

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D57/02

**Salaries tax** – whether allowance to be granted under section 30 (dependent parent) and section 30A (dependent grandparent) – ‘ordinarily resident in Hong Kong’ is a precondition for any allowance to be granted under sections 30 and 30A – definition of ‘ordinarily resident in Hong Kong’ – the Board is obliged to give effect to the words stated in the legislature – the Board is also obliged to apply a binding decision of a superior court in Hong Kong – sections 30, 30A and 41 of the Inland Revenue Ordinance.

Panel: Andrew J Halkyard (chairman), Thomas Mark Lea and Michael Seto Chak Wah.

Date of hearing: 19 August 2002.

Date of decision: 10 September 2002.

This was an appeal against the salaries tax assessment raised on the appellant for the year of assessment 2000/01. The appellant claimed that he should be granted dependent parent allowances for his father, mother, and mother-in-law, and a dependent grandparent allowance for his grandmother (‘the dependants’). At the appeal hearing before the Board, the appellant abandoned his claim in respect of his grandmother-in-law.

The sole issue was whether the dependants were ‘ordinarily resident in Hong Kong’ at any time during the year ended 31 March 2001.

The term ‘ordinarily resident in Hong Kong’ was a precondition for any allowance to be granted under section 30 (dependent parent) and section 30A (dependent grandparent). There was no statutory definition of this term for the purposes of these two sections, although there were definitions of ‘permanent resident’ and ‘temporary resident’ in section 41 for the purposes of eligibility for personal assessment.

The facts appear sufficiently in the following judgment.

#### **Held:**

1. The Hong Kong Court of Appeal has defined the term ‘ordinarily resident’: per Hunter J in Director of Immigration v Ng Shun-loi [1987] HKLR 798.

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2. Applying Ng Shun-loi to the facts of this appeal, there can be no doubt that none of the dependants were ordinarily resident in Hong Kong at any time during the year of assessment 2000/01.
3. Not one of them physically resided in Hong Kong at any time for at least 17 months prior to the beginning of the year of assessment; and then not one of them returned to Hong Kong at any time during that year.
4. Physical absence of such duration was, without proper explanation as to the circumstances of the dependants' daily life, fatal to the appellant's claims. This conclusion was not based simply on counting the number of days and seeing that the dependants did not stay in Hong Kong *most* of the time. Rather, since leaving Hong Kong the dependants did not reside here at *any* time. There was not one scintilla of evidence to suggest that, following their departure from Hong Kong, any of the dependants was 'habitually and normally resident' in Hong Kong or resident in Hong Kong 'for the purposes of everyday life'. Indeed, the facts before the Board pointed totally the other way.
5. The appellant argued that such a conclusion was unfair and the legislature could not possibly have intended such a result. The Board disagreed.
6. If the legislature had intended to grant allowances for dependants residing overseas who were simply supported physically and financially by the taxpayer, or who had Hong Kong permanent identity cards, or who owned property in Hong Kong, or who had lived in Hong Kong for so many years, it would have said so.
7. Instead, leaving aside the additional allowances (not relevant to this appeal), the legislation said that allowances would only be granted for dependent parents and grandparents who were 'ordinarily resident in Hong Kong'. The Board must give effect to these words and, by applying a binding decision of a superior court in Hong Kong, the Board had endeavoured to do so.

### **Appeal dismissed.**

Cases referred to:

Director of Immigration v Ng Shun-loi [1987] HKLR 798

Levene v IRC [1928] AC 217

R v Barnet London Borough Council, ex parte Nilish Shah [1982] 1 QB 688

Yeung Siu Fai for the Commissioner of Inland Revenue.

Taxpayer in person.

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### **Decision:**

1. This is an appeal against the salaries tax assessment raised on the Appellant for the year of assessment 2000/01. The Appellant claims that he should be granted dependent parent allowances for his father, mother, and mother-in-law, and a dependent grandparent allowance for his grandmother ('the dependants'). At the Board hearing, the Appellant abandoned his claim in respect of his grandmother-in-law.

### **The facts**

2. The facts before us can be briefly stated. The dependants departed from Hong Kong on the following dates: father and mother (11 October 1998), mother-in-law (26 May 1997), and grandmother (18 September 1993). At the Board hearing, the Appellant admitted that none of the dependants later returned to Hong Kong for any period of time before 31 March 2001. He claimed that, prior to their departure from Hong Kong, the dependants had all lived in Hong Kong for more than 50 years and that he and his brother (the only children of his parents) both lived in Hong Kong. He also claimed (in his letter of objection) that he and his wife supported the dependants financially and physically and that his wife stayed with them to show care and respect.

