

Case No. D72/06

Property tax – rates paid for non-rental period – burden of proof – sections 5(1), 5(1A), 5B, 59, 60 and 68(4) of the Inland Revenue Ordinance (‘IRO’)

Panel: Patrick Fung Pak Tung SC (chairman), Vincent Mak Yee Chuen and Duffy Wong Chun Nam.

Date of hearing: 7 November 2006.

Date of decision: 28 December 2006.

By an assignment dated 7 July 1998, the taxpayer acquired a property at address B. By a tenancy agreement dated 7 March 2000, the taxpayer let out the Property for a period of two years from 15 March 2000 at a monthly rental of \$32,000. The taxpayer declared only her income as a teacher but no rental income in her Tax Return – Individuals for the year of assessment 1999/2000. In her Tax Return – Individuals for the year of assessment 2000/01 the taxpayer declared her income as a teacher as well as rental income from the Property. In the 2001 Return she also inserted a note stating that she was going to sell the Property soonest the tenant moving out in July 2001 and applied for withholding all the taxable incomes as arising from the rental of the Property.

The assessor raised property tax assessments for 1999/2000 and 2000/01 on the taxpayer. For the year of assessment 1999/2000, the taxpayer objected on the ground that rates paid for the Property for the year 1999/2000 should be deducted from the 2000 Charge. As for the year of assessment 2000/01 the taxpayer objected on the ground that the tax for the 2001 Charge had already been paid and it was inconceivable that the IRD only processed half of the 2001 Return and only assess her for salaries tax but not property tax. It was unfair for the IRD to simply issue the assessment in 2006 and throw the burden of proof on the taxpayer.

Held:

1. The argument based on the word ‘those’ (in the plural) in the expression ‘those rates paid by him’ in section 5(1A)(b)(i) of the IRO to the effect that it is a reference to the rates payable per quarter as opposed to per year is quite ingenious but wrong. That paragraph in section 5(1A) simply refers to the situation where there is a contractual obligation on the part of the owner to pay rates. Furthermore, the case relied on by the IRD No D71/02 is squarely on the point. In that case the taxpayers let their property out for three-quarters of the year and paid rates for the

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entire year. It was held that the taxpayers could only claim deduction of the rates for three-quarters of a year from their rental income for tax purposes.

2. The Board does not think that it is inconceivable for the IRD to have processed only a part of the 2001 Return, because one part of it relates to salaries tax and the other part relates to property tax. Mistakes can happen. The Board finds as a fact on the balance of probabilities that the IRD did actually process the entirety of the 2001 Return and decided to hold over any tax payable in respect of the rental income received by the taxpayer in the year of assessment 2000/01 pending the sale of the Property in the then near future as requested by the taxpayer. The Board does not accept the assertion of the husband of the taxpayer that he made payment of property tax for the year of assessment 2000/01 which would have amounted to over \$40,000 in cash. The Board finds this allegation to be incredible. Section 68(4) of the IRO imposes on an appellant – taxpayer the burden of proving that the assessment appealed against is excessive or incorrect. She has failed to discharge the statutory burden imposed on her.

Appeal dismissed and costs order in the sum of \$5,000 imposed.

Case referred to:

D71/02, IRBRD, vol 17, 943

Taxpayer represented by her husband.

Tsui Nin Mei and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against a determination by the Respondent ('the Commissioner') dated 18 August 2006 whereby the Commissioner by one of her deputies overruled an objection by the Taxpayer against property tax assessments for the years of assessment 1999/2000 and 2000/01 raised on her. By the determination, the Commissioner also:

- (i) in respect of the assessment for the year 1999/2000, reduced the net assessable value of \$12,800 with tax payable thereon of \$1,920 to net assessable value of \$12,380 with tax payable thereon of \$1,857;
- (ii) in respect of the year of assessment 2000/01, reduced the net assessment value

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of \$307,200 with tax payable thereon of \$46,080 to net assessable value of \$296,700 with tax payable thereon of \$44,505.

