

**Case No. D45/06**

**Personal assessment** – eligibility – permanent resident – meaning of ordinary residence - sections 41(1), (1A), (4) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Chow Wai Shun and K L Alex Lau.

Date of hearing: 17 July 2006.

Date of decision: 19 September 2006.

The Acting Deputy Commissioner confirmed the property tax assessments for the years of assessment 2001/02, 2002/03 and 2003/04 on the Property acquired by the appellants (husband and wife) as joint tenants in October 2000.

The appellants, having emigrated to England since December 1997, contended that they were permanent residents and eligible to elect personal assessment for the relevant years of assessment. As the total amount of rental income received by them was less than the allowances they were entitled under personal assessment, they would not be required to pay any tax.

**Held:**

1. Section 41(1), (1A) and (4) defines eligibility for personal assessment which must be decided with reference to the year of assessment.
2. A taxpayer must ordinarily reside in Hong Kong during the relevant year(s) of assessment in order to be a permanent resident for the purposes of personal assessment.
3. 'Ordinary residence' connotes residence in a place with some degree of continuity and apart from accidental or temporary absence.
4. 'Ordinarily' means adopted voluntarily and for settled purposes and as part of the regular order of a man's life.
5. The appellants voluntarily decided and have been residing with their children in England for a settled purpose since January 1998 and their departure from Hong Kong has not been for a temporary absence.

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6. The appellants failed to discharge the onus of showing that they were qualified 'permanent residents' as defined in section 41(4) of the IRO for the purposes of personal assessment for the relevant years of assessment.

**Appeal dismissed.**

Cases referred to:

D7/05, IRBRD, vol 20, 262

Levene v Inland Revenue Commissioners [1928] AC 217

Inland Revenue Commissioner v Lysaught [1928] AC 234

Reg v Barnet LBC, Ex p Shah [1983] 2 AC 309

Pram Singh v Director of Immigration (2003) 6 HKCFAR

D37/02, IRBRD, vol 17, 677

Lau San Ching v Appollonia Liu, the Returning Officer of Kwai Tsing District, HCMP 3215 of 1994 (19 January 1995)

Re Vassis, ex parte Leung [1985] 64 ALR 407

Yvonne So Counsel instructed by Stanley So of Messrs Stanley So & Co, Certified Public Accountants, for the taxpayer.

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

**Decision:**

1. This is an appeal against the determination of the Acting Deputy Commissioner of Inland Revenue dated 13 January 2006 ('the Determination') whereby:

- (1) Property tax assessment for the year of assessment 2001/02 under charge number 5-8017244-02-A, dated 19 October 2005, showing net assessable value of \$76,160 with tax payable thereon of \$11,424 was confirmed;
- (2) Property tax assessment for the year of assessment 2002/03 under charge number 5-8017243-03-1, dated 19 October 2005, showing net assessable value of \$68,720 with tax payable thereon of \$10,308 was confirmed;
- (3) Property tax assessment for the year of assessment 2003/04 under charge number 5-8017242-04-3, dated 19 October 2005, showing net assessable value of \$18,585 with tax payable thereon of \$2,880 was confirmed.

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2. At the hearing before us the Appellants were represented by Miss Yvonne So, Counsel, instructed by Messrs Stanley So & Co, the appellants' accountant. The Commissioner was represented by Ms Lai Wing-man, senior assessor, and Mr Wong Kai-cheong, assessor.

3. The Appellants argued that they were eligible to elect personal assessment for the relevant years of assessment. Since the total amount of rental income received by them was less than the allowances they were entitled under personal assessment, they would not be required to pay any tax for those years if they succeeded.

**The facts**

4. On the materials before us, we make the following findings of fact:

- (1) The Appellants are husband and wife. Both of them were born in Hong Kong and are holders of Hong Kong Permanent Identity Cards.
- (2) They have two children, born in Hong Kong in 1983 and 1984 respectively.
- (3) The Appellants and their two children were registered as British citizens under the British Nationality (Hong Kong) Act 1990 in May 1993.
- (4) In July 1997, the Appellants sent their two children to England to continue their studies. Their daughter graduated in June 2004 while their son is still studying in England.
- (5) On 31 May 1998, the Appellants submitted their individual tax returns for the year of assessment 1997/98. In the returns, they both declared an address in England as their residential address, the husband declared his income from 1 April to 20 December while the wife declared that she resigned from her employment on 10 December 1997.
- (6) On 19 November 1998, the assessor, in giving effect to the Appellants' election for joint assessment pursuant to section 10(2) of the Inland Revenue Ordinance ('the IRO'), raised on the husband a salaries tax assessment for the year of assessment 1997/98 in accordance with the particulars of income declared by them.
- (7) By a letter dated 23 November 1998, their tax representatives, Messrs X lodged a claim, on behalf of the husband, to have the provisional salaries tax charged for the year of 1998/99 refunded on the ground that 'as a matter of fact, our client has migrated to England since December 1997'.

