

Case No. D7/05

Personal assessment – eligibility to claim personal assessment under section 41 of the Inland Revenue Ordinance ('IRO') – meaning of 'permanent resident' as defined under section 41 – reference to whether appellant or husband had ordinarily resided in Hong Kong – the meaning of the phrase 'ordinary residence'.

Panel: Kenneth Kwok Hing Wai SC (chairman), Susanna W Y Lee and Andrew Li Shu Yuk.

Date of hearing: 5 March 2005.

Date of decision: 21 April 2005.

The appellant appealed against property tax assessments for the years of assessment 1997/98 to 2002/03. As the appellant did not have any business or employment income, and was married with three children, there was a clear tax advantage if she elected for personal assessment.

The eligibility to elect for personal assessment is governed by section 41 of the IRO. In this connection, the appellant argued that she was a 'permanent resident' of Hong Kong within the meaning of section 41 of the IRO.

She relied on the fact that she was born in Hong Kong and had spent 27 years of her life in Hong Kong until 1992, when she emigrated overseas following her husband's job relocation. However, in terms of physical presence in Hong Kong, with respect to each of the relevant years of assessment, neither the appellant nor her husband spent more than 26 days in Hong Kong in any given year.

The issue before the Board was whether the appellant was entitled to elect for personal assessment, and in particular, the meaning of 'permanent resident' under section 41 of the IRO.

Held:

1. In order to be eligible to elect for personal assessment, either the appellant or her husband was required to be either a 'permanent resident' or 'temporary resident' as defined in section 41(4) of the IRO.
2. Under section 41(4) of the IRO, a 'permanent resident' was defined to mean 'an individual who ordinarily resides in Hong Kong'. The term 'ordinary residence'

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was to be given its ordinary and natural meaning. Accordingly, ordinary residence meant residence adopted voluntarily and for a settled purpose, whether or not of short or long duration.

3. On the evidence, neither the appellant nor her husband had resided in Hong Kong at any relevant time. It was accepted that neither the appellant nor her husband could be considered a 'temporary resident'. Accordingly, the appellant was not entitled to elect for personal assessment.
4. *Obiter*. The use of the phrase 'permanent resident' in section 41(1)(b) causes confusion. The Board expressed the tentative view there should be an amendment to this provision to refer to 'ordinarily resident in Hong Kong'.

Appeal dismissed.

Cases referred to:

Levene v Inland Revenue Commissioners [1928] AC 217
Inland Revenue Commissioners v Lysaght [1928] AC 234
Reg v Barnet LBC, Ex p Shah [1983] 2 AC 309
Prem Singh v Director of Immigration (2003) 6 HKCFAR 26
Sun Jie also known as Sun, Alex J v Registration of Persons Tribunal and others,
HCAL 186/2002, unreported, 16 August 2004

Taxpayer in person.

Tang Hing Kwan and Ng Yuk Chun for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 26 November 2004 whereby:
 - (a) Property tax assessment for the year of assessment 1997/98 under charge number 7-4024117-98-7, dated 5 November 2002, showing net assessable value of \$207,200 with tax payable thereon of \$27,972 was confirmed;
 - (b) Property tax assessment for the year of assessment 1998/99 under charge number 7-2269073-99-9, dated 13 February 2004, showing net assessable value of \$316,000 with tax payable thereon of \$47,400 was confirmed;

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- (c) Property tax assessment for the year of assessment 1999/2000 under charge number 7-2196408-00-7, dated 13 February 2004, showing net assessable value of \$288,000 with tax payable thereon of \$43,200 was confirmed;
- (d) Property tax assessment for the year of assessment 2000/01 under charge number 7-2204947-01-3, dated 13 February 2004, showing net assessable value of \$220,098 with tax payable thereon of \$33,014 was confirmed;
- (e) Property tax assessment for the year of assessment 2001/02 under charge number 7-3403702-02-A, dated 13 February 2004, showing net assessable value of \$239,176 with tax payable thereon of \$35,876 was confirmed; and
- (f) Property tax assessment for the year of assessment 2002/03 under charge number 7-1827030-03-5, dated 13 February 2004, showing net assessable value of \$229,976 with tax payable thereon of \$34,496 was confirmed.

The issue

2. The assessor assessed the appellant to property tax. The appellant contended for personal assessment of her total income. The issue is whether the appellant might elect for personal assessment.

3. Section 5 of the Inland Revenue Ordinance, Chapter 112, is the charging section on property tax. Property tax is charged and computed at the standard rate on the net assessable value of land and/or buildings.

4. In personal assessment cases, an individual's total income is the aggregate of the net assessable value, the net assessable income and the assessable profits, reduced by any allowable deduction under Part IVA (for example, approved charitable donations) (section 42). The total income is then reduced by any applicable allowance prescribed in Part V (for example, basic allowance, married person's allowance, and child allowance) and a single assessment is made by the assessor (section 42A). Tax is charged at the rates as specified in Schedule 2 (section 43).

