

Case No. D63/05

Salaries tax – home loan interest – whether mortgage loan interest when property still under development deductible – section 26E of the Inland Revenue Ordinance ('IRO').

Panel: Patrick Fung Pak Tung SC (chairman), Ng Tai Chiu and Peter Ngai Kwok Hung.

Date of hearing: 25 October 2005.

Date of decision: 21 December 2005.

For the year of assessment 2000/01, interest on the equitable mortgage loan of the Property had been allowed to the taxpayer.

Upon discovery that the Property was still under construction and not yet occupied by the taxpayer during that year of assessment, additional tax was raised on the taxpayer.

The taxpayer appealed.

Held:

1. Section 26E(1) of the IRO provides that a deduction of the interest paid by a person for a home loan obtained for a dwelling which is used by him/ her as his/ her place of residence during that year of assessment shall be allowable to him/ her for that year of assessment.
2. During the year of assessment 2000/01, when the Property was still under construction, the taxpayer did not use and could not have used the Property as her place of residence.

Appeal dismissed.

Taxpayer represented by her husband.

Chan Siu Ying and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

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1. This is an appeal by the Appellant (‘ the Taxpayer’) against a determination dated 22 July 2005 (‘ the Determination’) by the Respondent (‘ the Commissioner’) whereby the latter by one of her deputies overruled an objection by the Taxpayer against an assessment and demand for additional salaries tax made on her for the year of assessment 2000/01 and confirmed the assessment of additional net chargeable income of \$50,000 with additional tax payable thereon in the sum of \$8,500.

The facts

2. The Taxpayer did not appear at the hearing of the appeal but was represented by her husband who gave evidence.

3. The facts are not in dispute so that the representative of the Commissioner did not even cross-examine the Taxpayer’ s husband.

4. On 29 February 2000, the Taxpayer and her husband as joint tenants entered into an agreement for sale and purchase to purchase a property known as ‘Address A’ (‘ the Property’) at a consideration of \$3,883,600.

5. On 29 May 2000, the Taxpayer and her husband obtained a loan from Bank B secured by an equitable mortgage on their interest in the Property.

6. At the time of purchase of the Property, the development project was still under construction. It was not completed until the early part of 2001.

7. The Occupation Permit and the Certificate of Compliance for the project (including the Property) were not issued until 11 April 2001 and 18 June 2001 respectively.

8. The Property was assigned to the Taxpayer and her husband on 24 July 2001. On the same date, the said equitable mortgage was replaced by a legal mortgage.

9. The Taxpayer and her family subsequently moved into the Property which they have used as their home up to the present.

10. The assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2000/01:

	\$	\$
Income		340,870
<u>Less:</u> Home loan interest	50,000	

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Contributions to recognized Retirement schemes	<u>4,000</u>	<u>54,000</u>
		286,870
<u>Less:</u> Basic allowance		<u>108,000</u>
Net chargeable income		<u>178,870</u>
Tax payable thereon		<u>19,907</u>

There was a note by the assessor that the deductions were allowed subject to review. The Taxpayer did not object to the abovementioned assessment.

11. Upon discovery that the development project had not been completed in the year of assessment 2000/01 and that the Property had not been occupied by the Taxpayer as her residence during that time, the additional salaries tax was raised on her which as stated above has led to this appeal.

The case of the Taxpayer

12. The main thrust of the submission of the Taxpayer's husband is that the raising of the additional salaries tax in question is contrary to the spirit of the relevant legislation as declared by the Hon Donald Tsang when he was Financial Secretary which was to encourage citizens to purchase their own homes.

The law

13. The deduction of home loan interest is governed by section 26E of the Inland Revenue Ordinance ('IRO'). Section 26E(1) of the IRO provides as follows:

'Subject to the other provisions of this section and to section 26F, where a person pays during any year of assessment any home loan interest for the purposes of a home loan obtained in respect of a dwelling which is used at any time in that year of assessment by the person exclusively or partly as his place of residence, a deduction in respect of the home loan interest shall be allowable to that person for that year of assessment.'

The term 'home loan' is defined in section 26E(9) as follows:

"home loan" (居所貸款), in relation to a person claiming a deduction under this section for any year of assessment, means a loan of money which is –

(a) applied wholly or partly for the acquisition of a dwelling which –

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- (i) *during any period of time in that year of assessment is held by the person as a sole owner, or as a joint tenant or tenant in common; and*
 - (ii) *during that period of time is used by the person exclusively or partly as his place of residence; and*
- (b) *secured during that period of time by a mortgage or charge over that dwelling or any other property in Hong Kong ...'*

Our conclusion

14. It is quite clear to the Board that the Taxpayer did not qualify in claiming deduction of home loan interest for the year of assessment 2000/01 because she did not use and could not have used the Property as her place of residence during that year of assessment. The Occupation Permit and the Certificate of Compliance covering the Property were issued only after the expiration of the year of assessment 2000/01.

15. As the Taxpayer's husband realized, however, the home loan interest for that year of assessment can in effect be claimed for deduction at a later stage by the Taxpayer. Thus, the main effect of the present assessment and demand for additional salaries tax is really inconvenience to his family in the context of their tight budget at this time.

16. In the circumstances, we have no alternative but to dismiss the appeal of the Taxpayer. We also confirm the assessment of the Commissioner as contained in the Determination.