

Case No. D8/06

Salaries tax – home loan interest deductions – sections 26E, 26F, 60 and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Emily Lam Yuet Ming and Vincent Mak Yee Chuen.

Date of hearing: 17 March 2006.

Date of decision: 19 April 2006.

The appellant in B/R 104/05 (the 'Husband') and the appellant in B/R105/05 (the 'Wife') are husband and wife, collectively called the 'Couple'. This appeal and appeal Case No D9/06 were heard together.

By an assignment a residential flat and a car parking space (the 'Property') were assigned to the Couple as joint tenants. There was no allegation and no evidence that the acquisition of the Property had been financed by any loan. Ten months later, the Property was charged to secure general banking facilities granted by a bank to the Couple. Three years later, the Couple discharged the original charge on the Property and charged the Property to another bank to secure other banking facilities. The effect of the assessments appealed against was to disallow home loan interest deductions originally allowed.

The Husband also appealed on the ground that a deduction of \$12,000 should have been allowed as contributions to recognised retirement schemes. At the hearing of the appeal, the representative of the Inland Revenue conceded that a deduction of \$12,000 should have been allowed.

Held:

1. Given the respondent's concession, the Husband succeeds on the \$12,000 point.
2. In the context of the definition of a 'home loan' in section 26E(9), the loan of money must have been applied wholly or partly for the acquisition of a dwelling. In other words, unless the acquisition of the dwelling was financed wholly or in part by a mortgaged loan, claims for deduction are bound to fail. There was no allegation and no evidence that any of the bank loans was applied wholly or partly for the

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

acquisition of the Property. Both the Husband's appeal and the Wife's appeal on home loan interest deduction do not get off the ground.

Appeal allowed in part.

Taxpayer in person.

Tsui Nin Mei and Lau Yuen Yi for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 30 December 2005 whereby the salaries tax assessment for the year of assessment 2004/05 under charge number 9-0123513-05-0, dated 26 July 2005, showing reduced net assessable income of \$1,087,729 with tax payable thereon of \$174,036 was increased to net assessable income of \$1,127,400 with tax payable thereon of \$180,384.

2. The appellant in B/R 104/05 ('the Husband') and the appellant in B/R 105/05 ('the Wife') are husband and wife, collectively called 'the Couple'. The two appeals were heard together.

The relevant facts

3. By an assignment dated 1 July 1996, a residential flat and a car parking space ('the Property') were assigned to the Couple as joint tenants at a consideration of \$7.8 million.

4. There is no allegation and no evidence that the acquisition of the Property was financed by any loan.

5. 10 months later, by a Mortgage dated 13 May 1997, the Couple charged the Property to secure general banking facilities granted by a bank to the Couple.

- (a) The bank granted overdraft facilities up to \$5 million to the Couple.
- (b) There is no allegation and no evidence that any loan money was used in the acquisition of the Property or used in the repayment of any loan money used to acquire the Property.
- (c) The principal outstanding as at 2 May 2000 was \$4,361,292.
- (d) The charge on the Property was discharged on 2 May 2000.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

6. By a Mortgage dated 2 May 2000, the Couple charged the Property to secure banking facilities granted by another bank to the Couple.

(aa) A loan of \$4.2 million was drawn down on 2 May 2000.

(ab) There is no allegation and no evidence that any loan money was used in the acquisition of the Property or used in the repayment of any loan money used to acquire the Property.

(ac) The principal outstanding as at 25 June 2004 was \$3,209,988.53 and was repaid on 25 June 2004.

(ba) A further loan of \$0.25 million was drawn down on 22 June 2001.

(bb) There is no allegation and no evidence that any loan money was used in the acquisition of the Property or used in the repayment of any loan money used to acquire the Property.

(bc) The principal outstanding as at 25 June 2004 was \$202,555.81 and was repaid on 25 June 2004.

(ca) A further loan of \$5 million was drawn down on 25 June 2004.

(cb) There is no allegation and no evidence that any loan money was used in the acquisition of the Property or used in the repayment of any loan money used to acquire the Property.

7. The effect of the assessments appealed against was to disallow home loan interest deductions originally allowed.

Grounds of appeal

8. The Couple appealed on the ground that home loan interest deductions should have been allowed.

9. The Husband also appealed on the ground that a deduction of \$12,000 should have been allowed as contributions to recognised retirement schemes.

The appeal hearing

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

10. At the hearing of the appeal, the Husband appeared in person. The Wife was absent but represented by the Husband. The respondent was represented by Ms Tsui Nin-mei, assessor.

11. Neither the Husband nor the Wife nor the respondent called any witness.

12. Ms Tsui Nin-mei conceded that a deduction of \$12,000 should have been allowed. The Deputy Commissioner recorded the assessor's acceptance of this claim for deduction in paragraph 1(10) of his Determination, but failed to give effect to it in his Determination.

The Board's Decision

13. Given the respondent's concession, the Husband succeeds on the \$12,000 point.

14. We turn now to the claim for home loan interest deduction.

15. Section 68(4) of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

16. Home loan interest deduction was introduced in 1998 by the addition of sections 26E and 26F to the Ordinance.

17. 'Home loan' is defined in section 26E(9) to mean (emphasis added):

'...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 ... joint tenant ... 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'.

18. In the context of the definition of a 'home loan' in sub-section (9), the loan of money must have been applied wholly or partly for the acquisition of a dwelling. In other words, unless the acquisition of the dwelling was financed wholly or in part by a mortgaged loan, claims for deduction are bound to fail.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

19. As noted above, there is no allegation and no evidence that any of the bank loans was applied wholly or partly for the acquisition of the Property.

20. Both the Husband's appeal and the Wife's appeal on home loan interest deduction do not get off the ground. It is not a question of interpretation. One cannot simply ignore the definition in section 26E(9) that home loan is 'a loan of money which is applied wholly or partly for the acquisition of a dwelling ...'

21. The Husband mentioned that home loan interest deductions have been allowed in earlier years of assessments. Whether the assessor wishes to issue additional assessments under section 60 is a matter for the assessor. In this appeal, we are only concerned with the year of assessment 2004/05.

22. The Husband's appeal will be allowed to the extent of reducing the net assessable income by \$12,000. The Wife's appeal will be dismissed.

Disposition

23. We allow the Husband's appeal by reducing the assessment appealed against as increased by the Deputy Commissioner to show net assessable income of \$1,115,400 with tax payable of \$178,464.

Postscript

24. Before we part with this case, we would like to mention two points.

25. The failure of the Deputy Commissioner to deduct \$12,000 from the net assessable income seems quite inexplicable.

26. Both the Husband and the Wife submitted the same figures in their respective claims for home loan interest deduction, but the deductions originally allowed differed! In respect of the Husband, the assessor allowed a deduction of \$39,671. In respect of the Wife, the assessor allowed a deduction \$44,425.