nil	nil	>\$12,000
	(ii) residential care expenses	nil	nil	\$14,000

In response to an inquiry by the Inland Revenue Department regarding the year of assessment 2001/02, however, the Taxpayer's Wife said: 'My father's [Mr D] old people's home expenses were not paid by myself or my spouse. The \$14,000 expenses were incurred by us for weekly taking my father to go to drink tea, have dinner, go travelling and for clothing, shoes, socks, spectacles, seeing the doctor, seeing a bone-setter, activity money, buying a watch, buying a razor, setting false teeth etc.'

11. For the same years of assessment, Mr J also claimed exemption from tax liability in respect of expenditure incurred for his grandparents as follows:

<b>Year of assessment</b>	<b>Nature of claim</b>	<b>Mr D</b>	<b>Madam H</b>
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2000/01	(i) dependent grandparent allowance	>\$12,000	>\$12,000
	(ii) residential care expenses	\$21,600	\$12,000
2001/02	(i) dependent grandparent allowance	>\$12,000	>\$12,000
	(ii) residential care expenses	\$12,000	\$12,000
2002/03	(i) dependent grandparent allowance	nil	>\$12,000
	(ii) residential care expenses	nil	nil

**The law**

12. The relevant parts of section 26B of the Inland Revenue Ordinance Chapter 112 ('IRO') provide as follows:

***'26B. Concessionary deductions, general provisions***

- (1) *This Part prescribes the deductions which shall be allowable to persons chargeable to tax under Part III or VII and the circumstances in which such deductions shall be so allowable.*
- (2) *Every person who claims a deduction under this Part shall make his claim in the specified form and the person shall be allowed a deduction only if the claim contains such particulars and is supported by such proof as the Commissioner may require.'*

13. The relevant parts of section 26D of the IRO provide as follows:

***'26D. Elderly residential care expenses***

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(1) *Subject to the other provisions of this section, where a person or his or her spouse, not being a spouse living apart from the person, pays during any year of assessment any residential care expenses in respect of a parent or grandparent of the person who at any time in that year of assessment is aged 60 or more or, being under the age of 60, is eligible to claim an allowance under the Government's Disability Allowance Scheme, a deduction in respect of the residential care expenses shall be allowable to that person for that year of assessment.*

(2) *A deduction under subsection (1) is allowable to a person in respect of each parent or grandparent of the person, in so far as any residential care expenses described in that subsection have been paid by the person or his or her spouse in respect of that parent or grandparent.*

...

(4) (a) *Subject to paragraph (b), a deduction in respect of any residential care expenses shall not be allowable under this section to more than one person for any year of assessment in respect of the same parent or grandparent.*

(b) *Where a deduction in respect of any residential care expenses is claimed by or allowed to more than one person for any year of assessment in respect of the same parent or grandparent, section 33(2) to (4) shall apply with the necessary modifications to such a deduction as it does to a dependent parent allowance, a dependent grandparent allowance, a dependent brother or dependent sister allowance, a child allowance or a disabled dependant allowance; and section 33 shall, where this paragraph applies, be construed as if a reference therein to such an allowance included, in the case of any residential care expenses so claimed, a reference to an allowance to which section 33(2) applies and, in the case of any residential care expenses so allowed, a reference to an allowance to which section 33(3) applies.*

(5) *In this section –*

*'parent or grandparent' (父母或祖父母), in relation to any person, means –*

(a) *a parent or parent of his or her spouse; or*

(b) *a grandparent or grandparent of his or her spouse;*

*‘residential care expenses’ (住宿照顧開支) means any expenses payable in respect of the residential care received at a residential care home and paid to that residential care home or any other person acting on its behalf;’*

14. The relevant parts of section 27 of the IRO provide as follows:

***‘27. Allowances, general provisions***

- (1) *This Part prescribes the allowances which shall be granted to persons chargeable to tax under Parts III and VII and the circumstances in which such allowances are grantable.*
- (2) *Every person who claims an allowance under this Part shall make his claim in the specified form and an allowance shall be granted only if the claim contains such particulars and is supported by such proof as the Commissioner may require.’*

15. Section 30 of the IRO provides 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 that 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.*
- (2) *A dependent parent allowance may be granted in respect of each such parent who is so maintained.*
- (3) *A dependent parent allowance grantable under this section is –*

