

Case No. D38/12

Salaries tax – whether vessel a ‘dwelling’ – sections 26E and 68(4) of the Inland Revenue Ordinance (‘the IRO’) and section 10 of the Rating Ordinance (‘the RO’).

Panel: Chow Wai Shun (chairman), Jeevan Hingorani and Kumar Ramanathan SC.

Date of hearing: 4 September 2012.

Date of decision: 20 November 2012.

For the year of assessment 2010/11:

- the Appellant obtained the Loan to finance the acquisition of the Vessel;
- the Loan was secured by a mortgage over the Vessel;
- the Appellant paid interest in respect of the Loan; and
- the Vessel was used by the Appellant as his place of residence.

The Assessor was of the view that the Vessel was not a ‘dwelling’ as defined under section 26E. The loan interest payments on the Vessel were thus not deductible as home loan interest.

The Appellant objected.

Held:

1. ‘Home loan’ and ‘home loan interest’ refer to ‘dwelling’. ‘Dwelling’ consists of any ‘building’ or any part of a ‘building’ in that ‘rateable value’ is to be estimated under section 10 of the RO. ‘Building’, however, is not defined.
2. Even if the Vessel qualifies as a ‘building’ or a part of a ‘building’, the Appellant’s case still fails because the Vessel is not rateable under section 10 of the RO.

Appeal dismissed.

Cases referred to:

Owen Thomas Mangin v IRC [1971] AC 739

Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144

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D30/07, (2007-08) IRBRD, vol 22, 723

Wong Tai-wai, David and Lee Chi-man v Commissioner of Inland Revenue
6 HKTC 460

Stevens v Gourley (1859) 7 CB (NS) 98

Cardiff Rating Authority & Anor v Guest Keen Baldwin's Iron and Steel Co Ltd
[1949] 1 KB 385

Pollock v The Commissioners of Customs and Excise (1991) VAT Decision 6638

Dr John Parkinson v The Commissioners of Customs and Excise (2001) VAT
Decision 17257

John Dennis Julien Winser v The Commissioners of Customs and Excise (2005)
VAT Decision 19366

Yiu Lian Machinery Repairing Works Ltd & Ors v Commissioner of Rating and
Valuation [1982] HKC 55; [1985] 2 HKC 517

Taxpayer in person.

Ng Lai Ying Vivian and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 28 February 2012 ('the Determination') with regard to the salaries tax assessment on the Appellant for the year of assessment 2010/11.

2. The notice of appeal of the Appellant was sent to the Office of the Clerk to this Board by email on 5 April 2012. The Appellant stated in his notice and statement of the grounds of appeal that he understood that his appeal was formally 8 days late. The notice is prima facie invalid as it falls outside the statutory one-month period for lodging an appeal to this Board under section 66(1) of the Inland Revenue Ordinance ('the IRO'). The Appellant supplemented in his subsequent email to the Clerk to this Board that the date of the Determination was not the date of its 'transmission' to him. A letter from the Inland Revenue Department ('the IRD') dated 23 August 2012 confirmed that according to their record, the Determination was sent to the Appellant by registered post and was collected on 8 March 2012. The Respondent, therefore, raised no issue on the validity of the notice of appeal. On such basis, we proceeded to hear the substantive issue of the appeal.

Facts

3. As seen below, this appeal is on a specific question of law. The Appellant did not dispute the facts upon which the Determination was arrived at and gave no further evidence orally at the hearing. As such, we find the following facts relevant to this case:

- (a) The Appellant objected to the salaries tax assessments for the year of assessment 2010/11 raised on him.

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- (b) Company A ('the Employer') filed an employer's return in respect of the Appellant for the year of assessment 2010/11 which showed, among others, the following particulars:

Capacity in which employed	General Manager – Sales and Merchandising
Period of employment	01-04-2010 – 31-03-2011
Total income	\$2,072,272
Particulars of place of residence provided	
(i) Address:	Address B in Area C
(ii) Nature:	Flat
(iii) Period:	01-04-2010 – 19-09-2010

- (c) In his Tax Return – Individuals for the year of assessment 2010/11, the Appellant declared his employment income from and place of residence provided by the Employer for the period from 1 April 2010 to 31 March 2011 as per paragraph 3(b) above. Among others, the Appellant claimed deductions and provided documents as follows:

- i. church door donations of \$3,200;
- ii. home loan interest of \$131,693 in respect of a vessel 'D' ('the Vessel') moored at Berth E in Area C;
- iii. a copy of Loan Account Payment History dated 20 July 2011 issued by Bank F showing the payment records in respect of a loan of \$4,000,000 ('the Loan'). The loan repayments included interest payments in the total amount of \$131,693.31 for the period from 23 August 2010 to 31 March 2011.

