

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D8/86

*Board of Review:*

William Turnbull, *Chairman*, Della P. H. Chan and Yung Chu-kuen, Lincoln, *Members*.

**27 May 1986.**

Salaries Tax—child allowance claim under Section 42B(1)(c) of the Inland Revenue Ordinance—the definition of “child” in Section 43A of the Inland Revenue Ordinance.

The Appellant claimed child allowances in respect of two unmarried children maintained by him during the years 1980/81 to 1983/84. The children were born from co-habitation with a lady for five years and there is no dispute as to his claim as father of the children. For the purpose of granting child allowance a child is defined in Section 43A of the Inland Revenue Ordinance as “the child of an individual by his wife or former wife” and there is no evidence produced to prove that the mother of the two children was the Appellant’s wife or former wife as defined in the Inland Revenue Ordinance. The claim was disallowed and the Appellant appealed.

*Held:*

The Appellant was not entitled to claim child allowances under Section 42B(1)(c) as the children did not come within the definition of Section 43A.

Appeal dismissed.

#### **Cases referred:**

Board of Review Case No. D5/81.

J. G. A. Grady for the Commissioner of Inland Revenue.  
Appellant in person.

*Reasons:*

This is an appeal against a determination by the Commissioner that the Taxpayer is not entitled to claim an allowance under section 42B of the Ordinance in respect of two unmarried children which the Taxpayer was maintaining during the four years 1980/81, 1981/82, 1982/83 and 1983/84. Unfortunately and with considerable regret this Board of Review has no alternative but to confirm the determination of the Commissioner and dismiss the appeal. The facts of the case and the reasons for this decision are set out below.

The relevant facts are that the Taxpayer cohabited with a lady from approximately 1972 until 1977. Two children were born from this cohabitation and the Taxpayer was the natural father of both children. There was no dispute regarding this and the Taxpayer produced birth certificates for both children showing himself as the father. Certain differences arose

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between the lady and the Taxpayer as a result of which they separated in 1977. The Taxpayer maintained the two children during the four years of assessment to which the appeal relates.

When filing his tax returns the Taxpayer claimed child allowances under section 42B(1)(c) of the Ordinance and the Commissioner granted allowances in respect of the Taxpayer's children as claimed. However in 1984 the Commissioner decided that the two children in question were not qualified for the granting of child allowances because they did not come within the definition of "child" set out in section 43A of the Ordinance. Having so decided the Commissioner then also decided retrospectively to disallow the child allowances previously granted and to issue the four tax assessments against which this appeal has been lodged.

The Taxpayer appealed against the determination of the Commissioner on the ground that he was the natural father of the two children and was maintaining them. The Taxpayer said that he was not a wealthy person and already found difficulty in meeting the financial burden of maintaining his two children. He asserted that he could not afford to pay the tax now assessed on him. The reasons contained in the Commissioner's determination were stated as follows:—

"The sole issue to be determined is whether the Taxpayer is entitled to child allowances in respect of the children B and C. For the purpose of granting child allowance and so far as relevant to this case, the definition of child in the Inland Revenue Ordinance states that a child has to be 'the child of an individual by his wife or former wife'. It is clear from the circumstances of this case (see particularly Fact 3) that the mother of the two children was not the Taxpayer's wife or former wife. The claim for child allowance cannot therefore be admitted."

The facts of this case are not as uncommon as one might expect. In Hong Kong we are confronted by a mixture of British law and traditional Chinese attitudes. A number of appeals have come before the Board of Review relating to claims made by a taxpayer for allowances for a wife or children where there has been no marriage ceremony and there would appear to be a gap between the wording the Inland Revenue Ordinance and the intention of those making the law.

The position with regard to an allowance for a wife is a little different from that relating to allowances for children. This was recognized in a previous Board of Review case No. D.5/81 and this Board of Review adopts and accepts the legal interpretations and views of the Board of Review in that case. In that case the Board of Review was unable to grant a wife allowance even though the appellant in that case considered himself to be married and had gone through a form of marriage contract. On the other hand that Board of Review was able to grant a child allowance. We quote the conclusion of the Decision of that Board of Review with approval as follows:—

"Bearing all these in mind, we agree that with the contention of the Commissioner's representative that in a claim for wife allowance the words 'individual married to a wife' in

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Section 42B is referable to a person who is lawfully married to the individual as the context of the Section affords no justification to depart from the meaning of 'wife' as defined.