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- (a) *an allowance of the prescribed amount;*
- (b) *an additional allowance of the prescribed amount if a parent in respect of whom the person is eligible to claim an allowance under paragraph (a) for the year of assessment was residing, otherwise than for full valuable consideration, with the person continuously throughout the year of assessment.*

(4) *For the purposes of this section –*

- (a) *a parent shall only be treated as being maintained by a person or his or her spouse if–*
  - (i) *the parent resides, otherwise than for full valuable consideration, with that person and his or her spouse for a continuous period of not less than 6 months in the year of assessment; or*
  - (ii) *the person or his or her spouse contributes not less than the prescribed amount in money towards the maintenance of that parent in the year of assessment;*

(5) *Where a deduction has been allowed to a person under section 26D for any year of assessment in respect of a parent or parent of his or her spouse, no person shall be granted a dependent parent allowance under this section for that year of assessment in respect of the same parent.'*

16. Section 30A of the IRO is a section very similar to section 30 except that it applies to a dependent grandparent (as opposed to 'parent') allowance.

17. Section 33 of the IRO provides as follows:

***'33. Provisions supplementary to sections 30, 30A, 30B, 31 and 31A***

(1) *Subject to sections 31(2) and 31A(2), a dependent parent allowance, a dependent grandparent allowance, a dependent brother or dependent sister allowance, a child allowance or a disabled dependant allowance shall not be given to more than one person in any year of assessment in respect of the same parent, grandparent, brother, sister or child.*

(1A) *In any year of assessment –*

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- (a) *a dependent parent allowance and a dependent grandparent allowance; or*
- (b) *a dependent brother or dependent sister allowance and a child allowance,*

*shall not both be given for the same dependent person.*

- (2) *Subject to sections 31(2) and (3) and 31A(2) and (3), where the Commissioner has reason to believe that 2 or more persons are eligible to claim such an allowance in respect of the same parent, grandparent, brother, sister or child for the same year of assessment, the Commissioner shall not consider any claim until he is satisfied that the claimants have agreed which of them shall be entitled to claim in that year.*
- (3) *Where a dependent parent allowance, a dependent grandparent allowance, a dependent brother or dependent sister allowance, a child allowance or a disabled dependant allowance has been granted –*
  - (a) *otherwise than under section 31(2) or 31A(2) to 2 or more persons in respect of the same parent, grandparent, brother, sister or child; or*
  - (b) *to both a husband and wife, contrary to section 31(3) or 31A(3); or*
  - (c) *to a person and, within 6 months of such allowance being granted, another person appears to the Commissioner to be eligible to be granted that allowance in respect of the same parent, grandparent, brother, sister or child for the same year of assessment,*

*the Commissioner shall invite the persons to whom the allowance has been granted and any other individual who appears to the Commissioner to be eligible to be granted the allowance to agree which of them is to have the allowance (being an agreement consistent with the provisions of this Part) and the Commissioner may in consequence of such agreement, or if the individuals do not so agree within a reasonable time, within the period specified in section 60, raise additional assessments under that section.*



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(3A) *Where the Commissioner has reason to believe that there are persons eligible to claim, respectively –*

- (a) *a dependent parent allowance and a dependent grandparent allowance; or*
- (b) *a dependent brother or dependent sister allowance and a child allowance,*

*in respect of the same dependent person for the same year of assessment, the Commissioner shall not consider any claim until he is satisfied that the claimants have agreed which of the allowances shall be claimed in that year.*

(3B) *Where –*

- (a) *a dependent parent allowance and a dependent grandparent allowance; or*
- (b) *a dependent brother or dependent sister allowance and a child allowance,*

*have both been granted in respect of the same dependent person contrary to subsection (1A), the Commissioner shall invite the persons to whom the allowances have been granted to agree which of the allowances is to be given (being an agreement consistent with the provisions of this Part) and the Commissioner may in consequence of such agreement, or if the individuals do not so agree within a reasonable time, within the period specified in section 60, raise additional assessments under that section.*

(3C) *Where –*

- (a) *a dependent parent allowance or a dependent grandparent allowance has been granted for a dependent person; or*
- (b) *a dependent brother or dependent sister allowance or a child allowance has been granted for a dependent person,*

