

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D66/86

Board of Review:

H. F. G. Hobson, *Chairman*, David B. K. Lam and C. G. Large, *Members*.

31 March 1987.

Personal Assessment whether property tax paid in respect of certain vacant properties the Appellant owned ought, by virtue of Section 43(2B)(c) of the Inland Revenue Ordinance, to be set off against the total of taxable income from other sources.

On the 16 November 1981 the Appellant received a Property Tax Assessment which he paid without demur. Section 7 of the Inland Revenue Ordinance provides for the reduction and refund of property tax in case of unoccupied property. The Appellant had until 29 June 1982 (i.e. 90 days after the end of the year of assessment 1981/82) to make a claim to refund under Section 7B of the Inland Revenue Ordinance. Having failed to make a timely objection, the Appellant claimed that Property Tax paid in respect of certain vacant properties he owned ought, by virtue of Section 43(2B)(c) of the Inland Revenue Ordinance, to be set off against the total of taxable income from other sources. In effect the Appellant sought a set-off under the Personal Assessment System provided for in part VII of the Inland Revenue Ordinance which is aimed at affording taxpayers a taxable maximum.

Held:

It is up to the Appellant to invoke Part VII of the Inland Revenue Ordinance and endeavour to meet the criteria laid down in the provisions of Part VII. An anomaly exists in Section 43(2B)(c) of the Inland Revenue Ordinance but the Appellant having failed to meet the criteria laid down the appeal must fail.

Appeal dismissed.

(Note: The Appellant has subsequently appealed to the High Court.)

Wong Chi-wah for the Commissioner of Inland Revenue.

Lau Kam-cheuk of S Y Leung & Company for the Appellant.

Reasons:

Mr. L (the "Taxpayer") appealed against a personal assessment for the year 1981/82 on the grounds that Property Tax paid in respect to certain vacant properties he owned ought, by virtue of S. 43(2B)(c), to be set off against the total of taxable income from other sources.

The facts which are set out in the Determination of the Deputy Commissioner's Determination are disputed in one respect only, namely that the property tax assessment was made on the 16 November 1981 and not the 28 December 1981 as therein mentioned. The

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Revenue, represented by Mr. WONG Chi-wah, acknowledged the Deputy Commissioner's mistake but nothing of significance turns upon it.

The real issue arises out of an obscure anomaly in the Inland Revenue Ordinance which occurred when S. 5A(3A) was introduced into law by the Public Revenue Protection (Property Tax) Order 1981 on the 12 November 1981: that Order was made under the auspices of the Public Revenue Protection Ordinance, Cap. 12. The Order was intended to alleviate property tax by changing the system from a tax based upon "assessable value" relieved (under S. 7) only by certain periods of vacancy to one based upon the property being let out at the *beginning* of the Year of Assessment and then limiting the tax to the lesser of assessable value of actual rent again S. 7 providing hindsight adjustment.

On the 16 November the Taxpayer received a Property Tax Assessment which he paid without demur on the 28 December 1981. He had until the 29 June 1982 (i.e. 90 days after the end of the year of assessment 1981/82) to make a claim to refund under S. 7B he did not do so in ignorance, so we were told by Mr. LAU Kam-cheuk who represented him, of the consequence of the effect of the Order, namely that at the beginning of the year of assessment (i.e. 1 April 1981 or perhaps more precisely when he acquired the premises on 1 July 1981) as the property concerned was not let he would not be liable to property tax: the onus however lies upon the Taxpayer to object (S. 7B). Even if a taxpayer has failed to object within the 90 days mentioned in S. 7B he may nevertheless manage to achieve a set-off (a) against any profits tax he incurs within 6 years of the Property Tax Assessment or (b) by virtue of the Personal Assessment System provided he can meet the relevant conditions laid down in Part VII of the Ordinance.

To fully appreciate the issues it is necessary to undertake the following historical review of the relevant legislative provisions of the Inland Revenue Ordinance ("IRO") which we have edited by eliminating irrelevant passages.

