

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D62/97

**Child allowance** – interim application to summon a third party to attend – child allowance – section 31(1) – single parent allowance – section 32(1).

Panel: Christopher Chan Cheuk (chairman), John C Broadley and Kenneth Ting Woo Shou.

Date of hearing: 30 May 1997.

Date of decision: 15 October 1997.

The taxpayer was a divorcee and had two children. By a court order custody of the two children were granted to her husband but with defined reasonable access given to the taxpayer. The taxpayer claimed (a) that she was entitled to single parent allowance and (b) that the 1/6 portion of child allowances granted to the taxpayer was incorrect as she contributed more than her husband towards the maintenance of the children. The Revenue made an interim application requesting the Board to call the husband to attend the Board hearing for the following reasons: (i) that any decision made by the Board would affect the husband's tax liability and (ii) that the husband could give evidence helpful to the case. But, both parties indicated that they would not take the initiative to call the husband as witness.

Held:

- (a) The Board refused the interim application on the following grounds:
  - (i) that the husband was not a party to the proceedings and it was highly irregular and most unfair to him for the Board's decision to be made binding on him; and
  - (ii) that unless the parties or the Board thought the husband's evidence would be helpful to the Board but in the present case neither parties intended to call him and the Board was not in a better position to assess the necessity of calling the husband there was no reason for the Board to exercise the discretion to summon the husband as witness.
- (b) The taxpayer was not entitled to single parent allowance as it was found her husband did maintain the children.
- (c) The taxpayer was not successful in proving that the 1/6 portion of child allowances granted to the taxpayer was incorrect and needed adjustment.

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### **Appeal dismissed.**

May Chan for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

1. This is an appeal by Madam A ('the Taxpayer') against the determination by the Commissioner of Inland Revenue on 13 June 1996 in respect of the single parent allowance and the apportionment of child allowance relating to the Taxpayer's children with the effect that the Taxpayer was granted 1/6 of the child allowance prescribed by the Inland Revenue Ordinance in the five years of assessment 1989/90 to 1993/94.

### **Interim Application**

2. Before the hearing Ms Chan for the Revenue made an interim application in writing requesting the Board on its own motion to summon the Taxpayer's husband, Mr B to give evidence before the Board for the reasons: (a) that Mr B's evidence may assist the Board in coming to its decision and (b) the outcome of this appeal may affect his tax liabilities. The Board refused the application and indicated that it would give its reasons at the hearing. The Board do not think that reason (b) above is a good reason for calling Mr B as witness: Mr B is not a party to this proceeding and if he is called purely for the purpose ascertaining his liability it is highly irregular and most unfair to him. First of all, he is not a party to this appeal and is not prepared for it. Even assuming he is so prepared, we do not know how the Board can make the final decision binding upon him except by his own agreement and undertaking to the Revenue made it very clear that she did not intend to call Mr B as witness. We also understood from the Taxpayer that neither did she intend to call him. The Board see no reason why they have to take the initiative to call my witness as the parties know much better how to conduct their own cases and the Board are very loath in interfering. Unless the Board feel that it is absolutely necessary, otherwise Mr B will not be called. However, at this stage the Board do not want to pre-judge the issue whether to call Mr B. Accordingly, the interim application is dismissed. The Board will call Mr B only if they find that they are unable to make judgment upon the evidence produced by the parties and that Mr B can help to decide the issue.

### **Ground of Appeal**

3. The Taxpayer claimed that the proportion of child allowance that is 1/6 of the total amount prescribed by the Ordinance that had been decided by the Commissioner was unfair and unreasonable and that the proportion should be adjusted to reflect the amounts of actual payment by Mr B and herself towards the maintenance and education of their children. She did not state in the notice of appeal or at the hearing that she intended to appeal against the ruling by the Commissioner in respect of the single parent allowance against her. As the Taxpayer was acting in person we are prepared to give her the benefit of

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doubt that she was also appealing against that decision. Therefore, there were two issues before the Board, namely, (a) whether she was entitled to the single parent allowance under section 32(1) of the Inland Revenue Ordinance (the IRO) and (b) whether the 1/6 portion of child allowances granted to the Taxpayer pursuant to section 31(2) of the IRO was correct and whether it needed adjustment.