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- (8) On 20 January 1999, the husband signed his individual tax return for the year of assessment 1998/99. Messrs X were appointed as the husband's authorised representatives. Under salaries tax, the husband declared 'N/A (The taxpayer has left Hong Kong for good in December 1997)'. The wife also signed on the husband's return. Immediately above their signatures, they stated that 'we declare that we have left Hong Kong for good in December 1997'.
- (9) By a letter dated 25 January 1999, Messrs X pointed out that 'our client has left Hong Kong for good in December 1997' and informed the assessor that the husband did not receive any taxable income in Hong Kong during the year ended 31 March 1999 or thereafter.
- (10) On 10 October 2000, the Appellants purchased a property at Address A ('the Property') as joint tenants.
- (11) On 23 November 2004, the Appellants submitted the 2001/02 to 2003/04 property tax returns in respect of the Property and reported the following income from letting the Property:

	<b>2001/02</b>	<b>2002/03</b>	<b>2003/04</b>
Period of letting	1-4-2001 – 31-3-2002	1-4-2002 – 31-3-2003	1-4-2003 – 15-8-2003
Rental income	\$95,200	\$85,900	\$26,800
Rates paid by owner	[Blank]	[Blank]	\$3,568
Assessable value	[Blank]	[Blank]	\$23,232

Although the Appellants indicated on their returns their desire to elect personal assessment for the relevant years of assessments, no BIR 60 had ever been issued to either of them.

- (12) On 22 December 2004, the assessor issued to the Appellants the following 2001/02 to 2003/04 property tax assessments in respect of the Property:

	<b>2001/02</b>	<b>2002/03</b>	<b>2003/04</b>
Rental income per return	\$95,200	\$85,900	\$26,800
<u>Less:</u> Rates paid by owner	-	-	\$3,568
	\$95,200	\$85,900	\$23,232
<u>Less:</u> 20% statutory allowance	\$19,040	\$17,180	\$4,647
Net assessable value	\$76,160	\$68,720	\$18,585
Personal assessment:			

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Mr B (50%)	\$38,080	\$34,360	\$9,292
Ms C (50%)	\$38,080	\$34,360	\$9,293
Total	\$76,160	\$68,720	\$18,585

The Appellants did not object to those property assessments.

- (13) According to the records of the Immigration Department, the Appellants stayed in Hong Kong for the following number of days (counting the days of arrival and departure each as one day) during the period from 1 April 2000 to 31 March 2005:

- (a) The husband:

Year of assessment	Period in Hong Kong	No of days
2000/01	4-10-2000 – 17-10-2000	14
2001/02	22-12-2001 – 31-12-2001	10
2002/03	-	Nil
2003/04	14-6-2003 – 29-6-2003	16
2004/05	16-11-2004 – 27-11-2004	12

- (b) The wife:

Year of assessment	Period in Hong Kong	No of days
2000/01	3-4-2000 – 6-5-2000	34
	9-7-2000 – 23-8-2000	46
	4-10-2000 – 17-10-2000	<u>14</u>
	Total	94
2001/02	24-6-2001 – 30-6-2001	7
	4-7-2001 – 19-7-2001	16
	23-7-2001 – 21-8-2001	30
	1-12-2001 – 9-12-2001	9
	11-12-2001 – 31-12-2001	21
	15-3-2002 – 18-3-2002	4
	20-3-2002 – 25-3-2002	<u>6</u>
Total	93	
2002/03	7-7-2002 – 11-8-2002	36
	31-12-2002 – 18-2-2003	50
	20-3-2003 – 31-3-2003	<u>12</u>
	Total	98
2003/04	1-4-2003 – 29-6-2003	90
	27-7-2003 – 24-8-2003	29
	19-2-2004 – 21-3-2004	<u>32</u>

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	Total	151
2004/05	4-5-2004 – 2-6-2004	30
	2-11-2004 – 27-11-2004	<u>26</u>
	Total	56

- (14) The assessor considered that the Appellants were not eligible to elect personal assessment for the relevant years of assessment. On 19 October 2005, the assessor issued to the Appellants the following property tax assessments and notices of demand for tax:

	2001/02	2002/03	2003/04
Net assessable value	\$76,160	\$68,720	\$18,585
Tax payable thereon	\$11,424	\$10,308	\$2,880

- (15) The Appellants through Messrs X objected to the assessments in the following terms:

‘... they are excessive by reason of errors in not transferring the incomes to personal assessment in due course as (the Appellants) have duly elected personal assessment for all the captioned years.

