

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D58/91

Salaries tax – husband and wife – wife living apart from her husband – section 10 of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), Donald Cheung Quintin and Michael Choy Wah Ying.

Date of hearing: 30 October 1991.

Date of decision: 10 December 1991.

The taxpayer appealed against a decision by the Commissioner under which he had decided that the taxpayer was a wife living apart from her husband for the purposes of the Ordinance. The wife maintained that her husband should be charged to salaries tax in respect of her income. The facts before the Board supported the conclusion of the Commissioner that the marriage of the taxpayer had broken down and that the taxpayer was living apart from her husband.

Held:

The onus of proof was on the taxpayer and she had not discharged the same.

Appeal dismissed.

[Editor's note: The Taxpayer has filed an appeal against this decision but withdrawn later.]

Ng Kwok Yin for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal by the Taxpayer against the salaries tax assessment raised on her for the year of assessment 1988/89 on the ground that her husband should be charged to salaries tax in respect of her income for that year.

2. The Taxpayer did not specify the statutory authority she was relying on, but we agree with Mr Ng, the representative of the Commissioner of Inland Revenue, that the

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appeal must be grounded on the former section 10 (repealed since 1 April 1989) of the Inland Revenue Ordinance which reads as follows:

- ‘10. In the case of a husband and wife, not being a wife living apart from her husband:
- (a) salaries tax shall be paid on their net chargeable income; and
  - (b) the husband shall, subject to section 13(2), be solely charged to salaries tax in respect of their net chargeable income.’

Section 13(2), which related to an election by a husband and wife to be separately charged, had no application to the facts of this case. Like section 10, it has since been repealed. 1988/89 was the last year of assessment in which the system charging the husband solely to salaries tax in respect of the wife’s income applied: on 1 April 1989 a new system came into force whereby each spouse is liable to pay salaries tax in respect of his or her own income, unless they elect for salaries tax to be paid on their aggregated net chargeable income, in which case, depending on circumstances, one or the other of them becomes solely liable to pay.

3. The phrase ‘wife living apart from her husband’ was defined by the former section 2 as follows:

- ‘2. “Wife living apart from her husband” means:
- (a) a wife who is living apart from her husband:
    - (i) under a decree or order of a competent court within or outside Hong Kong;
    - (ii) under a duly executed deed of separation; or
    - (iii) in such circumstances that in the opinion of the Commissioner the separation is likely to be permanent;
  - (b) a wife who is a permanent resident as defined in section 41, but whose husband is neither such a permanent resident nor a temporary resident as defined by section 41.’

It was not disputed that none of paragraphs (a)(i), (a)(ii) nor (b) of the definition applied to the facts of the case. As for paragraph (a)(iii), the Commissioner stated his opinion in his determination dated 9 July 1991 that during the year of assessment 1988/89, the Taxpayer was living apart from her husband in such circumstances that their separation was likely to be permanent. We agree with Mr Ng that the onus was on the Taxpayer to demonstrate and prove that the Commissioner’s opinion was wrong.

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4. The Taxpayer did not give evidence, but she agreed with the facts stated in paragraph 1 of the Commissioner's determination and confirmed a number of documents produced by Mr Ng both as to authenticity and as to truth of contents. The facts that emerge from those documents, so far as they are relevant, may be summarised as follows.

5.1 The parties were married in 1978.

5.2 A son was born to them in 1980.

5.3 The Taxpayer's husband showed no affection for the Taxpayer, was a gambler and hot-tempered, raising arguments with her over trivial matters.

5.4 The Taxpayer's husband had been giving the Taxpayer \$1,000 pocket money every month until October 1985. They had a quarrel over the pocket money which led to assaults by the Taxpayer's husband on her.

5.5 On 1 November 1985 the Taxpayer left the matrimonial home, thereby causing a separation. The parties have not lived together again ever since.

5.6 The Taxpayer's husband has made no attempt at reconciliation and has refused two attempts at reconciliation made by the Taxpayer.

5.7 In early 1988 the Taxpayer filed her divorce petition on the grounds that the marriage had irretrievably broken down.

5.8 In late 1988 on the application of the Taxpayer, the court granted an interim injunction restraining her husband from assaulting, molesting, annoying or otherwise interfering with her or the child, or entering the matrimonial home until further order and interim custody of the child were offered to her.

5.9 Six days later the court made a decree nisi, and ordered among other things interim maintenance of the child at the rate of \$1,000 per month to be paid by the Taxpayer's husband.

5.10 At the end of 1988 the Taxpayer's husband applied for leave to apply for a transfer or settlement of property order in relation to the matrimonial home.

5.11 There were breaches of the interim injunction and the order for interim maintenance by the Taxpayer's husband, like seeking entry into the matrimonial home and destroying the lock to the main door, molesting and threatening the child on the telephone, assaulting the Taxpayer on several occasions and ceasing to pay interim maintenance of the child as from April 1989. On her instructions, her solicitors wrote to her husband's solicitors in December 1988, March and May 1989 complaining about the breaches and warning her husband of possible committal proceedings.

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5.12 On 3 July 1989 the Taxpayer wrote to the Commissioner regarding her salaries tax return for the year of assessment 1988/89, stating among other things the following:

‘As I am undergoing a divorce, I have not been in contact with [the Taxpayer’s husband] for a considerable period of time. Furthermore, my current home address must be kept strictly confidential and not to be disclosed to [the Taxpayer’s husband] for whatever reasons. This is the resultant effect from his pervious disturbances made towards my family and should you deem necessary, I shall be able to provide evidences from police reports.’

6. In the course of her submission, the Taxpayer told us that since the latter part of 1990, things had been quiet and that there had been no interference on the part of her husband. He has accessed to the child once every two weeks but pays no interim maintenance for the child or the Taxpayer.

7. The separation commenced in November 1985, has continued since then and is continuing. After two unsuccessful attempts at reconciliation, the Taxpayer decided to divorce her husband and in March 1988 filed her petition. Thereafter their relations went from bad to worse: there were repeated breaches of the injunction which kept the Taxpayer busy making protests and giving warnings and caused her to move to a secret home address to avoid further molestations. In the circumstances and on the facts as outlined in 5 above, we find that throughout the year of assessment 1988/89, the Taxpayer was living apart from her husband in such circumstances that their separation was likely to be permanent, and that the Commissioner was right in forming the opinion that he did.

8. The Taxpayer in her submission stated that the date of separation should be the date of the decree nisi being made absolute. Her husband’s claim on the matrimonial home impeded the progress of the divorce proceedings, that the decree nisi was yet to be made absolute but no deed of separation was executed. She was not willingly to live apart from her husband, but forced to do so by her husband’s bad behaviour. Furthermore, in any event, she argued, her salaries tax assessment was excessive in that it failed to take into account her husband’s income. We have considered these points with care, but have come to the conclusion that none of them assists the Taxpayer in this appeal, as they are all irrelevant to the one issue we have had to decide.

9. This appeal therefore stands dismissed.