

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D92/97

Salaries tax – Disability Allowance – whether the Social Welfare Department is the only competent authority to decide a person’s eligibility – whether eligibility can be determined before application to the Social Welfare Department – section 31A(1) of the Inland Revenue Ordinance – section 19 of the Interpretation and General Clauses Ordinance.

Panel: Andrew Halkyard (chairman), William E Mocatta and Philip St John Smart.

Date of hearing: 9 October 1997.

Date of decision: 23 December 1997.

The taxpayer’s mother, Madam X was a dependent of the taxpayer for the purposes of section 31A for the year of assessment 1995/96. She was diagnosed as suffering from lymphoma since December 1994. She died on 26 October 1996 and her death certificate stated that the disease or condition directly leading to death was ‘hodgkin lymphoma’ and the approximate interval between onset and death was ‘two years’. The taxpayer submitted to the Board of Review a Medical Assessment Form which stated, inter alia, that Madam X had right leg pain due to lymphoma since January 1996.

The Social Welfare Department had published a pamphlet explaining the main feature of the Scheme which included, inter alia, the Normal Disability Allowance.

After the end of 1995/96, the taxpayer became aware of the Scheme and on 18 June 1996 Madam X applied to the Social Welfare Department for a Normal Disability Allowance. Approval was granted for Madam X to receive payment of Normal Disability Allowance from 18 June 1996.

The Commissioner refused to grant the taxpayer a Disabled Dependant Allowance for the year of assessment 1995/96 on the basis that the Social Welfare Department had decided on 17 July 1996 that Madam X was eligible to claim the allowance with effect from 18 June 1996 and that all these took place after the year of assessment 1995/96.

Held:

(1) Section 31A of the Inland Revenue Ordinance was to be interpreted together with section 19 of the Interpretation and General Clauses Ordinance. The provision was deemed to be remedial and a fair, large and liberal construction and interpretation as would best ensure the attainment of the object of the provision according to its true intent, meaning and spirit was to be placed upon it. The object

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of the legislative provision would not properly be attained if the tax concession in question was solely dependent upon approval by the Social Welfare Department.

(2) Eligibility under the Scheme can be determined before application to the Social Welfare Department. It was clear that the Scheme itself envisaged two different situations: application before eligibility and eligibility before application.

Appeal allowed.

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Apart from one issue, which we deal with under the heading 'Proceedings before the Board', the facts before us are not in dispute. They stem from the assessor's refusal to grant the Taxpayer a Disabled Dependant Allowance in respect of his mother, Madam X for the year of assessment 1995/96 on the basis that she was not eligible to claim an allowance under the Government Disability Allowance Scheme ('the Scheme') in that year of assessment.

The facts

1. At least since December 1994 Madam X was diagnosed as suffering from lymphoma. She was periodically hospitalised at least from December 1994 to the date of her death at age 71 on 26 October 1996. Madam X's death certificate states that the disease or condition directly leading to death was 'hodgkin lymphoma' and the approximate interval between onset and death was 'two years'.

2. Madam X's illness was both long-standing and long-suffering. She underwent a course of treatment in 1995. By early 1996 she was suffering from significant low-back pain. A bone scan at that time showed osseous metastasis and bony metastasis in the region of the lower spine. In the period from January 1996 to April 1996, Madam X was hospitalised at least on the following days:

20 to at least 27 January 1996 inclusive
17 February to 10 April 1996 inclusive
14 to at least 24 April 1996 inclusive

3. The Social Welfare Department ('SWD') has published a pamphlet explaining the main features of the Scheme which includes the Normal Disability Allowance, Higher Disability Allowance, Normal Old Age Allowance and Higher Old Age Allowance. The pamphlet states, in relevant part:

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‘2. The Scheme is designed to provide non-contributory allowance to the severely disabled and elderly persons aged 65 or above to meet the special needs arising from disability and old age.’

‘Who is eligible?’

