

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D8/04

Salaries tax – home loan interest – definition of ‘place of residence’ – whether the property ‘used’ at any time during the relevant period of assessment by the appellant as ‘his place of residence’ – whether such home loan interest paid by the appellant was deductible – section 26E(1) of the Inland Revenue Ordinance (‘the IRO’).

Panel: Andrew J Halkyard (chairman), Charles Graeme Large and Vernon F Moore.

Date of hearing: 21 April 2004.

Date of decision: 12 May 2004.

The appellant purchased a property in Hong Kong (‘the Flat’) jointly with his former wife with a mortgage and paid 100% of the interest expenses on the mortgage at all relevant times until January 2000, when he assigned his half share interest in the Flat to his former wife in accordance with the terms of the divorce and bought a separate residence for himself. Since his separation from his former wife in July 1997, the appellant was refused to live in the Flat where he still left many of his personal possessions. During the year of assessment 1999/2000, he never slept in the Flat because he was prevented from doing so by his former wife. Instead, he slept in his mother’s Sheung Shui flat. In the Deputy Commissioner’s determination, the appellant’s claim for home loan interest deduction referable to his 50% ownership of the Flat during 1999/2000 was disallowed.

On appeal, it was contended by the appellant that he ‘used’ the Flat as his ‘primary place of residence’ during 1999/2000, that he had no reason not to live in the Flat during this time, and that the only thing preventing him from doing so was that his former wife had forced him out of the Flat.

Held:

1. To claim a deduction of home loan interest, the Flat must not only be a dwelling, but it must be the appellant’s sole or primary ‘place of residence’; and ‘used’ by the appellant as such. During 1999/2000, the Flat only satisfied the first count, but not the other counts.
2. A ‘place of residence’ means the place where a person normally lives and sleeps and it at least implies that the person has a sleeping apartment in the dwelling or shares one (BR 12/76, IRBRD, vol 1, 218; D46/87, IRBRD, vol 2, 447 and

INLAND REVENUE BOARD OF REVIEW DECISIONS

D108/02, IRBRD, vol 18, 45 applied). During 1999/2000, the appellant had neither a sleeping apartment nor shared one in the Flat.

3. The Sheung Shui flat was found to be his residence in 1999/2000 and certainly appeared to have been his 'primary' place of residence, if not his sole place of residence (Frost v Feltham (1980) 55 TC 10 distinguished). The Board concluded that the Flat was not the appellant's sole or primary 'place of residence' and that he did not 'use' the Flat as his 'place of residence'. Accordingly, such home loan interest paid by the appellant during 1999/2000 was not deductible under section 26E(1) of the IRO.

Appeal dismissed.

Cases referred to:

BR 12/76, IRBRD, vol 1, 218
D46/87, IRBRD, vol 2, 447
D108/02, IRBRD, vol 18, 45
Frost v Feltham (1980) 55 TC 10

Wong Kai Cheong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. The issue to be decided by us is whether the Appellant should be entitled under section 26E(1) of the Inland Revenue Ordinance to a deduction of home loan interest paid by him in respect of a property located in the Hong Kong Island ('the Flat') during the year of assessment 1999/2000.

The Facts

2. The background facts, which we so find, are set out in the Deputy Commissioner's determination dated 22 December 2003. During the Board hearing, the Appellant gave sworn evidence and was cross-examined thereon. On the basis of that evidence, and the documents produced before us by both parties, we find as follows.

- (a) At all relevant times until January 2000, the Appellant owned the Flat with his former wife as joint tenants.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) At all relevant times during the year of assessment 1999/2000 (the year under appeal) until January 2000, the Appellant paid 100% of the interest expenses on the mortgage taken out to finance the purchase of the Flat.
- (c) The Appellant and his former wife separated on 14 July 1997.
- (d) Thereafter, the Appellant moved to live with his mother in her flat at Sheung Shui. He shared a bedroom in that flat with his younger unmarried adult brother.
- (e) At some time between 14 July 1997 and 31 March 1999, the Appellant lived with a friend in Tin Shui Wai for a short period. During 1999/2000, however, he lived with his mother (and brother) in his mother's Sheung Shui flat until he purchased his own residence in January 2000 after the divorce was finalised.
- (f) The decree nisi in respect of the Appellant's divorce was issued on 19 October 1998. The decree absolute was issued on 4 December 1999. In accordance with the terms of the divorce, the Appellant assigned his share of the Flat to his former wife in January 2000.
- (g) At all relevant times, the Appellant wished to be reconciled with his former wife. His former wife however did not wish to be reconciled with the Appellant.
- (h) During 1999/2000 the Appellant never slept in the Flat. At least up to January 2000, he slept in his mother's Sheung Shui flat, although he regarded the Sheung Shui flat only as temporary accommodation.
- (i) During 1999/2000 the Appellant saw the couple's two children (a girl and a boy) outside the Flat in accordance with the terms of an interim custody order. In addition however, he took his son back to the Flat on several occasions after certain hospital visits (his son suffers from a history of life-long illness). He then played and watched television with both his son and daughter in the Flat. His former wife was not present during those occasions. During those occasions the Appellant had access to all parts of the Flat, except the master bedroom that his former wife then used exclusively.
- (j) From the time that he separated from his former wife in July 1997 until January 2000, the Appellant left many personal possessions in the Flat including books, clothing and photographic equipment. This supports the Appellant's claim that he always hoped to reconcile with his former wife and move back to the Flat.
- (k) At all relevant times, his former wife refused to allow the Appellant to live in the Flat. This is illustrated vividly by two police reports produced by the Appellant of incidents that occurred respectively in November 1997 and August 1998. For the sake of his two children, he did not attempt to exercise any right he may