(1) Prior to 1965

Section 7 and 7A read "7. Where it is proved to the satisfaction of the Commissioner that any land or buildings or land and buildings have been unoccupied during one or more entire months of any year of assessment any property tax payable in respect thereof shall be reduced proportionately and any excess tax paid shall be refunded.

7A. In this Part

"buildings", except for the purposes of subsections (2), (3), (4) and (5) of section 5, includes any part of a building;

"land or buildings or land and buildings" includes piers, wharves and other structures;

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“owner” includes a person who holds land or buildings or land and buildings subject to a ground rent or other annual charge;

“unoccupied” means put to no beneficial use other than use as a habitation for a caretaker.”

(2) By S. 8 of Ordinance 26 of 1969 the following was added to the IRO:

7B(1) “7B. (1) Notwithstanding section 70, a claim made for a refund of property tax under paragraph (a), (b) or (c) of subsection (3) of section 5 or under section 7 may be made in writing within ninety days after the end of the relevant year of assessment or within ninety days after notice of assessment to the property tax is given, whichever is the later:

Provided that if the Commissioner is satisfied that owing to absence from Hong Kong, sickness or other reasonable cause, the person claiming a refund of property tax was prevented from making his claim within the period allowed, the Commissioner shall extend the period as he considers reasonable in the circumstances.

(2) (2) For the purposes of Part XI a claim made in accordance with subsection (1) shall be regarded as an objection to an assessment under section 64.”

(3) IRO of 1970 Section 43 read as follows:

“43. (1) Tax shall be charged on the individual in respect of his total income reduced by the allowances under section 42B at the rates specified in the Second Schedule:

Provided that where a person is liable to tax under this Part for a part only of any year of assessment prior to the year of assessment 1950/51, the provisions of the Second Schedule shall be modified in the manner specified therein.

(1A) Notwithstanding subsection (1), the amount of tax charged on an individual under that subsection shall not in any case exceed the amount which would have been chargeable on him had the standard rate been charged on his total income as reduced by any allowance made under paragraph (e) of subsection (1) of section 42B.

(2) Any tax paid by the individual whether directly or by deduction under the provisions of section 6 or 29 and any salaries tax and any business profits tax paid under the provisions of Parts III and IV respectively shall, where the relevant amounts on which such taxes were calculated are included in the total income of the individual, be set off for the purposes of collection against the tax charged under this Part on that individual.

(2A) Any tax paid by the individual whether directly or indirectly under the provisions of Part II for a year of assessment for which he has elected personal assessment, to the extent to which such tax

(a) is available for set off under section 25;

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- (b) would have been refundable under subsection (3) of section 5 except that the relevant part of the land or buildings or land and buildings did not qualify under the definition of building or part thereof in paragraph (c) of subsection (5) of section 5;
- (c) would have been refundable under section 7 except that the relevant period when the land or buildings or land and buildings were unoccupied did not consist of entire months in the year of assessment.

shall be set off for the purposes of collection against the tax charged under this Part on that individual for that year of assessment.

(3) Where the aggregate of the taxes which may be set off under subsections (2) and (2A) exceeds the amount of tax charged on an individual under this Part, the Commissioner shall, on receipt of a claim from such individual in the form specified by the Board of Inland Revenue and on being satisfied that the claim is in order, refund such excess to such individual.”

- (4) By S. 5 of the Inland Revenue (Amendment) Ordinance 76 of 1975 Section 7 at (1) above was replaced by the following wording:

“7. Where it is proved to the satisfaction of the Commissioner that any land or buildings or land and buildings have been occupied for less than 12 months in any year of assessment any property tax payable in respect thereof shall be reduced proportionately and any excess tax paid shall be refunded.”

- (5) Sub-Section (2A)–(3) above was amended by the I.R. (Amendment) (No. 6) Ordinance 1981 by

- (a) relettering the section to 43(2B), and
- (b) deleting the words we have shown in square brackets in the quotation at (3) above.

At the same time there was a consequential amendment to Sub-Section (3) of S. 43 by adding the reference to the relettered (2B).

