Case No. D 5/81

Board of Review:

D. J. D'Almada Remedios, J.P. *Chairman*; B. A. Bernacchi; Y. C. Jao; Robert C. Kwok, *Members*.

29 May 1981.

Inland Revenue Ordinance, S.2(1) – Marriage Reform Ordinance – Legitimacy Ordinance – marriage by Chinese customary marriage after 7 October 1971 – whether husband can claim wife and child allowances.

The appellant went through a Chinese customary marriage in 1972. There were two children of the marriage. When the appellant was asked to produce a certificate of marriage the nature of the marriage became known to the Inland Revenue Department. They took the view that the wife was not a wife within the meaning of s. 2(1) of the Inland Revenue Ordinance and that the children did not fall within the definition of "child" contained in s. 43A of the Inland Revenue Ordinance. Accordingly the appellant was refused wife and child allowances.

The appellant appealed to the Board of Review.

Held:

(i) The board found that the wife was not a "wife" within the meaning of the Inland Revenue Ordinance and therefore the appellant was not entitled to an allowance for her.

(ii) However the children are to be considered legitimate by virtue of Section 11 of the Legitimacy Ordinance.

(iii) That being so the definition of child in s. 43A of the Inland Revenue Ordinance is wide enough to cover the children in this case.

Appeal allowed in respect of the two children and dismissed in respect of the wife.

Wong Ho-sang for the Commissioner of Inland Revenue.
T. M. Ho of T. M. Ho & Co. for the Appellant.

Reasons:

The Appellant contracted a marriage with Madam Y according to Chinese customary rites in July, 1972 at Yuen Long. It was followed by a dinner party in celebration of the marriage at which the parents of the bride and groom attended including the village elder and guests. Of this marriage there are two children living with their parents.

In the Appellant's personal assessment returns for the years 1975-76 and 1977-78 his claim for wife and child allowances were granted. In October, 1979 the assessor reviewed the Appellant's entitlement to wife and child allowances and requested the Appellant to submit a certified copy of the marriage certificate. It was then the assessor came to know of the marriage according to Chinese customary rites in July 1972 at Yuen Long.

As a result, additional personal assessments for the years 1975/76 to 1977/78 were raised the effect of which was that the wife and child allowances previously granted were withdrawn because Madam Y was not the Appellant's lawful wife since a Chinese customary marriage contracted in Hong Kong after the 7 of October, 1971 is not a marriage celebrated in accordance with the requirement under the Marriage Ordinance and is not a valid marriage. In June, 1980 the Appellant solemnized his marriage with Madam Y at the Marriage Registry, Hong Kong.

The point that arises for our decision is whether the Appellant is entitled to wife and child allowances for the years of assessment 1975/76 to 1977/78. It is accepted by the representative for the Commissioner that when the Appellant celebrated his marriage according to Chinese customary rites in 1972, he reasonably believed that his marriage was a valid marriage.

Wife

Section 2(1) of the Inland Revenue Ordinance provides that unless the context otherwise requires:

> "'wife' means the lawful wife of any person married to him by a Christian marriage or its civil equivalent, or in the case of a Chinese or any other Asiatic the principal spouse"

We do not think that the context of Section 42B of Part VII relating to Personal Assessment, is such as to require a wider interpretation of the word "wife" especially as the section deals with the allowance being payable "if … the individual was *married* to a wife". We also note that in the original Inland Revenue Ordinance of 1947, this same definition was included in the chapter dealing with personal assessment.

Principal Spouse

Leicester J. in a New Zealand case *C.C.R. and D.J.R. (Infants)* (1962) N.Z.L.R. 561 in dealing with the interpretation of the word "spouse" in connection with consent under adoption proceedings said:-

> "In the first place the natural parents are no longer spouses which is a term appropriate to married people in relation to each other as partner in marriage, a husband to a wife or a wife to her husband ..."

In the 2nd Edition Jowitt's Dictionary of English Law, "spouse" is denned as "a husband or wife", and in the Shorter Oxford Dictionary, the principal definitions of "spouse" are (1) a married woman in relation to her husband, a wife (2) a married man in relation to his wife, a husband. We are therefore of the opinion that principal spouse is to be interpreted as principal wife.

In Chinese Law and Custom the lady occupying the position of "Kit Fat" or "Tin Fong" was known as the principal wife, whereas all other ladies taken in marriage were known as secondary wives or concubines. It is also common knowledge that the old Chinese customs required a ceremony of marriage both for principal and secondary wives. We note that the definition in Section 2(1) of the Ordinance as applying to the Ordinance as a whole was added in 1955 and undoubtedly was inserted to distinguish a principal wife from secondary wives at a time when the law, in effect, recongised polygamy amongst people of Chinese or other Asiatic race. It is of course still necessary to have this provision, in that by virtue of Section 7 of the Marriage Reform Ordinance, Cap. 178, such customary marriages are deemed (still) to be valid if performed before the 7 October 1971. In particular, by Section 5(2)*(a)* of that Ordinance the rights and status of a concubine shall not be affected if taken before the said date. However, for unions contracted after the 7 October 1971, the distinction between the principal and secondary spouse, i.e. wife, simply does not arise.

