

Case No. D67/05

Salaries tax – married person's allowance – single parent allowance – sole or predominant care of a child – Inland Revenue Ordinance ('IRO') sections 29(1) and 32.

Panel: Benjamin Yu SC (chairman), Chow Wai Shun and Peter K F Ng SC.

Date of hearing: 8 September 2005.

Date of decision: 5 January 2006.

The taxpayer married Ms B in 1987 and have a son born in 1994. The taxpayer was legally divorced from Ms B in October 1998. Nevertheless, they continued to live together with the son in the matrimonial home after the divorce. The taxpayer paid for all household expenses including maintenance of the son.

Held:

1. As the taxpayer was not legally married to Ms B after November 1998, he is not entitled to married person allowance for the years of assessment from 1999/2000.
2. The taxpayer does not have the sole or predominant care of the son by the sole reason that he made financial contribution to maintenance of the son. He is also not entitled to single parent allowance.

Appeal dismissed.

Taxpayer in person.

Wong Kai Cheong and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

The issue

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1. This is an appeal by Mr A ('the taxpayer') against a determination by the Deputy Commissioner of Inland Revenue dated 31 May 2005. The taxpayer was dissatisfied with the determination in the rejection of the taxpayer's claim for married person's allowance and single parent allowance for the years of assessment 1999/2000 to 2001/02.

The facts

2. The facts in this case are not in dispute. The taxpayer gave evidence before us. His evidence was not challenged. We find the following facts proved:

- (1) The taxpayer married Ms B on 20 December 1987.
- (2) They have a son who was born on 8 January 1994.
- (3) On 24 August 1998, the District Court granted a decree nisi for the dissolution of the marriage between the taxpayer and Ms B. Custody of the son was granted to Ms B, with reasonable access to the taxpayer.
- (4) The decree nisi was made absolute on 30 October 1998.
- (5) The taxpayer nevertheless continued to reside with Ms B and the son in the matrimonial home after the divorce.
- (6) During the relevant period, the taxpayer was the sole breadwinner of the family. Ms B did not have a job. She spent her time looking after the family. The taxpayer paid for all household expenses including all outgoings and maintenance in respect of the son.

Claim for married person's allowance

3. As stated above, the taxpayer was legally divorced from Ms B since October 1998. However, in the original tax assessments for the years 1999/2000 to 2001/02, the assessor had allowed in each year married person's allowance of \$216,000. Upon review, the assessor considered that the taxpayer should not have been granted deductions of married person's allowance since November 1998 and raised additional assessments for the years of assessment 1999/2000 to 2001/02.

4. The taxpayer objected against the additional assessments, inter alia, on the ground that he should be granted married person's allowance.

5. Section 29(1) of the **Inland Revenue Ordinance** ('IRO') provides:

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‘An allowance (“married person’s allowance”) shall be granted under this section in any year of assessment if a person is, at any time during that year, married and –

- (a) the spouse of that person did not have assessable income in the year of assessment; or*
- (b) that person and his spouse have made, in relation to the year of assessment, an election under section 10(2); or*
- (c) that person has elected to be assessed under Part VII.’*

6. It is worth noting that under section 29(4), where husband and wife are living apart, a married person's allowance may be granted, although it shall only be granted where the spouse claiming the allowance is supporting or maintaining the other.

7. Marriage is a status. It is clear from section 29 that the grant of married person's allowance depends on the existence of the status. ‘Marriage’ is defined in section 2 of the IRO. It is defined to mean any marriage recognized by the law of Hong Kong or any marriage recognized by the law of the place where it was entered into and between persons having the capacity to do so.

8. On the facts, the taxpayer was not legally married to Ms B after November 1998. Since then the taxpayer has not married again. He is not entitled to the grant of married person's allowance for the years of assessment 1999/2000 to 2001/02. The determination of the Deputy Commissioner cannot be faulted on this ground.

Single parent allowance

9. The other ground of appeal raises the question whether the taxpayer was entitled to single parent allowance during the relevant year of assessment. Section 32 of the **Inland Revenue Ordinance** provides that

- ‘(1) An allowance (“single parent allowance”) of the prescribed amount shall be granted if at any time during the year of assessment the person had the sole or predominant care of a child in respect of whom the person was entitled during the year of assessment to be granted a child allowance.*
- (2) A person shall not be entitled to claim single parent allowance –*
 - (a) if at any time during the year of assessment the person was married and not living apart from his or her spouse;*

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(b) by reason only that the person made contributions to the maintenance and education of the child during the year of assessment; or

(c) in respect of any 2nd or subsequent child.'

10. The issue in this case is whether the taxpayer has the 'sole or predominant care' of the son during the relevant years of assessment. It is plain that he could not be said to have the 'sole' care. Can it be said that he had 'predominant' care?

11. The Deputy Commissioner regarded 'care' to relate to the custodial responsibility for the child, that is, day-to-day care, supervision and control of the child. No doubt, these are relevant factors to be considered. It seems to us, however, that the wording of sub-section (2)(b) suggests that financial contribution to maintenance and education is not irrelevant.

12. In our view, the question of whether a parent has the predominant care of a child is a question of fact. That question should be considered by reference to all relevant facts. This would include not only the day-to-day care and supervision over the child, but also the making of decisions for the child's welfare as well as the provision of financial support for the child.

13. Having taken into account all relevant facts, we are not satisfied that the taxpayer has the predominant care of his son. The situation in this household is typical of other small family where the father is the sole breadwinner, and the mother spends all her time looking after the family with help from the father when he is off work. Even taking into account the fact that the father is the sole financial provider, we are unable to say that he can, in these circumstances, be regarded as the person having the predominant care of the son.

14. For the reasons we have attempted to state, we would dismiss this appeal.