2. The Taxpayer appeared on the hearing of the appeal with her husband, Mr A, who gave evidence on oath and conducted the appeal on her behalf. The Taxpayer did not give evidence or say anything at the hearing.

3. Ms Tsui Nin-mei ('Ms Tsui'), representing the Commissioner, also gave evidence on oath and conducted the appeal on behalf of the Commissioner.

The relevant basic facts

4. The relevant basic facts are not in dispute. They are set out below.

5. By an assignment dated 7 July 1998, the Taxpayer acquired a property at Address B (with car parking space) ('the Property') at a total consideration of \$6,200,000.

6. By a tenancy agreement dated 7 March 2000, the Taxpayer let out the Property for a period of two years from 15 March 2000 at a monthly rental of \$32,000.

7. At the material time, the Taxpayer was a Government teacher by profession.

8. In her Tax Return – Individuals for the year of assessment 1999/2000 ('the 2000 Return'), the Taxpayer declared only her income as a teacher but no rental income.

9. In her Tax Return – Individuals for the year of assessment 2000/01 ('the 2001 Return'), the Taxpayer declared her income as a teacher as well as rental income from the Property as follows:

	\$
Rental income	384,000
<u>Less : Deduction</u>	<u>13,125</u>
Assessable value	370,875
	=====

10. In the 2001 Return, she also inserted a handwritten note in the following terms:

'Please see my application for any Tax to be deducted from my forthcoming expected loss in selling of this property.'

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She further attached to the same an Attachment which reads as follows:

‘I am going to sell this property, i.e. [Address B] soonest the tenant moving out in July 2001, of which moving out I was given notice from the tenant.

I hereby apply for withholding all the taxable incomes (HK\$384,000- for the current return and amounts to be received thereafter) as arising from the rental of this property from paying tax for the time being and any amounts of revenue from rental are to be offset part of the losses in the selling of the above property.

You may fully appreciate the property market in Hong Kong being sharply fallen in prices. The selling of the property will definitely result in loss of my original capital of buying this property, even if to include rental revenues of the property.

Your favourable consideration and approval will be highly appreciated.’

11. By a letter dated 13 January 2006, the assessor informed the Taxpayer that she was reviewing property tax assessments for the years of assessment 1999/2000 and 2000/01 in relation to the Taxpayer and asked the Taxpayer for certain information.

12. By a facsimile dated 22 February 2006, the Taxpayer supplied the following information about the Property:

1. 1999/2000 – from 1-4-1999 to 14-3-2000 – under decoration and vacant
15-3-2000 to 31-3-2000 – rental agreement started &
half month Rental payment
\$16,000 received.
2. 2000/01 – from 1-4-2000 to 31-3-2001 Rental payment
\$384,000 received.
3. 2001/02 – from 1-4-2001 to 14-6-2001 Rental agreement
terminated, on 14-6-2001,
2.5 months rental
(\$75,000) received.
15-11-2001 to 31-3-2002 New rental agreement
payment of 4.5 months
\$135,000 received.

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13. On 7 March 2006, the assessor raised on the Taxpayer the following property tax assessments:

Year of assessment	1999/2000	2000/01
Charge number	7-2314154-00-A [‘2000 Charge’]	7-2358774-01-1 [‘2001 Charge’]
	\$	\$
Assessable value	16,000	384,000
<u>Less : 20% Statutory deduction</u>	<u>3,200</u>	<u>76,800</u>
Net assessable value	<u>12,800</u>	<u>307,200</u>
Tax payable thereon (@15% standard rate)	<u>1,920</u>	<u>46,080</u>

14. On 10 May 2006, the Taxpayer objected to the 1999/2000 property tax assessment under the 2000 Charge in the following terms:

‘I refer to the above Charge and Receipt for my payment of an amount of \$1,920-

Please be informed that the above Charge has not been taking into account of the Rate I have paid for the above housing unit.