INLAND REVENUE BOARD OF REVIEW DECISIONS

have had as joint owner to live in the Flat. He did not want to do anything that would adversely affect the well-being of his two children.

Arguments for the Appellant

3. On the basis of his notice of appeal and his written submission, the Appellant argued that the facts before us show that he ‘used’ the Flat as his ‘primary place of residence’ during 1999/2000, that he had no reason not to live in the Flat during this time, and that the only thing preventing him from doing so was that his former wife had forced him out of the Flat. On this basis the Appellant argued that he was entitled to a home loan interest deduction referable to his 50% ownership of the Flat during the year of assessment 1999/2000.

Decision

4. This is a sad case and we feel sorry for the Appellant. He clearly loves his family and apparently did everything he could to keep the family together. He regarded the Flat as both his home and his residence, and the Sheung Shui flat as merely temporary accommodation. On the facts found however, the law is against him and there is nothing we can do to alter that.

5. To claim a deduction under section 26E(1), the Flat must not only be a dwelling (it is), but it must be the Appellant’s sole or primary ‘place of residence’, and ‘used’ by the Appellant as such (and during 1999/2000 on both counts it was not). The cases cited by both parties indicate that a ‘place of residence’ means the place where a person normally lives and sleeps (see, for example, BR 12/76, IRBRD, vol 1, 218, D46/87, IRBRD, vol 2, 447). During 1999/2000 the Appellant did not live in the Flat and did not sleep there. It is true that he was prevented from so doing by his former wife, but on no occasion did he actually reside in or occupy the Flat (apart from visiting his children) and he had no access to his former bedroom when physically present in the Flat with his children. As stated in D108/02, IRBRD, vol 18, 45, a ‘place of residence’ within section 26E at least implies that the person has a sleeping apartment in the dwelling or shares one. During 1999/2000 the Appellant had neither.

6. We understand the Appellant’s frustrations concerning his domestic turmoil during 1999/2000 and we acknowledge his desire to live in the Flat with his family. This leads us to recall the well-known phrase that ‘home is where the heart is’. The Appellant’s heart was, without doubt, at the Flat, but it is incontrovertible that he did not at any time during the relevant period live nor reside there, did not sleep there, and did not have or share any sleeping apartment there. In the event, we must conclude that the Appellant did not ‘use’ the Flat as his ‘place of residence’ in the sense defined in the cases cited above. There is no authority of which we are aware (including Frost v Feltham (1980) 55 TC 10 referred to by the Appellant) that would justify a contrary finding for the purposes of interpreting the phrases quoted above within the context of section 26E as a whole. We must therefore confirm the 1999/2000 assessment, which is the subject of the appeal.

INLAND REVENUE BOARD OF REVIEW DECISIONS

7. In light of this conclusion, it is strictly not necessary for us to decide whether, given his lengthy residence in his mother's Sheung Shui flat from August 1997 to January 2000, the Flat was his 'primary' place of residence as mandated by section 26E(9). We note however that, in accordance with the cases cited above, the Sheung Shui flat was his residence in 1999/2000 and that he lived and always slept there until at least January 2000 when he bought a separate residence. We conclude that, if the Sheung Shui flat was not his sole place of residence during the relevant period, then it certainly appears to have been his 'primary' place of residence.

8. It only remains for us to thank the Appellant for his full and frank testimony; and the Commissioner's representative, Mr Wong Kai Cheong, for his compassionate presentation in this case which was done with due consideration for the proper dignity of the Appellant.