*and, within 6 months of the allowance being granted, another person appears to the Commissioner to be eligible to be granted the other allowance for the same dependent person for the same year of assessment, the Commissioner is to invite the person to whom the allowance has been granted and any other person who appears to the Commissioner to be eligible to be granted the other*

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*allowance for the same dependent person to agree which of the allowances is to be granted (being an agreement consistent with this Part).*

*(3D) The Commissioner may, in consequence of an agreement under subsection (3C), or, if the persons do not agree under that subsection within a reasonable time, within the time specified in section 60, raise additional assessments under section 60.*

*(4) The Commissioner shall exercise his powers under this section in such manner as may appear to him to be just having regard to such information only as may be in his possession at the time when he exercises those powers.'*

18. For the relevant years of assessment, the limits of claim for allowances under sections 30 and 30A are set out in Schedule 4 to the IRO as follows:

*'3. Section 30 (dependent parent allowance) –*

<i>(a) subsection (3)(a)</i>	<i>\$30,000</i>
<i>(b) subsection (3)(b)</i>	<i>\$30,000</i>
<i>(c) subsection (4)(a)</i>	<i>\$12,000</i>

*4. Section 30A (dependent grandparent allowance) –*

<i>(a) subsection (3)(a)</i>	<i>\$30,000</i>
<i>(b) subsection (3)(b)</i>	<i>\$30,000</i>
<i>(c) subsection (4)(a)</i>	<i>\$12,000'</i>

**The issue**

19. The crux of the reasons for the Determination are set out in sub-paragraphs (7) and (8) on the last page thereof as follows:

*'(7) First, regarding [the Taxpayer's] claim for dependent parent allowance in respect of [Mr D], I accept that both [the Taxpayer] and [Mr J] are respectively qualified to claim dependent parent allowance and dependent grandparent allowance in respect of [Mr D]. Under the circumstance that [the Taxpayer] and [Mr J] cannot reach any agreement, according to section*

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33 of the Inland Revenue Ordinance, I am not allowed to entertain the claim for allowance by either side. I think that my decision not to grant allowance to either of [the Taxpayer] and [Mr J] is just.

- (8) Secondly, regarding [the Taxpayer's] claim for residential care expenses deduction or dependent parent allowance in respect of [Madam H], I accept that [the Taxpayer] is qualified in respect of [Madam H] to claim or be granted the residential care expenses deduction or dependent parent allowance in question. At the same time, however, according to present information, I also believe that [Mr J] is qualified in respect of [Madam H] to claim or be granted dependent grandparent allowance. Under the circumstance that [the Taxpayer] and [Mr J] cannot reach any agreement, according to sections 26D(4)(b) and 33 of the Ordinance, I shall not allow or consider the claim by either side for the relevant deduction or allowance. I think that my decision not to grant the deduction or allowance in question to [the Taxpayer] or [Mr J] is just.'

20. The issue is whether the Commissioner is justified in accepting that both the Taxpayer and Mr J were qualified to claim the deductions/allowances in question resulting in neither party being granted the same.

**The course of the proceedings**

21. Before we proceed to consider the merits of the appeal, we should mention the course which the proceedings took.

22. The appeal was first heard on 8 March 2005. On that occasion, the Taxpayer gave evidence on oath and made submissions. He also called Madam H to give evidence. As it was obvious that the hearing could not be finished on that evening, it was adjourned to another day to be fixed. It was also made clear by the Board that the adjournment should enable the Commissioner's representatives to check with the Care and Attention Home G the accuracy of certain records of visits and activities produced by the Taxpayer in evidence.

23. At the first hearing, the Commissioner's representatives also indicated that they would be calling Madam I and, possibly, Mr J, to give evidence for the Commissioner.

24. Shortly before the resumed hearing on 5 May 2005, the Board was informed by the Commissioner's representatives that they would not be calling Mr J or Madam I to give evidence. The Board was also supplied with copies of correspondence between those two persons and the Commissioner's representatives which indicated that Madam I had been expecting only to be questioned by members of the Board. When it was pointed out that she could be questioned also

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by the Taxpayer, the response was that she would refuse to attend the resumed hearing. As a result, the Commissioner called no evidence.