The amount of Rate for the year 1999/2000 is HK\$3,150 x 4 = \$12,600 as confirmed by Rating & Valuation Department (Miss Vicky Cheung) reference No. [x-xxx-xx-xxx].

Please arrange for the amendment of the Charge taking into account of the necessary deduction from the taxable property income as per Laws of Hong Kong and refund the excessive amount of charges.’

15. By a facsimile dated 15 March 2006, the Taxpayer objected to the 2000/01 property tax assessment under the 2001 Charge in the following terms:

‘The amounts of taxable income ... were previous reported + submitted in the years as per salaries tax under the column of property tax. These amount were charged and paid. The above charges were duplicated charges.’

16. There were subsequent correspondence and communications between the Inland Revenue Department (‘the IRD’) and the Taxpayer during which the Taxpayer put forward her arguments against the 2000 Charge and the 2001 Charge and the IRD requested the Taxpayer to

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provide proof that she had actually paid the property tax assessed for the year of assessment 2000/01.

17. The matter was not resolved.

18. By a letter to the Taxpayer dated 16 May 2006, the assessor proposed to revise the property tax assessments for the years of assessment 1999/2000 and 2000/01 as follows:

Year of assessment	(a) <u>1999/2000</u>	(b) <u>2000/01</u>
	\$	\$
Rental income	16,000	384,000
<u>Less : Rates</u>	<u>(i)&(ii)525</u>	<u>(iii)13,125</u>
Assessable value	15,475	370,875
<u>Less : 20% statutory deduction</u>	<u>3,095</u>	<u>74,175</u>
Revised net assessable value	<u>12,3802</u>	<u>296,700</u>
Revised tax payable thereon (@15% standard rate)	<u>1,857</u>	<u>44,505</u>

Note

(i) ‘... as the rental income of \$16,000 was for the period 15 March 2000 to 31 March 2000, only rates paid for the same period can be deducted in arriving at the assessable value.’

(ii) \$525 = \$3,150 x 0.5 month/3 month

(iii) Deduction of rates in the amount of \$13,125

19. The matter was still not resolved. Hence, the Determination and this appeal.

The relevant statutory provisions

20. The relevant parts of Section 5(1) and (1A) of the Inland Revenue Ordinance, Chapter 112 (‘IRO’) provide as follows:

‘(1) Property tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person being the owner of any land or buildings or land and buildings wherever situate in Hong Kong and shall be computed at the standard rate on the net assessable

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value of such land or buildings or land and buildings for each such year ...

(1A) *In subsection (1), “net assessable value” (應評稅淨值) means the assessable value of land or buildings or land and buildings, ascertained in accordance with section 5B –*

(a) ...

(b) *less –*

(i) *where the owner agrees to pay the rates in respect of the land or buildings or and buildings, those rates paid by him; and*

(ii) *an allowance for repairs and outgoings of 20% of that assessable value after deduction of any rates under subparagraph (1).’*

21. The relevant parts of Section 5B of the IRO provide as follows:

‘(2) *The assessable value of land or buildings or land and buildings for each year of assessment shall be the consideration, in money or money’s worth, payable in that year to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or land and buildings.*

...

(6) *In this section, “consideration” (代價) includes any consideration payable in respect of the provision of any services or benefits connected with or related to the right of use.’*

22. Section 59 of the IRO reads as follows:

‘(1) *Every person who is in the opinion of an assessor chargeable with tax under this Ordinance shall be assessed by him as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1)...’*

23. Section 60 of the IRO reads as follows:

'(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 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 ...'