4. Any person who is severely disabled (as defined in paragraph 5 below), is eligible for a Normal Disability Allowance on condition that he must –

- (a) have lived in Hong Kong continuously for at least a year immediately before claiming the allowance ...;
- (b) continue to reside in Hong Kong;
- (c) not be in receipt of any other allowance under the Scheme;
- (d) not be imprisoned.

Who is severely disabled?

5. A person will be considered as severely disabled within the meaning of this Scheme if he is certified by the Director of Health or the Chief Executive, Hospital Authority (or under special circumstances by a registered medical practitioner of a private hospital) as falling into one of the following categories-

- (a) Disabling physical condition ...

This means that a person is in a position broadly equivalent to a person with a 100% loss of earning capacity according to the criteria of the Employee’ Compensation Ordinance (First Schedule of Chapter 282) [including] ... illness, injury or deformity resulting in being bedridden [or] any other conditions resulting in total disablement.’

‘14. Before a decision is made on whether or not a Normal or Higher Disability Allowance is payable, it is necessary for the applicant’s medical condition to be assessed.

How is payment made?

15. When it has been decided that an allowance is payable, a formal notification of the decision is sent to the applicant. Payment will be calculated from the date of receipt of application by the Department (or the date of application or referral if the application is referred by an organization) or the date of eligibility, whichever is the later.’

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‘Social Security Appeal Board

21. A Social Security Appeal Board ... considers appeals against the decisions of the Department. ...’

4. On 18 June 1996 Madam X applied to the SWD for a Normal Disability Allowance. The approval letter issued by the SWD informing Madam X of the amount of Normal Disability Allowance payable to her for the year ended 1 June 1997 was dated 17 July 1996.

5. In response to the assessor’s enquiries, the Director of Social Welfare advised:

- (a) Madam X was not eligible to claim an allowance under the Scheme during the year ended 31 March 1996. She became eligible to claim the allowance from 18 June 1996, namely, the date of her application for Normal Disability Allowance.
- (b) The date of medical assessment for Madam X was 25 June 1996.
- (c) The disease which rendered Madam X severely disabled for the purpose of the Normal Disability Allowance was lymphoma.
- (d) Madam X commenced receiving Normal Old Age Allowance on 2 March 1991 and Higher Old Age Allowance on 2 March 1995. She ceased receiving Higher Old Age Allowance from 18 June 1996, namely, the date she commenced receiving payment of Normal Disability Allowance.

6. On 30 December 1996 the Commissioner confirmed the salaries tax assessment raised on the Taxpayer for the year of assessment 1995/96. The Commissioner refused to grant a Disabled Dependant Allowance to the Taxpayer in respect of Madam X on the basis that the SWD had decided that she was eligible to claim the allowance with effect from 18 June 1996 (fact 5(a) refers), that approval was given on 17 July 1996 (fact 4 refers) and that all this took place after the year of assessment 1995/96. In response to the Taxpayer’s argument that Madam X was eligible to claim the Normal Disability Allowance in the year of assessment 1995/96 because of her disability in that year, the Commissioner stated:

‘It is not for the Taxpayer or this Department to decide whether his mother was eligible for the Government’s Disability Allowance Scheme. The Scheme is administered by the Social Welfare Department. Eligibility for disability allowance under the Scheme has to be determined through the procedures of application and assessment. In my view, a person cannot rightly and legally be regarded as eligible to claim the allowance until he or she has gone through the necessary procedures and is considered by the Social Welfare Department to be eligible. [Although in 1995/96 Madam X] might be eligible to apply for the allowance, she was not eligible to claim the allowance because no application

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was made and approved in that year. There must be a distinction between the eligibility to apply for and the eligibility to claim the allowance. The claim does not exist before the application is approved, even though the physical conditions giving rise to the claim exist before the approval. It follows that the Taxpayer cannot be granted Disabled Dependant Allowance for that year.'

7. On 21 January 1997 the Taxpayer lodged a valid appeal to this Board. The Taxpayer claims that the Commissioner was wrong in denying his claim for Disabled Dependant Parent Allowance in respect of Madam X for the year of assessment 1995/96.