25. Furthermore, as a result of not being able to call evidence, the Commissioner's representatives in the course of submissions made the following concessions:

- (i) In respect of the notice of assessment and demand for additional salaries tax for the year of assessment 2000/01 (see paragraph 2(i) above), the same would be withdrawn or cancelled.
- (ii) In respect of the notice of assessment and demand for additional salaries tax for the year of assessment 2002/03 (see paragraph 2(ii) above), the same would also be withdrawn or cancelled.
- (iii) In respect of the notice of assessment and demand for salaries tax for the year of assessment 2001/02 (see paragraph 2(ii) above), the figure of '\$335,994' representing the assessable income would be amended to read '\$305,994'.

As a result, the scope of the dispute became narrower.

**Our decision**

26. We have looked at all the evidence, especially the documentary evidence produced in relation to the claims by both the Taxpayer and Mr J.

27. In relation to the claim by Mr J, we find that the alleged visits by Madam I and/or Mr J do not tally with the records kept by the Care and Attention Home G, as analysed by the Taxpayer.

28. In relation to the savings account no. XXX-X-XXXXXX-X with the Bank K held in the name of Madam H, it was alleged by Mr J that, over a long period of time, money was injected by him or his mother every month into it for the upkeep of Madam H. The savings account record book shows, however, that every time an amount was deposited the same amount would be withdrawn the same day. In a letter from the Inland Revenue Department to Mr J dated 18 August 2004, the senior assessor said:

'As shown by the record of the [Bank K], the relevant deposits were totally withdrawn by your mother [Madam I]. Obviously, the deposits in question were not withdrawn by [Madam H] nor utilized for the use of [Madam H]. Under such circumstances, do you still persist in your allegation that every year you gave [Madam H] a sum of not less than \$12,000 for her upkeep.'

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In a letter to the Inland Revenue Department dated 30 August 2004 from Madam I, she said in response to inquires to her about the same matter:

‘ Mother authorized daughter [Madam I] to keep safe custody of the seal and Savings Account Bank for A/C No. [XXX-X-XXXXXX-X] and also to withdraw money therefrom to pay the fee for the [Care and Attention Home G]. Any deficiency would be paid for by [Madam I].’

It does not make sense for the money to be deposited into the account and withdrawn immediately. The irresistible inference to be drawn is that money was deposited into the account and withdrawn immediately by Madam I or Mr J just for the purpose of creating an impression that money was put into Madam H' s account for her expenditure.

29. The matters referred to in paragraphs 27 and 28 above have created considerable doubt in the minds of the Board members as to the genuineness of the claim by Mr J and Madam I. The burden is of course on the Taxpayer to show that he has merits in this appeal. He has given evidence on oath and has called Madam H to give evidence on oath. There is no challenge by the Commissioner about the Taxpayer' s own entitlement to claim the relevant tax benefit. As regards Mr J' s entitlement, the Taxpayer can at best only refer to the evidence from which adverse inferences can be drawn against Mr J. He had done so. It was then for the Commissioner to call Mr J and/or Madam I to give evidence in rebuttal. Unfortunately, although originally it was intended by the Commissioner to call Madam I and/or Mr J to give evidence, at the last minute, they refused to attend the hearing on learning that they would have to be cross-examined by the Taxpayer. This is not the fault of the Commissioner but the fact remains that the Commissioner has not adduced credible evidence to rebut the allegations of the Taxpayer.

30. In all the circumstances, we have come to the conclusion that the Commissioner should not have accepted that Mr J was equally entitled to claim the relevant tax benefit. Hence, the tax benefit should be given to the Taxpayer.

31. We therefore allow the Taxpayer' s appeal.

### **Conclusion**

32. We order as follows:

- (i) The notice of assessment and demand for additional salaries tax for the year of assessment 2000/01 is null, void and of no effect and should be withdrawn or cancelled.

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- (ii) The notice of assessment and demand for additional salaries tax for the year of assessment 2002/03 is null, void and of no effect and should be withdrawn or cancelled.
- (iii) The Commissioner's representatives do supply within 7 days from the date of receipt of this decision for the approval of the Board a revised calculation for the year of assessment 2001/02 in respect of the Taxpayer based on our finding above.

33. We make it clear that the Board reserves the right to deal with any matter arising out of the order contained in paragraph 32 above should the need arise.