24. Section 68(4) of the IRO provides that:

'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

The case of The Taxpayer

25. The argument of the Taxpayer can be summarized as follows:

(1) In respect of the year of assessment 1999/2000

- (i) For the whole year, the Taxpayer received a rental income of \$16,000 and paid rates in the sum of \$12,600. On the true construction of the relevant provisions, the whole amount of the rates paid should be deducted against the rental income for the purpose of tax computation.
- (ii) The previous decision of the Board in case No D71/02, IRBRD, vol 17, 943 has no application to the present case.

(2) In respect of the year of assessment 2000/01

- (i) It is inconceivable that the IRD only processed half of the 2001 Return of the Taxpayer and only assessed her for salaries tax but not property tax.
- (ii) The fact that the IRD was unable to find any record of having assessed the Taxpayer for property tax does not mean that there was never such record. The IRD had the duty to cover all possibilities of the record having been lost by computer or human error before issuing the assessment in the year 2006.
- (iii) It is unfair for the IRD to simply issue the assessment in 2006 and throw the burden of proof on the Taxpayer.
- (iv) From recollection, the husband of the Taxpayer did pay property tax for the year of assessment 2000/01 in cash.

- (v) The Taxpayer is unable to produce the receipt for the payment in cash because all relevant papers were lost/destroyed when she moved house in April 2005.

The Board's findings

26. We deal first with the year of assessment 1999/2000. We find that there is no substance in the argument of Mr A. His argument based on the word 'those' (in the plural) in the expression 'those rates paid by him' in section 5(1A)(b)(i) of the IRO to the effect that it is a reference to the rates payable per quarter as opposed to per year is quite ingenious but wrong. That paragraph in section 5(1A) simply refers to the situation where there is a contractual obligation on the part of the owner to pay rates.

27. Furthermore, the case relied on by the IRD, No D71/02, IRBRD, vol 17, 943, is squarely on the point. In that case, the taxpayers let their property out for three-quarters of the year and paid rates for the entire year. It was held that they could only claim deduction of the rates for three-quarters of a year from their rental income for tax purposes. The Board said at page 948 of the report as follows:

'The answer to the point raised by Mr. B on deduction for rates paid lies again in the previous of section 5 of the IRO. The use of the word "those" in the English version of the IRO in section 5(1A)(b)(i) to qualify the word "rates" suggests that the owner does not get deduction of the amount of rates merely because the rates have been paid by him, he also has to show that the rates which he claims deductions for are the subject of agreement between him and the tenant ... we are of the opinion that the Commissioner was correct in not allowing deduction of rates paid by the owner during the quarter when the Property was unoccupied. The rates that the Appellants paid for that quarter (when the Property was vacant) would not be rates which they paid pursuant to any agreement.' (emphasis added)

28. We now deal with the assessment for the year of assessment 2000/01.

29. First, we do not think that it is inconceivable for the IRD to have processed only a part of the 2001 Return, because one part of it relates to salaries tax and the other part relates to property tax. Mistakes can happen.

30. Secondly, we find as a fact on the balance of probabilities that the IRD did actually process the entirety of the 2001 Return.

31. It is common ground that the Taxpayer was assessed for salaries tax and did pay it.

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32. As regards property tax, Ms Tsui, in giving evidence, produced and showed to the Board, the Taxpayer and Mr A the original file containing the 2001 Return where there were attached to it two forms of 'Request For Land Registry Report', one relating to one part of the Property, namely, the Flat of Address B and the other one relating to the other part of the Property, namely, the carpark space of Address B. On the latter, there was a note by the assessor to the 'AO' (Assessing Officer) in the following terms:

'pl assess AV = 0.'

Ms Tsui explained that that was a direction to the Assessing Officer to assess the assessable value of the Property at zero. She further explained that the probability was that the assessor had been affected by the Taxpayer's request by her note on the 2001 Return for the property tax to be held over on the basis that she was intending to sell the Property at a loss in the near future. Ms Tsui explained that in the circumstances then existing, if the Property was really going to be sold soon, it would be treated as a trading activity on the part of the Taxpayer, whereupon profits tax considerations would come into play and any rental income received would be dealt with in the context of profits tax as opposed to property tax. We accept the explanation of Ms Tsui.