5. The appellant had no employment or business income. As a married person with three children, there was a clear tax advantage to the appellant if she might elect for personal assessment.

The appellant's case

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6. The appellant was adamant that she was a Hong Kong permanent resident. Her case was that she was born in Hong Kong and had spent 27 years of her life in Hong Kong until 1992 when she moved to Country A following her husband's job relocation.

The relevant facts

7. The appellant's husband was born in Hong Kong in 1956.

8. The appellant was born in Hong Kong in 1965.

9. In February 1992, she gave birth in Hong Kong to her eldest son.

10. In March 1992, she left Hong Kong with her husband and her son for Country A.

11. In November 1993, she gave birth in Country A to her second son, a citizen and passport holder of Country A.

12. By December 1995 at the latest, the appellant's husband has been a citizen and passport holder of Country A.

13. In April 1996, the appellant gave birth in Country A to her third child, a daughter, a citizen and passport holder of Country A.

14. By January 2001 at the latest, the appellant has been a citizen and passport holder of Country A.

15. In July 2001, she left Country A with her husband and their three children for Country B.

16. Counting the day of arrival as one day and counting the day of departure as one day (except for same day arrival and departure in which case the number is one), the number of days when the appellant and her husband were in Hong Kong were respectively as follows:

Year of assessment	No. of days of the appellant's presence in Hong Kong	No. of days of the appellant's husband's presence in Hong Kong
1996/97	11	22
1997/98	4	4
1998/99	12	20
1999/2000	7	12
2000/01	5	26
2001/02	0	8

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2002/03	14	7
2003/04	16	6

Eligibility for personal assessment

17. Section 41, so far as relevant to this case, provides that:

‘(1) *Subject to subsection (1A), an individual-*

(a) *of or above the age of 18 years, or under that age if both his or her parents are dead; and*

(b) *who is or, if he or she is married, whose spouse is either a permanent or temporary resident,*

may elect for personal assessment on his or her total income in accordance with this Part.

...

(4) *In this section-*

“permanent resident” (永久性居民) means an individual who ordinarily resides in Hong Kong;

“temporary resident” (臨時居民) means an individual who stays in Hong Kong for a period or a number of periods amounting to more than 180 days during the year of assessment in respect of which the election is made or for a period or periods amounting to more than 300 days in 2 consecutive years of assessment one of which is the year of assessment in respect of which the election is made.’

18. To be eligible for election for personal assessment, the appellant or her husband must be a ‘permanent resident’ or ‘temporary resident’, **within the meaning of these terms as defined in section 41(4).**

Whether ‘temporary resident’

19. The appellant accepted that neither she nor her husband had been in Hong Kong:

(a) for more than 180 days in any of the relevant years of assessment; or

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- (b) for more than 300 days in two consecutive years of assessment one of which was one of the relevant year of assessment.

Neither the appellant nor her husband was a temporary resident within the meaning of section 41(4).

Whether ‘permanent resident’, that is, whether ‘ordinary residence’

20. Unless the appellant or her husband was a permanent resident within the meaning of section 41, the appellant might not elect for personal assessment and her appeal must fail.

21. Section 41(1)(b), read with section 41(4), makes it clear that to be a permanent resident within the meaning of section 41, the individual must ordinarily reside in Hong Kong.

Meaning of ‘ordinary residence’

22. The words ‘ordinary residence’ were considered by the House of Lords in two tax cases reported in 1928. In these two cases, the House of Lords decided to construe the words as bearing their natural and ordinary meaning as words of common usage in the English language.

23. In Levene v Inland Revenue Commissioners [1928] AC 217 at page 225, Viscount Cave LC found it difficult to imagine a case in which a person while not resident there was yet ordinarily resident there and held that ‘ordinary residence’ connoted residence in a place with some degree of continuity and apart from accidental or temporary absences:

‘The expression “ordinary residence” is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word “residence” as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here.’

24. In Inland Revenue Commissioners v Lysaght [1928] AC 234, Viscount Sumner held that ‘ordinarily’ meant ‘adopted voluntarily and for settled purpose’ and Lord Buckmaster rejected the element of choice as a factor of great or final consequence in determining residence and held that ordinary residence meant no more than that residence was not casual or uncertain but that the person did so in the ordinary course of his life.

‘My Lords, the word “ordinarily” may be taken first. The Act on the one hand does not say “usually” or “most of the time” or “exclusively” or

“principally” nor does it say on the other hand “occasionally” or “exceptionally” or “now and then,” though in various sections it applies to the word “resident,” with a full sense of choice, adverbs like “temporarily” and “actually.” I think the converse to “ordinarily” is “extraordinarily” and that part of the regular order of a man’s life, adopted voluntarily and for settled purposes, is not “extraordinary.” (per Viscount Sumner, at page 243)

‘I understand the judgment of the Court of Appeal to mean this, that they regard the object of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities of his position in relation to the company of John Lysaght, Ltd., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.’ (per Lord Buckmaster at page 248)

25. In Reg v Barnet LBC, Ex p Shah [1983] 2 AC 309, Lord Scarman, with whom the other members of the House of Lords agreed, held that ‘ordinary residence’ meant residence adopted voluntarily and for settled purpose and that employment was a common reason for choice of regular abode.