Contentions of the Taxpayer

The Taxpayer in correspondence with the assessor, in his grounds of appeal and in his arguments before us has presented various contentions in support of his claim. We summarise them as follows:

- (1) Section 31A(1) of the Inland Revenue Ordinance has not restricted the year in which the Disabled Dependant Allowance could be granted. Neither has it stipulated that the date of approval of the SWD will determine the date of entitlement to the Disabled Dependant Allowance. Rather, it simply prescribes that the allowance shall be granted in any year in respect of every dependant who is eligible to claim an allowance under the Scheme. In other words, section 31A(1) does not state that SWD approval must be obtained in the year in which a person becomes eligible to claim. It only speaks of a person being 'eligible to claim'.
- (2) In similar vein, the Commissioner was wrong in basing her determination upon the distinction between the eligibility to apply for and the eligibility to claim the allowance under the Scheme, even in the case where the physical conditions giving rise to the claim exist before approval by SWD. Section 31A(1) does not make this distinction. In any event, the meaning of the terms 'eligible to apply for' and 'eligible to claim' are essentially the same.
- (3) It is accepted that the date of granting the Normal Disability Allowance commences only after the application date (compare fact 3, paragraph 15). It is also accepted that it is not possible to have the date of grant backdated notwithstanding that the condition giving rise to the grant had existed for a long period of time. But, as indicated above, the application date does not determine the date on which a person is eligible for the Normal Disability Allowance. In this regard, Madam X had been suffering from, and disabled due to, lymphoma since her hospitalisation in 1994. Furthermore, lymphoma was precisely the medical condition that rendered Madam X severely disabled and it was this condition that entitled her to be granted the Normal Disability Allowance.
- (4) The SWD is not the authority to determine disability. It is the medical officer who decides the disability and SWD approval is based on medical advice.

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Accordingly, the date of SWD approval, while being relevant for the purposes of making the grant, should not determine the date of eligibility. It is neither in accordance with section 31A(1) nor fairness that the Commissioner relies on SWD approval as the sole basis for determining whether a taxation allowance should be granted to the Taxpayer. The SWD administers the Scheme and determines whether and when payments can be made. The Commissioner, on the other hand, must only look to whether a disabled dependant is eligible to claim an allowance under that Scheme.

- (5) Entitlement to the Disabled Dependand Allowance should not be penalized due to the fact the Taxpayer only became aware of the right to obtain it after the end of the year of assessment 1995/96, namely, when he received his tax return for that year. As the year of assessment 1995/96 was the first year in which the allowance was introduced, the Taxpayer simply could not adhere to the Commissioner's requirement that approval from SWD should be obtained in that year of assessment.
- (6) Granting the Disabled Dependand Allowance in this case would surely accord with the spirit and purpose that Government had made known to the public in enacting the allowance in the first place. It is common ground that Madam X was eligible according the criteria under the Scheme and that the disability certified by the required medical assessment which rendered her qualified for disability allowance was lymphoma. This fulfils the criteria for eligibility outlined at fact 3 above.

Contentions of the Commissioner

The Commissioner's representative, Mr Tam Tai-pang, handed to the Board a written submission. Essentially, Mr Tam advanced the following three arguments in support of the Commissioner's determination:

- (1) A person can only be eligible to claim an allowance under the Scheme if his or her eligibility has actually been established. In other words, eligibility cannot be determined before application and it is not to the point to argue that if an application had been made, then eligibility would have been established.
- (2) The SWD is the only competent authority to decide a person's eligibility to claim a Normal Disability Allowance under the Scheme, its decision subject only to appeal to the Social Security Appeal Board (fact 3, paragraph 21 refers). Various conditions must be satisfied before an application for a Normal Disability Allowance is granted by SWD. These conditions are not simply concerned with the medical condition of the applicant. Therefore Madam X's medical condition is not the conclusive matter in deciding whether the Taxpayer should be granted a Disabled Dependand Allowance. The totality of SWD's role involves receiving and processing the application, making the necessary assessment and obtaining the recommendation of the appropriate

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medical officer. In this case, the SWD decided that Madam X was eligible with effect from 18 June 1996 and the Normal Disability Allowance was payable from that date. It is simply not open to the Board of Review to substitute the SWD's decision with its own and determine that Madam X was eligible to claim the allowance at an earlier date.