... (the Appellants) are both at all material time Hong Kong permanent residents since birth and thus are always entitled to elect for personal assessment under s 41(1) of (the IRO) to have their incomes including rental income transferred and computed under s 42 accordingly.’

- (16) In amplification of the Appellants’ ground of objection stated immediately above, Messrs X, by a letter dated 30 November 2005, claimed the following:

- (a) ‘(The Appellants) both born in Hong Kong.’
- (b) ‘They were educated in Hong Kong.’
- (c) ‘They work and pay tax in Hong Kong.’
- (d) ‘They ordinarily reside in Hong Kong since birth without leaving Hong Kong for good.’
- (e) ‘Their parents, brothers, sisters and children are Hong Kong permanent residents and ordinarily reside in Hong Kong as well. Their family members both lineal ancestor and lineal descendant are all Hong Kong citizens. Thus their family links always situate in Hong Kong.’

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- (f) 'As a Hong Kong citizen, they both entitle to enjoy all rights and benefits under the Hong Kong law. In anywhere of the world, Hong Kong citizens including (the Appellants) and their family members should be protected by the Hong Kong law and by the Hong Kong SAR Government as well.'
- (g) 'They reside in Hong Kong every year of assessment since birth.'
- (h) 'They maintain bank accounts/hold investments including landed properties in Hong Kong.'
- (i) 'They never did anything giving rise a termination of their Hong Kong permanent resident status. They have and always secure the right of abode in Hong Kong. They all the way regard Hong Kong their home country for their residency.'
- (j) '(The Appellants) and their children all hold Hong Kong Permanent Identity Cards. (The Appellants) have recently applied from the Immigration Department the new smart Hong Kong Permanent Identity Cards.'
- (k) 'They enter and leave Hong Kong as a Hong Kong permanent resident while travelling abroad.'
- (l) 'Under other Ordinances, (the Appellants) are permanent residents ordinarily reside in Hong Kong.'
- (m) 'Their family is now occupying an apartment as their residence in Hong Kong.'
- (n) 'From the above facts, they both ordinarily reside in Hong Kong.'
- (o) 'All their overseas travellings should be regarded as temporary absence particularly taking into account the time they reside in Hong Kong as a whole.'
- (p) 'Anything counting their "absence" in Hong Kong in undermining their Hong Kong permanent resident's status should violate Articles of the Basic Law in connection with freedom to travel.'
- (q) 'Under s 41 of (the IRO), a taxpayer should be either a permanent

resident or a temporary resident. Any one of (the Appellants) should not in any circumstances be regarded as a temporary resident. Thus, they should belong to the class of permanent resident under s 41.'

- (r) '... a temporary resident should be not a Hong Kong citizen. The term "temporary resident" should only point to "visitors". By definition the residence of a temporary resident counts only his "stay" in Hong Kong while he "visits" Hong Kong.'
- (s) 'Even if the law took the same approach in measuring temporary resident as aforesaid for assessing the status of a permanent resident, residence should at least count the taxpayer's living in Hong Kong during his lifetime as a comparison to the ins and outs instead of counting yearly. We must stress that taking same approach for the assessment of permanent resident status is totally illogical, incorrect and not lawful.'

- (17) For the relevant years of assessment, apart from the rental income from the Property, the Appellants did not derive any chargeable income or profits from Hong Kong. The total amount of rental income received by the Appellants from the Property was less than the allowances they were entitled.

### **The evidence**

5. Both the wife and the Appellants' daughter were called to give oral evidence. In both situations, an unsigned statement, with exhibits including, inter alia, statements of travel records certified by the Immigration Department, was submitted before the hearing. For each of them, a supplementary document prepared by the Appellants' accountant was submitted while the witness was giving evidence with a view to showing such details as the destinations and purposes of various trips in and out of Hong Kong during the relevant years. Both the wife and the Appellants' daughter were prompted by a question from Counsel to make certain corrections (mainly in relation to the places they left Hong Kong for) which, in our view, did not have any material impact on this case. Both witnesses confirmed the truthfulness of their typed statements with all exhibits attached and the supplementary documents as amended. The husband, however, was absent from the hearing and gave no evidence whatsoever.