### **Facts of the case**

4. The Taxpayer was a divorcee and had two children: the daughter was born on 25 March 1979 and the son on 7 April 1981. By a court order dated 10 day of September 1986 custody of the two children were granted to Mr B but with access in the following two ways reserved to the Taxpayer: (i) staying access on alternate weekend between 10:00 am on Saturday and 8:00 pm Sunday and (ii) additional access for one half of the Summer School Holidays, Christmas Holiday, New Year Holiday, Chinese New Year Holiday and Easter Holiday. The Board were told, and there is no reason to doubt, that the parties were generally observing the order of custody and access with some variation when occasions arose that there were family celebrations the children would stay slightly longer with the Taxpayer.

### **Evidence**

5. The parties agreed a bundle of documents consisting of 90 pages which was marked as exhibit 'A'. At the hearing the Taxpayer produced a further bundle of documents of 14 pages which was marked as exhibit 'B'. The Taxpayer gave evidence on oath and was cross-examined by Ms Chan for the Revenue.

6. In her evidence Madam A tried to demonstrate to us that she was a caring mother and showed great concern for her children, which we have no reason to doubt. She also attempted to convince us that Mr B was an 'absentee' father and did not pay too much attention to the children's welfare. Then she attacked the statements of account given by Mr B in respect of the expenses spent on the two children for the year of assessment 1989/90 as set out in exhibit A-73 with translation at A74-75. She pointed out the different items that she considered unreasonable including the following:

books & stationeries	As the children were studying at a subsidised school such items were provided by the school and not by Mr B.
reference books etc	Mr B did not care too much about the children and it was unlikely that the children were given money to buy those books.
breakfast etc	The children were studying in the afternoon session and got up very late every day; they hardly had any breakfast at all.
sundries items	The Taxpayer rightly pointed out that sundries appeared in three separate items and should be reduced.

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pocket money            Madam A claimed that Mr B hardly provided any pocket money for the children.

various course fees      The Taxpayer accused Mr B of not enrolling the children to any course except the computer class.

7.            The Taxpayer then proceeded to prove her case by referring to exhibit B page by page, one after another:

B1            Extracts of the Taxpayer's bank account showed her salaries for the years of 1989, 1990 and 1991. She claimed that her former husband's income should be relatively the same.

B2 to B6        With these receipts Madam A tried to prove that most of the medical treatments and health care for the children were handled by her.

B7 to B10       The four documents are receipts from Limited C, a music company, which showed the enrolment for music courses and purchase of musical instruments by Madam A who claimed that they were for the children.

B11 & B12      These are receipts from Company D for purchase of Chinese nutritious foods by Madam A who claimed that she bought them for her children's consumption.

B13 & B14      These are three tuition fees receipt for language classes attended by the Taxpayer and the children.

The above evidence as contained in exhibit B show very clearly that the Taxpayer is a loving mother who shows great concern for her children. Exhibits B are piecemeal evidence and are not sufficient to build up a full picture how much she spent towards the maintenance and education of the children.

8.            Ms Chan for the Revenue was successful in her cross-examination in establishing that the account rendered by the Taxpayer for the year of assessment 1989/90 consisted of nothing but very rough estimates and not supported by receipts except the few referred to in exhibits B. She also pointed out to the Board that the sum of \$18,000 allocated to accommodation should not be taken into consideration as the property was owned by the Taxpayer and for the same reason Mr B had not included this item in his calculation.

9.            For the year of assessment 1989/90 the Taxpayer gave three different sets of figures:

(a)          The first one was an attachment to her tax return dated 7 May 1990 where she gave very rough estimates and generally commented on Mr B's account. Most

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probably the assessor made the apportionment of the child allowance based on these estimates and comments.

- (b) The second set of accounts was embodied in the Taxpayer's letter dated 30 May 1992, that was about two years after the above tax return. It set out in detail with explanation on the various sums she had spent.
- (c) The third set was dated 18 July 1995 which included more items than before, for example, birthday presents. The figures for the original items were much higher than those set out in the previous statement, for example, the item for food being \$15,000 in the reply of 30 May 1992 which was raised to \$18,000 in the third set of account.