- (3) Even if the Board holds that, for the purpose of section 31A(1), it can decide whether Madam X was eligible to claim under the Scheme, there is no evidence to prove that Madam X was eligible in the year of assessment 1995/96. Specifically, in order to be eligible for a Normal Disability Allowance, a person must, among other things:
 - (a) be severely disabled within the meaning of the Scheme as certified by an appropriate medical officer (fact 3, paragraph 5): Madam X was not so certified in the year of assessment 1995/96; and
 - (b) not be in receipt of any other allowance under the Scheme (fact 3, paragraph 4(c)): Madam X received Higher Old Age Allowance throughout the year of assessment 1995/96 (fact 5(d)) and was thus not eligible for Normal Disability Allowance for that year.

Proceedings before the Board

At the outset of the proceedings the Board asked the Commissioner's representative, Mr Tam, whether he was prepared to argue the appeal purely on the basis of the reasoning set out in the Commissioner's determination at fact 6. Essentially, this determination focused upon the Commissioner's interpretation of section 31A(1) of the Inland Revenue Ordinance (the IRO) and the terms of the Scheme summarised at fact 3.

It was in this context that we specifically asked Mr Tam whether, as a matter of reality, he was prepared to accept that Madam X was severely disabled as at 31 March 1996. After consideration, Mr Tam agreed that an objective bystander would find that she was so disabled but that, as a technical matter, under the terms of the Scheme only a qualified medical officer could make that determination. Therefore, Mr Tam replied that Madam X was not severely disabled as at 31 March 1996 within the terms of the Scheme because there is no documentation before the Commissioner or this Board to show that a medical officer actually took such a view.

We then asked the Taxpayer whether he had any concrete evidence that Madam X was suffering from lymphoma in March 1996 and whether he had any medical certificate to the effect that she was severely disabled within the terms of the Scheme during the year ended 31 March 1996. The Taxpayer responded by referring us to Madam X's death certificate (fact 1 refers) showing that she had been suffering from lymphoma from at least late 1994.

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Subsequent to the Board hearing, on 17 October 1997 we instructed the Clerk to the Board of Review to write to the Taxpayer in the following terms:

‘After reviewing the documents before us and the arguments of both parties, we have found, upon reflection, that it would be useful to obtain further information in order to decide your appeal. Specifically, we request you to produce a medical certificate from Hospital Y that at any time prior to 31 March 1996 [Madam X] was severely disabled within the terms of the Normal Disability Allowance under the Social Security Allowance Scheme administered by the Social Welfare Department.’

The Taxpayer responded on 3 November 1997. He enclosed a copy of the Medical Assessment Form, dated 25 June 1996 (fact 5(b) refers), signed by a medical officer of Hospital Y, which was used for the purpose of determining whether Madam X qualified for Normal Disability Allowance. The form stated that:

- (1) ‘[Madam X] is in a position broadly equivalent to a person with a 100% loss of earning capacity due to: ... lymphoma.’
- (2) ‘Recommendation [Madam X] qualifies for Normal Disability Allowance [see (1) above].’
- (3) ‘Has [right] leg pain [due] to lymphoma since January 1996.’

Reasons for our decision

Section 31A(1) of the IRO provides that:

‘An allowance (“Disabled Dependent Allowance”) of the prescribed amount shall be granted in any year of assessment to a person in respect of every dependant of his or hers who is eligible to claim an allowance under the Government’s Disability Allowance Scheme.’

