

**Case No. D70/05**

**Salaries tax** – claims for the deduction of home loan interest – delay of the Inland Revenue Department to notify the taxpayer – sections 26E and 60(1) of the Inland Revenue Ordinance ('IRO') – whether or not a beneficial owner of an interest in the property in question can claim for home loan interest.

Panel: Patrick Fung Pak Tung SC (chairman), Chow Wai Shun and Jiang Zhaodong.

Date of hearing: 5 December 2005.

Date of decision: 24 January 2006.

A property was purchased in the names of the younger sister and the mother of the husband of the taxpayer as joint tenants. The registered owners of the Property and the taxpayer's family have lived in the Property ever since. The younger sister and the mother of the husband of the taxpayer purchased the Property as joint tenants so that a low interest loan can be obtained from the employer of the younger sister of the taxpayer. It was the taxpayer to make the contribution to the mortgage repayments due from the mother of the taxpayer's husband.

The taxpayer claimed deductions from her assessable income the home loan interest paid on the mortgage. On 2005, the taxpayer was informed that her previous claim for deduction of home loan interest was disallowed. The taxpayer complained about the delay on the part of the Inland Revenue Department in notifying her of the rejection of her claim.

**Held:**

1. The law on the interpretation of section 26E of the IRO is very clear that no one can claim a deduction for home loan interest unless he is a legal 'sole owner', 'joint tenant' or 'tenant in common'. In other words, that person must be a 'registered owner' as opposed to just a beneficial owner of an interest in the property in question (D/22/04, IRBRD, vol 19, 163; D20/01, IRBRD, vol 16, 187 and D94/01, IRBRD, vol 16, 792 followed).
2. Section 60(1) of the IRO allows the Inland Revenue Department to have a period of six years within which to claim tax payable. The delay therefore does not afford the taxpayer a sufficient reason to resist the assessment and demand by the Inland Revenue Department.

**Appeal dismissed.**

Cases referred to:

D22/04, IRBRD, vol 19, 163

D20/01, IRBRD, vol 16, 187

D94/01, IRBRD, vol 16, 792

Taxpayer in person.

Tsui Nin Mei and Chan Wai Yee for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal by the Appellant ('the Taxpayer') against the determination by the Respondent ('the Commissioner') through one of her deputies dated 16 September 2005 rejecting the Objection by the Taxpayer to an assessment for additional salaries tax against her for the years of assessment 2000/01, 2001/02 and 2002/03.
2. The facts of the case are very simple and are not in dispute, so much so that the representative for the Commissioner did not even cross-examine the Taxpayer who gave evidence.
3. The case relates to a property known as Address A ('the Property'). The Property was purchased in the names of Madam B and Madam C as joint tenants in 1995. Madam B and Madam C are respectively the younger sister and the mother of the husband of the Taxpayer. Madam B, Madam C, the Taxpayer, her husband and the child of the Taxpayer and her husband have lived in the Property ever since.
4. According to the Taxpayer, the reason why the Property was purchased in the names of Madam B and Madam C was that Madam B was able to obtain a low-interest loan from her then employer for the purpose of purchasing her residential property. Madam B was, however, not able to obtain a loan for the purchase of the entirety of the Property because she was not in a high enough income bracket. The Property had therefore to be purchased jointly with a close relation. Neither the Taxpayer nor her husband was qualified for the purpose of the said employer. The joint purchaser had therefore to be the mother. Madam C however did not have the ability to pay any part of the purchase price of the Property. It was the Taxpayer (and/or her husband) who had been making the contribution to the mortgage repayments due from Madam C.

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5. For the years of assessment in question, the Taxpayer claimed that she should be entitled to deduction from her assessable income the home loan interest paid on the mortgage. Such claim was allowed by the Inland Revenue Department 'subject to review'.

6. By letters dated 28 April 2005, the Commissioner by one of her Assistant Commissioners informed the Taxpayer that her previous claim for deduction from her assessable income the interest paid on the mortgage of the Property was disallowed because she was not a registered owner of the Property. She was issued with assessments and demands for additional salaries tax as follows:

- (i) for the year of assessment 2000/01 : \$5,244;
- (ii) for the year of assessment 2001/02 : \$7,010;
- (iii) for the year of assessment 2002/03 : \$6,875.

7. The Taxpayer objects to such assessments and demands. She says that she (and/or her husband) genuinely paid for the mortgage repayments due on the part of Madam C. She complains that, even if she was wrong on her claim, the Inland Revenue Department should not have taken such a long time to inform her of such mistake and should not have accepted her claim year after year, albeit 'subject to review'. She says that if she had been informed earlier, she would have made other arrangements so that she would be able to enjoy the benefit of the deduction in question.