10. Ms Chan was also successful in casting doubt on the Taxpayer's assertion that Mr B's income for those years was almost the same as hers. She had not been in contact with him since divorce. She only visited Mr B's house three times during that period when Mr B was not at home. She did not know when he was promoted from the position of a teacher to that of panel teacher and later, headmaster.

### LAW

11. Under section 31(1) child allowance is granted to a person who has living and is maintaining an unmarried child under the age of 18. If there are more than one person who is entitled to the child allowance the allowance will be apportioned by the Commissioner having regard to the contributions made by each individual to the maintenance and education of the child during the year.

12. As to single parent allowance under section 32(1) it is granted to the person who has the sole or predominant care of a child in respect of whom he was entitled to be granted a child allowance.

13. Section 68(4) passes the burden of proof that the assessment appealed against is incorrect to the Taxpayer.

### FINDINGS

14. The Board have no doubt in their mind that the Taxpayer is a very caring and good mother. She felt aggrieved because she lost custody of the two children to her former husband. She also thought that the Revenue had treated her unfairly as she had spent and gave up so much for the children while she was given only 1/6 of the child allowance which was disproportionate to the effort and time she had spent on the children. The Taxpayer seemed to have overlooked that the Hong Kong Revenue system was governed by law. Both the Commissioner and the Board have to make their decisions based on the evidence before them.

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15. The Board find it as fact, and neither did the Taxpayer dispute it in any part of her evidence, that the children mainly lived with Mr B who had the custody and care of them in fact and in law. For this reason her appeal against the Commissioner's decision on her claim for single parent allowance must fail.

16. As stated above, the burden to prove that the Commissioner was wrong in granting her only 1/6 of the child allowance rested with the Taxpayer. She was successful in showing to the Board that Mr B may have exaggerated in his statements of account the amounts he had spent for the children as stated in paragraph 6 above. However, the main parts of his contributions towards maintenance and education of the children remain unshaken. For reasons we give in the following paragraphs this does not help Madam A in her appeal.

17. The Taxpayer did not give full accounts of her expenditure for the children. Except for the year of assessment 1989/90 which she gave three different versions, for the other years we have comments and explanations set out in each year of her tax return but we do not have any actual figure to rely on for us to assess her actual contribution. As to the year of assessment 1989/90 the figures for the same item vary from one set of account to another. There is no way to ascertain what the actual figures are. We are of the opinion that there are similar exaggerations in her accounts as those in her former husband's. Further, as the law restricts our consideration to maintenance and education there are a number of items which had been spent by the Taxpayer do not fall within these two categories, for example, purchase of toys, soft toys and gold bracelets.

18. The burden is on the Taxpayer to show that the Commissioner was wrong in making the apportionment but on the evidence before us we are not persuaded that the Taxpayer is successful in doing so. Neither do we think that Mr B's evidence, if he is called, will be able to help to establish how much had been spent by Madam A as contributions towards the maintenance and education of the children.

19. At first the Board was puzzled why the Taxpayer took so much trouble in prosecuting the appeal as the amount involved was not significant. In her final submission she took great pain to explain in length how she lost custody of the children to her former husband and why she was not satisfied with the court decision. She wanted to prove that Mr B was a liar. She felt she was unfairly treated. She said in her submission if she was successful in the appeal she would not keep the money but used it for the children. The Board have great sympathy for her but we do not decide the case on sympathy. We note that the daughter is now over 18 years old; according to law she is out of age and she has the right and freedom to make her own decision and manage her own affair. It is not proper for the Board to give the Taxpayer any legal advice but she is strongly advised to take independent legal opinion on the matter of custody and access. The Board of Review is definitely not the right forum for her to pursue such claim.

### **DETERMINATION**

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20. For reasons stated above the Board dismiss the Taxpayer's appeals against the Commissioner's determination on 13 June 1996 in respect of the single allowance under section 32(1) and the allocation of 1/6 of the child allowance to the Taxpayer under section 31(2) relating to the five years of assessment from 1989/90 to 1993/94. Accordingly, both the Commissioner's determination and the salaries tax assessments for the respective years are confirmed.