33. We find as a fact on the balance of probabilities that the assessor did process the entirety of the 2001 Return and decided to hold over any tax payable in respect of the rental income received by the Taxpayer in the year of assessment 2000/01 pending the sale of the Property in the then near future as requested by the Taxpayer. (It transpired, according to the evidence of Mr A, that the Property had not been sold eventually. It is now used as a residence for the Taxpayer and her family.)

34. We reject the argument of Mr A that the note by the assessor to the Assessing Officer applied only to the Carport but not to the Flat. We further reject the argument of Mr A that the figure '0.' in the note does not mean 'zero' but is an abbreviation for the word 'original'.

35. Thirdly, we do not accept Mr A's assertion that he made payment of property tax for the year of assessment 2000/01 which would have amounted to over \$40,000 in cash. We do not accept his assertion that the receipt for the cash payment had been lost in the process of moving house. The allegation of payment of property tax in cash does not sit well with the fact that payment of salaries tax by the Taxpayer, \$36,871 for the year of assessment 1999/2000 and \$27,512 for the year of assessment 2000/01 was by PPS (Payment By Phone Service), as borne out by the Confirmations of Payment (Exhibits R – 1 (a) and R – 1 (b)) produced by Ms Tsui. We do not accept the allegation by Mr A that there were two systems of payment of tax in the family, namely, that payment of salaries tax would be done by the Taxpayer by PPS and of property tax by himself in cash. We find his allegation to be incredible.

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36. We further find the allegation by Mr A that at the material time he was engaged in the construction business and used to carrying on him a lot of cash and that he paid property tax for his wife in cash because there was a deadline to be met failing which he would have had to pay a penalty of 5% to be incredible. Such an allegation was never made in the elaborate correspondence between the Taxpayer and the IRD. In the letter from the IRD dated 13 April 2006, the assessor said:

‘I therefore propose to solve the problem we now face by verifying with the bank(s) with which you maintain the payment by phone services accounts. We would check with bank(s) whether they have records showing that you paid the property tax for year of assessment 2000/01 to the Inland Revenue Department . If you agree with my proposal, please forward the following information :

- (1) The name(s) of bank(s) with which you maintain payment by phone services accounts since January 2001.
- (2) The account numbers of the banks listed in (1).

If you disagree my proposal, please forward your proposal in substantiating your claim.’

In the reply from the Taxpayer dated 29 April 2006, she said:

- ‘5. Your letter last Paragraph offered to check my bank accounts for me, with the intention of passing the burden of proof to me. I do not think it is appropriate as it should be you to check and clear within your own house before the (the 2001 Charge) was originated in the first instance ...’

One would have thought that if there was any truth in the allegation made by Mr A as stated above, the same would have been set out right away instead of the response by the Taxpayer quoted above.

37. Fourthly, section 68(4) of the IRO imposes on an appellant – taxpayer the burden of proving that the assessment appealed against is excessive or incorrect. Here, the Taxpayer has not produced any receipt or bank evidence or any satisfactory or credible evidence to show that he should not be liable for the tax demanded. She has failed to discharge the statutory burden imposed on her.

Conclusion

38. We therefore dismiss the appeal of the Taxpayer and confirm the Commissioner’s determination as follows:

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- (i) For the year of assessment 1999/2000, the Taxpayer should pay property tax in the sum of \$1,857.
- (ii) For the year of assessment 2000/01, the Taxpayer should pay property tax in the sum of \$44,505.

39. We take the view that this appeal is frivolous and vexatious and that Mr A has given untruthful evidence.

40. We make an order pursuant to section 68(9) of the IRO that the Taxpayer should pay the costs of the Board in the sum of \$5,000. This is hardly sufficient to cover the costs incurred by Government in dealing with the appeal of the Taxpayer.