Child

The position of the two children of what we have in effect held was a void marriage until 1980 has caused us much difficulty. It is agreed by the Commissioner that the Appellant at the time of acts of intercourse resulting in their birth reasonably believed that his marriage to their mother was valid. We think therefore that Section 11 of the Legitimacy Ordinance, Cap. 184 applies, and these children are legitimated. This proposition was not denied by the Commissioner's representative, but he submitted that this only affects their interest in property, in effect under Sections 4 and 5 of that Ordinance. However, he argued that the definition of "child" as contained in Section 43A of the part dealing with personal assessment of the Inland Revenue Ordinance means (and means only):-

> "*(a)* the child of an individual by his wife or former wife; or
>
> *(b)* in the case of a woman her own child; or

(c) in the case of Asiatics a child of the individual by his concubine if such child is recognised by him and his family as a member of his family; or

(d) an adopted child; or

(e) a step-child"

He says that *(a)* does not apply because the general definition of wife means a lawful wife and in this case the Appellant and his wife were not lawfully married until 1980. He says that *(b)* does not apply because the Appellant is the father not the mother. He says that *(c)* does not apply because, whatever else Madam Y is, she is not a concubine and anyhow she could not have been lawfully taken as a concubine after the 7 October 1971. He says as regards *(d)* that just because a child is living with his natural father, this cannot be an adoption which has to be effected by a court order, and he says *(e)* does not arise.

Interpretation

Certainly, we do not think that exclusion of legitimated children could possibly have been the intention of the legislature especially when the Appellant has been supporting these children from their birth. We think that in 1955 when this particular definition was added, it was thought that *(a)* and *(c)* were sufficient to cover all the possible situations that were likely to arise in cases similar to the present, where the children are recognized by the tax-payer and his family and are brought up as members of his family. We note the word "concubine" is no where defined in this Ordinance, and the restriction to "wife" as meaning the lawful wife is only "unless the context otherwise requires".

In the old case of **Eyston v. Studd** (1574) 2 Plowden 459 it was said that:-

"Equity enlarges or diminishes the letter according to its discretion ... experience shows us that no law-maker can foresee all things which may happen, and therefore it is fit that if there be any defeat in the law, it should be reformed by equity ... it is a good way, when you peruse a statute, to suppose the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present".

This quotation has been consistently cited by all editions of Maxwell of Interpretation of Statutes. However, Lord Herschell LC said in **Arrow Shipping Co. Ltd. v. Tyne Improvement Commissioner** (1894) A.C. 508 that:-

"A sense of the possible injustice of interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations."

Mr. Justice Ungoed-Thomas in **Re Maryon-Wilson's Will Trusts** (1968) Ch 268 at page 282 said:

> "If a court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statute or over-riding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice."

Conclusion

Bearing all these in mind, we agree that with the contention of the Commissioner's representative that in a claim for wife allowance the words "individual married to a wife" in Section 42B is referable to a person who is lawfully married to the individual as the context of the Section affords no justification to depart from the meaning of "wife" as denned.

However, in the claim for child allowance, the question is: Can the words "child of an individual by his wife or former wife" in Section 43A be interpreted to include a child of an individual born as the result of a union of marriage celebrated in the belief that the ceremony of marriage was lawful? In our opinion, the word "child" in Section 43A read in conjunction with the variety of cases that would cover the meaning of a child which need not be the natural child of a taxpayer such as a step-child or adopted child and which includes the child of a concubine who is not a wife, leaves the door open for one to construe the word "wife" in the context of Section 43A as capable of meaning a wife in the accepted sense of the word as being descriptive of a person who by reason of a union of marriage contracted in the reasonable belief that the marriage was lawful is recognized by the husband and all those to whom the family is known, as his wife. We find justification in arriving at this conclusion because although the word "wife" is defined in the Ordinance as a "lawful wife", the definition is subject to the qualification as expressed in the words "unless the context otherwise requires". Since, in the general rule of construction, one looks not only to the words but at the context, the collocation and the object of such words relating to such matter (per Blackburn, J. In **Rein v. Lane** (1867) L.R. 2QB, 144, 151) we take the view that the reference to a "child of an individual by a wife" can include the child of a person who has gone through what he and his wife reasonably thought was a lawful marriage ceremony but which through a technicality unknown to the contracting parties at the time did not render the marriage a valid one. Alternatively, child allowance would be permissible by giving the undefined word "concubine" a meaning which includes a lady like Madam Y who was in fact living in the Appellant's house as his wife together with the children since in most dictionaries (including Webster's and the Shorter Oxford Dictionary) the word "concubine" can have 2 meanings (i) a woman who cohabits with a man or (ii) in certain polygamous societies, a secondary wife. It is reasonable to suppose that as the legislature realized that the first meaning could apply, we find a proviso inserted in the section to make it a condition that such child must be recognized by him and his family as a member of the family.

We think further that this interpretation is in line with the intention of the Legitimacy Ordinance, particularly Section 7:-

> "A legitimated person shall have the same rights, and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and, subject to the provisions ... of any law relating to claims for ... allowances, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated persons."

Section 70 of Inland Revenue Ordinance

As regards the point taken on Section 70 of the Inland Revenue Ordinance as to the original assessment being final and conclusive for all purposes, we think that the Appellant is caught by the provisions of Section 60 and that additional assessments can be made at any time within 6 years. We would point out that this Section is now counter-balanced by Section 70A which gives the tax-payer the right to call upon the assessor to correct errors making the assessment too high, also at any time within 6 years.

In the result, the appeal is allowed in respect to the allowances for the two children, but regretfully dismissed in so far as the wife's allowances are concerned.