- (d) The Assessor raised on the Appellant the following salaries tax assessment for the year of assessment 2010/11:

	\$	\$
Income		2,072,272
<u>Add:</u> Value of residence [1]		<u>97,652</u>
		2,169,924
<u>Less:</u> Retirement scheme contributions		<u>12,000</u>
		2,157,924
<u>Less:</u> Married person's allowance	216,000	
Child allowance	150,000	<u>366,000</u>
		<u>1,791,924</u>
Tax payable thereon		<u>286,627</u>

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Notes

1. $\$2,072,272 \times 172/365 [2] \times 10\% = \$97,652$
2. Number of days in which quarters were provided / number of days in the year of assessment 2010/11

The Appellant objected to the assessment.

- (e) The Assessor allowed deduction for charitable donations but was of the view that the loan interest payments on the Vessel were not deductible. Accordingly the Assessor proposed to revise the assessment as follows:

	\$	\$
Income		2,072,272
<u>Add:</u> Value of residence [1]		<u>97,652</u>
		2,169,924
<u>Less:</u> Retirement scheme contributions	12,000	
Charitable donations	3,200	<u>15,200</u>
		2,154,724
<u>Less:</u> Married person's allowance	216,000	
Child allowance	150,000	<u>366,000</u>
		<u>1,788,724</u>
Tax payable thereon		<u>286,083</u>

The Appellant disagreed.

The statutory provisions

4. The deduction of home loan interest is governed by section 26E of the IRO which provides, among other things, as follow:

- ' (1) Subject to the other provisions of this section and to section 26F, where a person pays during any year of assessment any home loan interest for the purposes of a home loan obtained in respect of a dwelling which is used at any time in that year of assessment by the person exclusively or partly as his place of residence, a deduction in respect of the home loan interest shall be allowable to that person for that year of assessment.*

.....

- (9) *In this section –*

“dwelling” means any building or any part of a building –

- (a) *which is designed and constructed for use exclusively or partly for residential purposes; and*
- (b) *the rateable value of which is separately estimated under section 10 of the Rating Ordinance (Cap. 116);*

“home loan”, in relation to a person claiming a deduction under this section for any year of assessment, means a loan of money which is –

- (a) *applied wholly or partly for the acquisition of a dwelling which –*
 - (i) *during any period of time in that year of assessment is held by the person as a sole owner, or as a joint tenant or tenant in common; and*
 - (ii) *during that period of time is used by the person exclusively or partly as his place of residence; and*
- (b) *secured during that period of time by a mortgage or charge over that dwelling or any other property in Hong Kong;*

“home loan interest”, in relation to a person claiming a deduction in respect of a dwelling under this section, means interest paid by the person as a sole owner, or as a joint tenant or tenant in common of the dwelling for the purposes of a home loan...’

5. Under section 10 of the Rating Ordinance (‘the RO’), the Commissioner of Rating and Valuation (‘the CRV’) shall separately estimate the rateable value of each tenement except in certain circumstances, none of which is applicable to this case, whilst the word ‘tenement’ is defined under section 2 of the RO to mean ‘any land (including land covered with water) or any building, structure, or part thereof which is held or occupied as a distinct or separate tenancy or holding or under any licence’.

6. Section 68(4) of the IRO provides that ‘the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant’.

The Appellant’s ground of appeal and his submission

7. The Appellant put much emphasis on the word ‘home’. Since the Vessel is the place of residence for him and his family, it is his home. Accordingly, the interest payment for the Loan falls categorically into ‘home loan interest’ and should be deductible under section 26E of the IRO. This is in line with the original idea of granting tax deduction to all who incur interest expenses in respect of a loan taken to purchase a home. As to other words used in the statutory provision including ‘dwelling’ and ‘building’, they are irrelevant, cause confusion or indeed, according to dictionaries and legal literature, can include (or do not

exclude) the Vessel. In the last regard, the Appellant claims that the Vessel is permanently moored and cannot be used for sailing. In support, he submitted photos of the Vessel with outside and inside views and claimed that the Vessel is rather a ‘building’.

8. The Appellant confirmed that he had never paid any rates on the Vessel but he argued that the Vessel was ‘not non-rated’ but its rateable value was, numerically, zero.

The Respondent’s submission

9. It is common ground that the Appellant’s claim satisfies some of the requirements for deduction prescribed in section 26E of the IRO, viz, (1) the Appellant obtained the Loan to finance the acquisition of the Vessel; (2) the Loan was secured by a mortgage over the Vessel; (3) the Appellant paid interest in respect of the Loan; and (4) the Vessel was used by the Appellant as his place of residence in the year of assessment 2010/11. The Respondent submitted that the issue in dispute hinged on only one requirement, that is, whether the Vessel is a ‘dwelling’ as defined under section 26E of the IRO which is plainly a matter of statutory interpretation. It is the Respondent’s submission that by adopting a purposive approach to construe section 26E of the IRO, ‘dwelling’ must mean a land property. In support, the Respondent cited the following authorities:

- (a) on statutory interpretation –
 - i. Owen Thomas Mangin v IRC [1971] AC 739;
 - ii. Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) (‘IGCO’) and in this relation, Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144;
 - iii. D30/07, (2007-08) IRBRD, vol 22, 723; and
 - iv. Wong Tai-wai, David and Lee Chi-man v Commissioner of Inland Revenue 6 HKTC 460;
- (b) on the meaning of ‘building’ –
 - i. Shorter Oxford Dictionary (5th edition);
 - ii. Stevens v Gourley (1859) 7 CB (NS) 98;
 - iii. Cardiff Rating Authority & Anor v Guest Keen Baldwin’s Iron and Steel Co Ltd [1949] 1 KB 385;
 - iv. Pollock v The Commissioners of Customs and Excise (1991) VAT Decision 6638;

- v. Dr John Parkinson v The Commissioners of Customs and Excise (2001) VAT Decision 17257; and
 - vi. John Dennis Julien Winser v The Commissioners of Customs and Excise (2005) VAT Decision 19366; and
- (c) on the issue whether the Vessel has a rateable value –
- i. Volume 22, Halsbury’s Laws of Hong Kong, paragraph 325.017; and
 - ii. Yiu Lian Machinery Repairing Works Ltd & Ors v Commissioner of Rating and Valuation [1982] HKC 55; [1985] 2 HKC 517.

Our analysis

10. We agree with the Respondent on their summary of the issues involved and the way how the outstanding issue should be dealt with.

11. In interpreting tax statutes such as the IRO, this Board in D30/07 has decided that section 19 of the IGCO is of little assistance since the fiscal object of the provisions are normally attained by adopting the ‘literal’ interpretation of the language of the statute, as adumbrated by the principles cited by Lord Donovan in Owen Thomas Mangin v IRC:

‘ First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J says in his (albeit dissenting) judgment in Marx v Inland Revenue Commissioner [1970] N.Z.L.R 182, 208, moral percepts are not applicable to the interpretation of revenue statutes.....

Secondly, “...one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”: per Rowlatt J. in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B. 64, 71, approved by Viscount Simons L.C. in Canadian Eagle Oil Co. Ltd v The King [1946] A.C. 119, 140.....

Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a liberal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.....

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.'

12. Section 26E(1) is made 'subject to the other provisions in this section' including the statutory definitions of 'home loan', 'home loan interest' and 'dwelling' in subsection (9). The definitions of 'home loan' and 'home loan interest' refer to 'dwelling'. The definition of 'dwelling' consists of two cumulative limbs, the first referring to any 'building' or any part of a 'building' whereas the second 'rateable value' estimated under section 10 of the RO. We accept the Respondent's submission that there is no room for substituting an ordinary meaning to 'dwelling' even though the Appellant cited the Oxford Dictionary in which 'houseboat' is defined to mean a boat which is or can be used as a dwelling.

13. 'Building', however, is not defined in the IRO. It is, therefore, appropriate to refer to its natural and ordinary meaning. The Appellant cited the Oxford Dictionary again which defines 'building' to mean structure with roof and walls, such as a house and a factory. In the Shorter Oxford Dictionary (5th edition), 'building' is defined, among other things, to mean (1) a thing which is built; (2) a structure, an edifice; a permanent fixed thing built for occupation, as a house, school, factory, stable, church, etc. It is the Respondent's submission that the first meaning is too wide for the purpose. In support, they relied on Stevens v Gourley in which Byles J noted the verb 'to build' is often used in a wider sense such that, *inter alia*, a ship-builder is said to build a ship but the ship when constructed cannot be called a 'building'. The Respondent further cited Cardiff Rating Authority & Anor v Guest Keen Baldwin's Iron and Steel Co Ltd and the three UK VAT cases to support that the Vessel is not a 'structure' and does not fall within the natural and ordinary meaning of 'building'. We are mindful that the authorities are either relatively old or decided on a UK statute for a different context. As such, we incline not to make a definite ruling on this point, one way or another, as we see it unnecessary to do so.

14. Even if the Vessel qualifies as a 'building' or a part of a 'building', the Appellant's case still fails because the Vessel is not rateable under section 10 of the RO.

15. It has been established since the Court of Appeal judgment in Yiu Lian Machinery Repairing Works Ltd & Ors v Commissioner of Rating and Valuation that the English doctrine of chattels enjoyed with the land should not be applicable in Hong Kong and if it were not correct the dry docks which floated in the sea many feet above a piece of land could not be properly said to be enjoyed with it or enhance its value because the connection was to simply prevent either getting lost or into difficulties. Consequentially the CRV has accepted that all floating structures, unless there is a high degree of mutual adaptation with land, are not rateable. In this particular instance, the CRV has confirmed that the Vessel does not have a rateable value under section 10 of the RO. Indeed, the Appellant has never paid any rates in respect of the Vessel. The counter-argument of the Appellant that the Vessel is not 'non-rated' but that it has a zero rateable value cannot be accepted. The Vessel does not qualify for rating and is thus unrated. It is different from being through the rating process but is assessed a nominal value.

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16. Although the 1998/99 Budget Speech of the Financial Secretary at that time was referred to us by both parties, we do not find it necessary to go into any detail of it since we find the statutory provisions clear and unambiguous.

Conclusion

17. On the basis of the above analysis, we dismiss the Appellant's appeal and confirm the revised assessment set out in paragraph 3(e).