6. At examination in chief, the wife stressed that the original plan was to leave for England for about three months to see if the two children might have any adaptation problem there. She claimed that at that time return tickets were bought. It turned out that the son appeared to adapt well while the daughter had some emotional problems. With persuasion, the daughter eventually agreed to settle in.

7. During cross-examination of the wife, it transpired that the Appellants purchased a



property in England in June 1997 and sold it when they purchased another property in England from the husband's sister, now deceased, the completion of which took place in early 2003. They are still the owners of that property.

### **The Appellants' argument**

8. Counsel for the Appellant submitted a skeleton argument at the hearing. In replying to the question when the relevant time was for determining 'ordinary residence' of a taxpayer, Counsel put forward the argument that it should be the date of the formal written election for personal assessment (in this case, that is, 19 November 2005), failing which the relevant years of assessment.

### **The statutory provisions**

9. Section 41 of IRO provides:

*'(1) Subject to subsection (1A), an individual –*

*(a) of or above the age of 18 years, or under that age if both his or her parents are dead; and*

*(b) who is or, if he or she is married, whose spouse is either a permanent or temporary resident,*

*may elect for personal assessment on his or her total income in accordance with this Part (VII).*

...

*(4) In this section –*

*“permanent resident” means an individual who ordinarily resides in Hong Kong;*

*“temporary resident” means an individual who stays in Hong Kong for a period or a number of periods amounting to more than 180 days during the year of assessment in respect of which the election is made or for a period or periods amounting to more than 300 days in 2 consecutive years of assessment one of which is the year of assessment in respect of which the election is made.'*

10. Section 68(4) of the IRO provides:

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

**The issue**

11. On the facts, the Appellants could not be temporary residents for the purposes of electing personal assessment. The issue to be decided by the Board in this case is whether the Appellants have discharged the onus of showing that they were qualified 'permanent residents' as defined in section 41(4) of the IRO. If either the husband or the wife is considered a 'permanent resident', their claim must be allowed; otherwise they are bound to fail.

**Relevant time for determining where a taxpayer ordinarily resides**

12. As seen above, a 'permanent resident' is defined to mean an individual who 'ordinarily resides' in Hong Kong. It is the basis of asking, as the Board did so to Counsel for the Appellants at the hearing, the question of when the relevant time is for determining the ordinary residence of a taxpayer.

13. The first argument put forward by Counsel for the Appellants in response to this question was that it should be the date of formal written application for election for personal assessment (in this case, 19 November 2005). Counsel admitted that she could not find any case law to support this proposition. However, she submitted that reference to 'year of assessment' could (and should) have been included in relation to the definition of 'permanent resident' if the legislature had so intended. Accordingly, submitted by Counsel, the absence of such reference in the said definition pointed to nothing but that 'year of assessment' was not intended to be referred to in determining whether a taxpayer ordinarily resides in Hong Kong.

14. The Board does not find that the argument carries any weight at all. Section 41(1), (1A) and (4) define eligibility for personal assessment. In the absence of any provision to the contrary, eligibility must be decided with reference to the year of assessment. Section 41(3) is a provision on the time limit for election and has nothing to do with eligibility. There is thus no statutory basis for bringing in the time of election as the relevant time for deciding eligibility.

15. The argument was tested against the scenario of a deceased taxpayer. By virtue of section 41(2) of the IRO, the executor of the deceased taxpayer is given the same right to elect for personal assessment on the total income of the deceased as the deceased would have if he were alive. Where would the deceased 'ordinarily reside' at the time of the election by the executor? When posed this question, Counsel for the Appellants replied that then one would have to consider the whereabouts of the corpse. This would only produce absurd results and as will be seen below would not be in line with the established authorities. In our view, therefore, the relevant time for determining where a taxpayer ordinarily resides for the purposes of electing for personal

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assessment cannot be a specific date.

16. Counsel of the Appellants referred to paragraph 64 of the Report of the Inland Revenue Ordinance Committee (December 1954) which reads:

‘During our deliberations on section 41 it became apparent to us that the rights of bona fide residents of the Colony might be, and in one case have been, adversely affected by temporary absences.

