

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D42/01

**Salaries tax** – single parent allowance – sections 2(3), 32(1), 32(2) and 68(4) of the Inland Revenue Ordinance (‘IRO’).

Panel: Patrick Fung Pak Tung SC (chairman), Andy Lam Siu Wing and Stephen Yam Chi Ming.

Date of hearing: 15 February 2001.

Date of decision: 12 June 2001.

The taxpayer objected to a notice of assessment and demand for salaries tax for the year of assessment 1997/98 on the basis that she should have been granted single parent allowance in respect of her son. The issue for the Board was whether the taxpayer had become separated from her husband on a date before 1 April 1997.

The taxpayer gave evidence. When she referred to the ‘separation’ between her husband and herself, she meant that they no longer slept or ate together although they continued to live at a housing estate flat for about three months before her husband moved out. The taxpayer gave different dates of her separation in various documents.

#### **Held:**

1. The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant. The evidence tended to contradict the allegation by the taxpayer. On the evidence, during the year of assessment of 1997/98, the taxpayer was married and not living apart from her spouse within the meaning of section 32(2) of the IRO.
2. As a matter of law, the Board did not think that the expression ‘living apart’ could include the situation in which a couple still lives under the same roof in a small flat, notwithstanding that they no longer live as husband and wife and lead separate lives (as claimed in this case).

**Appeal dismissed.**

Wong Ki Fong for the Commissioner of Inland Revenue.

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Taxpayer in person.

### **Decision:**

1. This is an appeal by the Taxpayer against:
  - (a) a notice of assessment and demand for salaries tax for the year of assessment 1997/98 issued by the Commissioner on 10 May 1999 showing net chargeable income of \$196,926 with tax payable thereon of \$25,726 which was subsequently reduced to net chargeable income of \$152,480 with tax payable thereon of \$17,726 (‘ the First Assessment ’ ); and
  - (b) a notice of assessment and demand for salaries tax for the year of assessment 1998/99 issued by the Commissioner on 8 December 1999 showing net chargeable income of \$301,649 with tax payable thereon of \$40,780 (‘ the Second Assessment ’ ).
2. In respect of the First Assessment, the Taxpayer objected on the basis that her income as assessed was excessive and that she should have been granted single parent allowance in respect of her son.
3. In relation to the Second Assessment, the Taxpayer objected on the basis that she should not have been taxed on her contribution to provident fund.
4. By his determination dated 5 September 2000, the Commissioner rejected the Taxpayer’ s points of objection referred to in paragraphs 2 and 3 above. He accepted a point about rental reimbursement made by the Taxpayer which does not concern us.
5. At the hearing of the appeal, the Taxpayer indicated to the Board that she was abandoning her objection to the Second Assessment. Hence, only the First Assessment remained in issue.

### **The Taxpayer’ s case**

6. The Taxpayer’ s case can be summarised as follows:
  - (a) At all material times, the Taxpayer was married to a Mr A.
  - (b) Their son, Mr B, was born on 8 August 1997.

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- (c) She and Mr A had separated from each other since 15 February 1997.
- (d) In the circumstances, she should be granted single parent allowance in respect of her son during the year of assessment 1997/98 pursuant to section 32 of the IRO.

### **The case of the Commissioner**

7. The Commissioner does not accept that the Taxpayer has been separated from her husband as from 15 February 1997 as alleged; even if they were in a sense so separated, such separation was not in the opinion of the Commissioner likely to be permanent during the year of assessment 1997/98.

### **The law**

8. The relevant part of section 32(1) and (2) of the IRO reads as follows:

***‘32. Single parent allowance***

- (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.*
  - (2) *A person shall not be entitled to claim single parent allowance –*
    - (a) *if at any time during the year of assessment the person was married and not living apart from his or her spouse;*
- ...’

9. Section 2(3) of the IRO reads as follows:

- (3) *For the purposes of this Ordinance a husband and wife shall be deemed to be living apart when they are living apart –*
  - (a) *under a decree or order of a competent court in or outside Hong Kong;*
  - (b) *under a duly executed deed of separation or any instrument of similar effect; or*

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(c) *in such circumstances that the Commissioner is of the opinion the separation is likely to be permanent.*

### **The issue**

10. The issue before the Board is whether the Taxpayer became separated from her husband on 15 February 1997, that is, a date before 1 April 1997 which was the commencement of the year of assessment 1997/98, as alleged, or whether she became separated with her husband only on a date later than 1 April 1997.

### **The Taxpayer's evidence**

11. The Taxpayer gave evidence on affirmation and was cross-examined by Miss Wong for the Commissioner.

12. The Taxpayer gave evidence to the effect that as at January 1997 she and her husband were residing at a flat in Housing Estate C ('the Housing Estate C flat'). As a result of something which happened (the details of which she refused to go into), she and her husband became separated on 15 February 1997. The reason why she remembered the date so clearly was that it was one day after Valentine's Day. When she referred to the 'separation' between her husband and herself, she meant that they no longer slept or ate together. Her husband continued to live at the Housing Estate C flat until he moved out on about 8 May 1997 to another flat in Housing Estate D.

13. She further said in evidence that their son was born on 8 August 1997 and that she presented a Petition for divorce to the Court on 14 September 1999. She was, however, unwilling to show the Board a copy of the Petition.

### **Our conclusion**

14. We are of the view that the Taxpayer cannot succeed in this appeal.

15. On the evidence, during the year of assessment 1997/98, the Taxpayer was married and not living apart from her spouse within the meaning of section 32(2) of the IRO. As a matter of law, we do not think that the expression 'living apart' can include the situation in which a couple still lives under the same roof in a small flat, notwithstanding that they no longer live as husband and wife and lead separate lives (as claimed in this case).

16. Furthermore, even if the Taxpayer and her husband did become separated at some stage, we are not convinced that such separation took place before May 1997. The evidence which tends to contradict the allegation by the Taxpayer can be summarised as follows:

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- (a) In the tax return for the year of assessment 1997/98, the Taxpayer stated in English that she was separated with her husband on ' 8 May 1997' .
- (b) In the tax return for the year of assessment 1998/99, the Taxpayer stated in Chinese that she was separated from her husband on ' 1 May 1997' .
- (c) In her notice of objection against the First Assessment dated 17 June 1999, the Taxpayer stated in Chinese that she and her husband had been separated for ' one year and seven months' .
- (d) In a letter dated 28 July 1999 from Mr A to the Inland Revenue Department, he stated ' I am writing to confirm that my estranged wife and I had been separated since May 1999' .
- (e) According to the record in the Births and Deaths Registry which was entered on 30 August 1997 in relation to the birth of the son on information provided by Mr A, the address of Mr A was still given as the Housing Estate C flat.
- (f) In evidence, the Taxpayer admitted that even after the separation, she and her husband were still trying to save their marriage.
- (g) The Taxpayer further admitted that over the Christmas holiday in 1997, she and her husband took their son to see Mr A' s parents in Country E. The trip lasted between 15 December 1997 and 11 January 1998 and they were staying in the home of Mr A' s parents. The same thing happened over the next Christmas holiday between 17 December 1998 and 5 January 1999. Sometime in May 1999, the Taxpayer travelled to Country F with her son to see her husband. In December 1999, the Taxpayer and her husband took their son to Country G to see the Taxpayer' s parents.

17. Section 68(4) of the IRO provides at the appeal to the Board:

*'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

We are not satisfied that the Taxpayer has discharged her onus.

18. In all the circumstances, we dismiss the appeal by the Taxpayer.