‘I agree with Lord Denning M.R. that in their natural and ordinary meaning the words mean “that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration.” The significance of the adverb “habitually” is that it recalls two necessary features mentioned by Viscount Sumner in Lysaght’s case, namely residence adopted voluntarily and for settled purposes.’ (page 342)

‘There are two, and no more than two, respects in which the mind of the “propositus” is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no

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opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the ‘propositus’ intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

...

An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man’s settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: nor will inquiry into such questions call for any deep examination of the mind of the “propositus.”’ (page 344)

26. The Barnet or Brent or Shah case is regarded by the Hong Kong courts as the authority on the meaning of ‘ordinary residence’.

27. It was applied by the Court of Final Appeal in Prem Singh v Director of Immigration (2003) 6 HKCFAR 26 at paragraphs 65 and 75.

‘65. *In Akbarali v Brent London Borough Council, ex p Shah [1983] 2 AC 309, Lord Scarman explains the ordinary and natural meaning of the words “ordinary residence”. Adopting the approach in the tax cases Levene v IRC [1928] AC 217 and IRC v Lysaght [1928] AC 234, his Lordship (at p.343) stated that the concept:*

... refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

Elaborating on the term “settled purposes” Lord Scarman added (at p.344):

The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the “propositus” intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.’

‘75. *In my judgment, the two week period of imprisonment in this case was not de minimis. Ms Eu sought to argue that the sentence brought about a trivial interruption because the period of two weeks represents a small fraction of the seven year qualifying period. However, the exclusion of periods of imprisonment from the ordinary and natural meaning of the words “ordinary residence” in BL art.24(2)(4) does not depend on the duration of such periods being substantial or on their amounting to a substantial fraction of the seven year qualifying period. The exclusion is qualitative. The incarceration, reflecting sufficiently serious criminal conduct to warrant an immediate custodial sentence, falls outside what could qualify as “the settled purposes” underlying a person’s ordinary residence in the ordinary and natural sense of those words, referred to by Lord Scarman in Akbarali v Brent London Borough Council, ex p Shah [1983] 2 AC 309 at p.344. It is this qualitative aspect of time spent in prison that has led to such periods being excluded from the concept of “ordinary residence” in successive statutory schemes and in the Basic Law.’*

28. A more recent example is the case of Sun Jie also known as Sun, Alex J v Registration of Persons Tribunal and others, HCAL 186/2002, unreported, 16 August 2004 where the Honourable Mr Justice A Cheung said in paragraph 29 that the authority of the House of Lords’ decision in Shah cannot be doubted.

Board’s decision on ‘permanent resident’ / ‘ordinary residence’

29. It is clear that neither the appellant nor her husband resided in Hong Kong at any relevant time. Applying the cases cited above, neither the appellant nor her husband ordinarily resided in Hong Kong at any relevant time, that is, neither the appellant nor her husband was a permanent resident within the meaning of section 41. The appellant might not elect for personal assessment and her appeal fails.

Amendment of section 41(1)(b)

30. The use of the phrase ‘permanent resident’ in section 41(1)(b) as a criteria and the definition of ‘permanent resident’ in section 41(4) as ‘an individual who ordinarily resides in Hong Kong’ may breed misunderstanding and discontent.

31. Prior to the Inland Revenue (Amendment) (No. 3) Bill 1989, dependent parent allowance was governed by section 42B. An individual who was a ‘permanent resident’ in Hong Kong might be eligible for dependent parent allowance. The Inland Revenue (Amendment) (No. 3) Bill 1989 was a bill to amend the Ordinance in relation to the taxation of husband and wife. Clause 13 of the Bill provided for the repeal of section 42B and Clause 9 of the Bill provided for the enactment of a new section 30 on dependent parent allowance. The words ‘a permanent resident of Hong Kong’ appeared in the proposed section 30(1)(a). However, when the legislature enacted the Inland Revenue (Amendment) (No. 3) Ordinance 1989, those words were replaced by ‘ordinarily resident in Hong Kong’.

32. When the legislature introduced the dependent grandparent allowance in 1994, it adopted the ‘ordinarily resident in Hong Kong’ wording.

33. Perhaps section 41(1)(b) ought to be amended to adopt the same ‘ordinarily resident in Hong Kong’ wording.

Disposition

34. We dismiss the appeal and confirm the assessments as confirmed by the Deputy Commissioner.