### **The issue**

3. The sole question before us is whether the dependants were 'ordinarily resident in Hong Kong' at any time during the year ended 31 March 2001. The term 'ordinarily resident in Hong Kong' is a precondition for any allowance to be granted under section 30 (dependent parent) and section 30A (dependent grandparent). There is no statutory definition of this term for the purposes of these two sections, although there are definitions of 'permanent resident' and 'temporary resident' in section 41 for the purposes of eligibility for personal assessment.

### **The Appellant's argument**

4. In his notice of appeal the Appellant contended that:

'My parents have been receiving pension from the Government and are current taxpayers in Hong Kong. They have maintained bank accounts, credit cards, club membership and social life circle in Hong Kong and the only reason that they are not coming back for a certain period of time is due to financial reason, bad health and old age of my grandparents. My mother-in-law maintains properties, bank accounts in Hong Kong. In fact, my parents had just come back in last November after my grandparent has passed away. The only factor the Commissioner relied on was whether the persons are physically in Hong Kong in the year of assessment. It is

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without doubt that a person could be an ordinarily resident [*sic*] in Hong Kong but does not stay in Hong Kong most of time. I myself am one of those examples. The Board of Review is requested to look into the actual intention of the phrase [*sic*] “ordinarily resided” [*sic*] and conclude a definition according to the understanding of a reasonable person and applicability of the interpretation.’

5. At the Board hearing, the Appellant argued that to determine ordinary residence we should not simply count the number of days the dependants were physically in Hong Kong. Rather, we should look at the whole picture as set out in the facts above and as stated in his notice of appeal quoted above. The Appellant also argued that, to a layman, ‘ordinarily resident’ meant ‘permanent resident’. Finally, the Appellant contended that the intent of the legislative provisions should not be interpreted to deny him the benefit of the allowances, and to do so would be patently unfair.

### The law

6. The Hong Kong Court of Appeal has defined the term ‘ordinarily resident’ in Director of Immigration v Ng Shun-loi [1987] HKLR 798, per Hunter J:

*‘The words “ordinarily resident” mean that the person must be habitually and normally resident here apart from temporary or occasional absences of long or short duration’* (Levene v IRC [1928] AC 217 applied).

*‘A person is resident where he resides. ...When is he ordinarily resident? I think that is when he resides there in the ordinary way. That must be the meaning of the adverb. The expression is therefore contemplating residence for the purposes of everyday life. It is residence in the place where a person lives and conducts his daily life in circumstances which lead to the conclusion that he is living there as an ordinary member of the community would live for all the purposes of his daily life’* (R v Barnet London Borough Council, ex parte Nilish Shah [1982] 1 QB 688 applied).

### Analysis

7. Applying Ng Shun-loi to the facts of this appeal, there can be no doubt that none of the dependants were ordinarily resident in Hong Kong at any time during the year of assessment 2000/01. Not one of them physically resided in Hong Kong at any time for at least 17 months prior to the beginning of the year of assessment; and then not one of them returned to Hong Kong at any time during that year. Physical absence of such duration is, without proper explanation as to the circumstances of the dependants’ daily life, fatal to the Appellant’s claims. This conclusion is not based simply on counting the number of days and seeing that the dependants did not stay in Hong Kong *most* of the time. Rather, since leaving Hong Kong the dependants did not reside here at *any* time. There is not one scintilla of evidence to suggest that, following their departure from Hong

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Kong, any of the dependants was 'habitually and normally resident' in Hong Kong or resident in Hong Kong 'for the purposes of everyday life'. Indeed, the facts before us point totally the other way.

8. The Appellant argues that such a conclusion is unfair and the legislature could not possibly have intended such a result. We disagree. If the legislature had intended to grant allowances for dependants residing overseas who were simply supported physically and financially by the taxpayer, or who had Hong Kong permanent identity cards, or who owned property in Hong Kong, or who had lived in Hong Kong for so many years, it would have said so. Instead, leaving aside the additional allowances (not relevant to this appeal), it said that allowances would only be granted for dependent parents and grandparents who were 'ordinarily resident in Hong Kong'. We must give effect to these words and, by applying a binding decision of a superior court in Hong Kong, we have endeavoured to do so. This appeal is hereby dismissed.