- (6) A copy of the 1981 Order is attached hereto for convenience the introduced Sub-Section (3A) to Section 5A is reproduced here:

“(3A) Subject to subsection (3B), where any land or buildings or land and buildings are wholly let on the first day of any year of assessment and the Commissioner is satisfied that the assessable value of the land or buildings or land and buildings as ascertained in accordance with this section exceeds the annual rent in respect of the land or buildings or land and buildings, the assessable value for that year of assessment shall, if paragraphs (a) and (b) of subsection (1) or (2) apply, be reduced to the annual rent.”

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Before turning to consideration of the foregoing we feel that we should mention that Mr. Lau strenuously argued that the underlying intention of the Personal Assessment System contained in Part VII of the IRO is to enable a Taxpayer to limit the total of all taxable earnings from property, interest salary and profits to the standard rate. In this instance however, in consequence of the Deputy Commissioner's Determination, the Taxpayer's total tax will exceed this rate: to the tune of \$3,922.

We recognize that indeed Part VII is aimed at affording taxpayers a taxable maximum, though we are bound to add that it is up to the taxpayer to invoke Part VII (as was done here) and endeavour to meet the criteria laid down in the provisions of Part VII.

Reverting to the provisions quoted above it will be seen that for the year of assessment 1981/82, Section 7 contemplates reduction of property tax in proportion to *any* period within that year of assessment when the property is vacant. Section 43(2B) on the other hand remained in force with the words "except the relevant period when the ... buildings ... were unoccupied did not consist of entire months in the year of assessment".

Thus an anomaly exists: whilst Section 7 (as quoted at (4) above) allows an unqualified pro rata reduction for vacancy no matter for how long, a set-off under S. 43(2B)(c) is only permissible *if* the taxpayer is *not* entitled to a reduction under Section 7 *because* the vacancy period did not consist of entire months, yet quite clearly such a situation could never arise after S. 7 was amended to introduce the unqualified apportionment reduction.

Mr. Wong submitted that with the coming into force of (4) above paragraph (c) to Section 43(2B) became redundant: in effect he was conceding that when the Inland Revenue (Amendment) Ordinance 76 of 1975 was passed it should also have included a provision for the elimination of paragraph (c).

Mr. Lau on the contrary submitted that it remains on the statute book and deliberately so and hence we have to make some sense of it by construing it as "(c) would have been refundable under Section 7 if the taxpayer had applied for a refund ...". The effect of this interpretation would be to give a taxpayer a second chance so far as his Property Tax Assessment is concerned which he did not have before S. 7 was amended i.e. a new opportunity would be introduced despite the fact that the wording of S. 43(2B)(c) remained unaltered. No evidence was adduced to the effect that the legislature intended any such consequence when amending S. 7 in 1975. We are of the view that the failure to amend S. 43(2B)(c) by deleting paragraph (c) was an oversight.

Mr. Lau drew our attention to the fact that in the Deputy Commissioner's reasons for rejecting the Taxpayer's objection he referred to the latter's failure to make a timely objection (claim) under S. 7B whereas S. 43(2B)(c) refers only to S. 7 and by the Interpretation and General Clauses Ordinance, Cap. 1, at S. 17(2) the reference is necessarily confined to S. 7 and cannot embrace S. 7B. We do not think there is merit in this argument since in our opinion S. 7B merely lays down the time and method whereby the

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taxpayer is proven to the satisfaction of the Commissioner etc. as though S. 7 were expressed “where it is proved, in the manner and within the time laid down in S. 7B, to the satisfaction of the Commissioner ...”.

Whilst we have considerable sympathy for the Taxpayer’s case for the reasons expressed above we are of the view that his appeal must fail despite the fact that in consequence he will for the year of assessment concerned be paying tax in excess of the standard rate.

We arrived at this decision notwithstanding that the Revenue was placed in the unusual position of having to argue that a portion of the Statute of which it is the monitor is redundant. We recognize however that the Revenue, though involved in the drafting of amendments, is not the body ultimately responsible for such legal anomalies as are encountered here.

We recognize that it can be argued that upon the expiry of 90 days that the entitlement to a refund ceases to exist; consequently there is no “refundable tax” upon which s. 43(2A)(c) can operate. We think however that it is unnecessary to examine the merits of such an argument having reached the opinion set out above.