We therefore recommend that the Ordinance be so amended [and hence the current version of section 41] that a bona fide resident is entitled to personal assessment despite temporary absences from the Colony, and that a non-resident is entitled to personal assessment if he stays in the Colony for the periods prescribed in the present definition.’

17. The Board found that the paragraph quoted would not take the Appellants’ argument any further. To qualify a temporary resident, a taxpayer must reside in Hong Kong for a prescribed minimum number of days within the relevant year of assessment or two consecutive years one of which is the relevant year of assessment. This would be totally out of place and inconsistent if a taxpayer could qualify a permanent resident by ordinarily residing in Hong Kong for a period other than the relevant year of assessment. Therefore, the Board holds the view that a taxpayer must ordinarily reside in Hong Kong during the relevant year(s) of assessment in order to be a permanent resident for the purposes of personal assessment.

**Meaning of ‘ordinary residence’**

18. The relevant authorities have been succinctly summarized in a recent decision of this Board: see D7/05, IRBRD, vol 20, 262, paragraphs 22 – 28.

19. In brief, it is clear that the words ‘ordinary residence’ must be construed as bearing their natural and ordinary meaning as words of common usage in the English language: Levene v Inland Revenue Commissioners [1928] AC 217 and Inland Revenue Commissioner v Lysaught [1928] AC 234 applied.

20. The term connotes residence in a place with some degree of continuity and apart from accidental or temporary absence: see Levene v Inland Revenue Commissioner, above, at 225.

21. ‘Ordinarily’ means ‘adopted voluntarily and for settled purposes’ and as part of the regular order of a man’s life: see Inland Revenue Commissioners v Lysaught, above, at 248.

22. To be an ordinary resident of a place, the person must be ‘habitually and normally resident here, apart from temporary or occasional absences of long or short duration.... (The

concept) refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration' and this is ultimately a question of fact. To be a settled purpose, it is necessary to have 'a sufficient degree of continuity': see Reg v Barnet LBC, Ex p Shah [1983] 2 AC 309, at 342 – 344. The House of Lord decision in Shah has been applied by the Hong Kong Court of Final Appeal in Prem Singh v Director of Immigration (2003) 6 HKCFAR 26.

### **Whether the Appellants ordinarily resided in Hong Kong during the relevant years of assessment**

23. It is a question of fact for the Board to decide. In this regard, the Board did not see any basis on which this case could be distinguished from the two recent decisions of this Board on the same provision: D37/02, IRBRD, vol 17, 677 and D7/05, above.

24. Specifically, the Appellants have been residing in England since January 1998. Their departure from Hong Kong has not been for a temporary absence. During the relevant years of assessment, they lived with their children in England. The husband has been working at all relevant time in England and came to Hong Kong only when he was in his annual leave from his employment. He did not even make arrangement to attend this hearing. The wife has all along been a housewife looking after the family in England. For those periods she came to Hong Kong, she stayed casually for seeing relatives and friends. Whenever the Appellants got back to Hong Kong, they were invited to stay at their relatives' flats. They did not maintain a place of abode in Hong Kong during the relevant years of assessment.

25. Their actual move to England might have been prompted by their thinking of sending their children there for further studies. However, after all, the decision was made voluntarily and was for a settled purpose, as distinguished from cases quoted by the Appellants such as Lau San Ching v Apollonia Liu, the Returning Officer of Kwai Tsing District, HCMP 3215 of 1994 (19 January 1995) where the ordinary residence of the claimant was interrupted by his imprisonment in the Mainland which was by no means voluntary or Re Vassis, ex parte Leung [1985] 64 ALR 407 where the bankrupt fled his home jurisdiction while ordinarily residing there since he was still carrying on a business there albeit it was in the process of being wound up.

### **Conclusion**

26. Having considered all the facts and evidence made available to the Board, and in the light of the authorities before us, we hold that neither of the Appellants ordinarily resided in Hong Kong during the relevant years of assessment. As such, neither of them qualifies a permanent resident for the purposes of personal assessment for the years of assessment concerned. We dismiss this appeal and uphold the assessments as confirmed by the Acting Deputy Commissioner in his Determination.

**Postscript**

27. The Board asks the taxpayers or their authorised representatives for an estimate of the length of hearing before fixing dates for hearing of appeals. The Board relies on the taxpayers or their representatives to give proper estimates. Gross over-estimate is as unhelpful as gross under-estimate. In this case, Messrs Stanley So & Co insisted on their 4-day estimate. None of us thought this case could possibly take four days. In the event, the hearing was concluded in half a day.