8. The relevant provisions in the Inland Revenue Ordinance Chapter 112 ('the IRO') are as follows:

***'26E. Home loan interest***

- (1) *Subject to the other provisions of this section and to section 26E 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.*
- (2) (a) *Subject to paragraphs (b) and (c) and subsection (3), a deduction allowable to a person under subsection (1) in respect of any home loan interest paid by the person during any year of assessment shall be –*

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(i)(A) *where the dwelling is used by the person exclusively as his place of residence during the whole of that year of assessment, the amount of the home loan interest paid;*

...

(b) *For the purposes of this section, where a dwelling is held by a person otherwise than as a sole owner, the amount of the home loan interest paid referred to in paragraph (a)(i) shall be regarded as having been paid –*

(i) *where the dwelling is held by the person as a joint tenant, by the joint tenants each in proportion to the number of the joint tenants; or*

(ii) *where the dwelling is held by the person as a tenant in common, by the tenants in common each in proportion to his or her share in the ownership in the dwelling.*

(c) *For the purpose of paragraph (a), where a dwelling is held by a person otherwise than as a sole owner, the relevant amount specified in Schedule 3D referred to in paragraph (a)(ii) shall be regarded as having been reduced –*

(i) *where the dwelling is held by the person as a joint tenant, in proportion to the number of the joint tenants; or*

(ii) *where the dwelling is held by the person as a tenant in common, between the tenants in common each in proportion to his or her share in the ownership in the dwelling.*

(9) *In this section -*

*“dwelling” (住宅) means any building or any part of a building –*

(a) *which is designed and constructed for use exclusively or partly for residential purposes; and*

(b) *the rateable value of which is separately estimated under section 10 of the Rating Ordinance (Cap. 116);*

*“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 –*
  - (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;*

*“home loan interest” (居所貸款利息), in relation to a person claiming a deduction in respect of a dwelling under this section, means interest paid by the person as a sole owner, or as a joint tenant or tenant in common of the dwelling for the purposes of a home loan to –*

- (a) the Government;*
- (b) a financial institution;*
- (c) a credit union registered under the Credit Unions Ordinance (Cap. 119);*
- (d) a money lender licensed under the Money Lenders Ordinance (Cap. 163);*
- (e) the Hong Kong Housing Society;*
- (f) an employer of the person; or*
- (g) any recognized organization or association;*

*“place of residence” (居住地方), in relation to a person who has more than one place of residence, means his principal place of residence;*

*...’*

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9. The law on the interpretation of section 26E of the IRO is now very clear. It has been decided by the Board of Review in other cases that no one can claim a deduction for home loan interest under that section unless he is a **legal** 'sole owner', 'joint tenant' or 'tenant in common'. In other words, that person must be a 'registered owner' as opposed to just a beneficial owner of an interest in the property in question. See the decisions in Cases No D22/04, IRBRD, vol 19, 163, D20/01, IRBRD, vol 16, 187 and D94/01, IRBRD, vol 16, 792.

10. Since the Taxpayer is not a registered owner of the Property at law and is at most a beneficial owner of an interest in the Property, her claim cannot succeed.

11. As regards the complaint by the Taxpayer about the delay on the part of the Inland Revenue Department in notifying her of the rejection of her claim, we have some sympathy for her. The law, however, allows the Inland Revenue Department to have a period of six years within which to claim tax payable. Section 60 (1) of the IRO reads as follows:

*'60. Additional assessments*

*(1) Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, and the provisions of this Ordinance as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder:*

*Provided that –*

*(a)*

*(b) where the non-assessment or under-assessment of any person for any year of assessment is due to fraud or wilful evasion, such assessment or additional assessment may be made at any time within 10 years after the expiration of that year of assessment.'*

The delay therefore does not afford the Taxpayer a sufficient reason to resist the assessment and demand by the Inland Revenue Department.

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12. In the circumstances, we have no alternative but to dismiss the appeal by the Taxpayer. We confirm the assessments for additional salaries tax on the Taxpayer made by the Commissioner as contained in the Determination.

13. We have noticed that in the relevant tax return forms there is no item requiring a person making a return to state the names of the registered owner/owners of a property relevant for a claim for deduction for home loan interest. Such an item would readily avoid the situation which has arisen in the present case because it would have been obvious that the claimant was not a registered owner. Furthermore, we have noticed that the relevant note in the explanatory guideline for making a tax return does not really make the point clearly about registered ownership in the context of a claim for deduction for home loan interest.

14. We, therefore, recommend that the Inland Revenue Department should look into the question as to whether the tax return form and the explanatory guideline should be amended accordingly.