However, in the claim for child allowance, the question is: Can the words 'child of an individual by his wife or former wife' in Section 43A be interpreted to include a child of an individual born as the result of a union of marriage celebrated in the belief that the ceremony of marriage was lawful? In our opinion, the word 'child' in Section 43A read in conjunction with the variety of cases that would cover the meaning of a child which need not be the natural child of a taxpayer such as a step-child or adopted child and which includes the child of a concubine who is not a wife, leaves the door open for one to construe the word 'wife' in the context of Section 43A as capable of meaning a wife in the accepted sense of the word as being descriptive of a person who by reason of a union of marriage contracted in the reasonable belief that the marriage was lawful is recognized by the husband and all those to whom the family is known, as his wife. We find justification in arriving at his conclusion because although the word 'wife' is defined in the Ordinance as a 'lawful wife', the definition is subject to the qualification as expressed in the words 'unless the context otherwise requires'. Since, in the general rule of construction, one looks not only to the words but at the context, the collocation and the object of such words relating to such matter (per Blackburn, J. In *Rein v. Land* (1867) L.R. 2QB, 144,151) we take the view that the reference to a 'child of an individual by a wife' can include the child of a person who has gone through what he and his wife reasonably thought was a lawful marriage ceremony but which through a technicality unknown to the contracting parties at the time did not render the marriage a valid one. Alternatively, child allowance would be permissible by giving the undefined word 'concubine' a meaning which includes a lady like Madam Y who was in fact living in the Appellant's house as his wife together with the children since in most dictionaries (including Webster's and the Shorter Oxford Dictionary) the word 'concubine' can have 2 meanings (i) a woman who cohabits with a man or (ii) in certain polygamous societies, a secondary wife. It is reasonable to suppose that as the legislature realized that the first meaning could apply, we find a proviso inserted in the section to make it a condition that such child must be recognized by him and his family as a member of the family.

We think further that this interpretation is in line with the intention of the Legitimacy Ordinance, particularly Section 7:—

'A legitimated person shall have the same rights, and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and, subject to the provisions ... of any law relating to claims for ... allowances, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.' "

In the present case we are only dealing with a claim for child allowance and we take the view that the widest interpretation should be given to the granting of a child allowance within the terms of the Inland Revenue Ordinance. It appears clear to us that it was the intention of the legislature that any person maintaining a child for which he or she considered himself or herself legally or morally responsible should be granted an appropriate child relief. Unfortunately there is a gap in the interpretation section, Section 43A, which we are not able to bridge in this particular case. Section 43A specifically relates to the child of an individual "by his wife or former wife" or a child of the individual by his concubine "if such child is recognized by him and his family as a member of his family". In

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the present case there is no claim that the lady with whom the Taxpayer cohabited was his wife. There does not appear to have been any legal or other ceremony on which a claim to such a status of wife can rest. We agree that the word concubine should be given the dictionary meaning referred to in Board of Review decision D.5/81. Unfortunately the definition refers to a child recognized by both the father and his family as a member of his family. As there is no evidence before us of such recognition we are unable to say that the two children in question come within this definition. For this reason we are obliged to dismiss the appeal and affirm the assessments and additional assessments issued by the Commissioner.

In dismissing this appeal we request that the Commissioner to refer this matter to those responsible for drafting the law as it would appear that the natural father of a child who has recognized that he is the natural father and who is in fact maintaining the child should be entitled to claim the relief granted by Section 42B(1)(c). To allow the natural mother of a child to claim a child allowance and to deny the same allowance to the natural father cannot have been the intention of the legislature.

Finally as this allowance for four years has been disallowed retrospectively we hope, though have no power to direct, that the Commissioner will grant whatever length of time of payment may be necessary to avoid any hardship on the Taxpayer and what are in fact, if not in tax law, are his children.