It is common ground that Madam X was a dependant of the Taxpayer for the purposes of section 31A for the year of assessment 1995/96. The sole question before us is whether, in that year of assessment, Madam X was ‘eligible to claim an allowance under the Government’s Disability Allowance Scheme.’ Our conclusion is that she was eligible.

Given the structural logic of Mr Tam’s submission for the Commissioner, we can best explain our reasoning by specifically addressing Mr Tam’s contentions in the order he put them to us.

(1) Can eligibility under the Scheme be determined before application?

The answer is clearly yes. At fact 3, paragraph 15 the terms of the Scheme, in relevant part, state: ‘Payment will be calculated from the date of receipt of application by

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the Department ... or the date of eligibility, whichever is the later.’ It is clear that the Scheme itself envisages two different situations: application before eligibility and eligibility before application. We therefore reject the Commissioner’s contention that eligibility cannot be determined before application under the Scheme.

(2) Is the SWD the only competent authority to decide a person’s eligibility?

Reading Section 31A(1) in a purposive manner (we will say more on this below), we think not. However, it is not necessary to determine this question in this case. The fact is that the SWD has decided that Madam X was eligible for a Normal Disability Allowance. What we must decide is whether the conditions for eligibility were present at any time during the year of assessment 1995/96.

We have not ignored Mr Tam’s argument that the SWD decided that Madam X was only eligible with effect from 18 June 1996 (fact 5(a) refers) and that it is simply not open to the Board of Review to substitute the SWD’s decision with its own and determine that Madam X was eligible to claim the allowance at an earlier date. The SWD’s statement must, however, be put into its proper context. This statement appeared on a standard pre-printed form. The form was separated into two parts, namely, a standard query from the assessor and a standard form (in normal type) and the manner in which the Director of Social Welfare completed that form (in **bold** type).

From: Commissioner of Inland Revenue
Re: Madam X

To: Director of Social Welfare

For the purpose of the Inland Revenue Ordinance, I should be grateful if you were to supply the following information in respect of the abovenamed during the year ended 31 March 1996:

- (a) whether she is eligible to claim disability allowance ...

From: Director of Social Welfare
Re: Madam X

To: Commissioner of Inland Revenue

I confirm that the above named **was (deleted)**/ was not eligible to claim an allowance under Government’s Disability Allowance Scheme during the year ended 31 March **1996**. She became eligible to claim the allowance from **18.6.96**.

In view of our decision at (1) above, when read fairly and considering the pre-printed nature of this form, we are sure that the SWD were not stating categorically that Madam X did not satisfy the criteria for eligibility for the allowance at any time prior to 18 June 1996, namely, at any time prior to the date of application for the allowance. In terms of its administration of the Scheme in relation to Madam X, the SWD was only concerned with when application was made because that date determined the date of payment of the Normal Disability Allowance (there being no doubt whatsoever that, in terms of paragraph 15 of the Scheme, in this case eligibility preceded application).

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If one were tempted to adopt a contrary view of the SWD's response to the assessor, it is then appropriate to ask whether (given the terms of paragraph 15 of the Scheme) the SWD must be taken to conclude that Madam X was only eligible on 18 June 1996, but not eligible on 17 June 1996. On the facts before us, this interpretation of the SWD's response is absurd. The simple answer is, in terms of SWD's administration of the Scheme in this case, they simply did not direct their minds to when Madam X satisfied the criteria for eligibility: it was enough just to show that as at 18 June 1996 the criteria were satisfied.

We were also mindful of Mr Tam's argument that, essentially, the Board should not second guess the SWD, particularly bearing in mind that the SWD's decision is subject only to appeal to the Social Security Appeal Board (fact 3, paragraph 21 refers). We are not second guessing the SWD. Indeed, we reply upon SWD's decision that the conditions for eligibility were satisfied and SWD's approval in subsequently granting the allowance to Madam X from 18 June 1996 as the basis for our considering whether those conditions were present at any time during the year of assessment 1995/96. We also reiterate that, in accordance with paragraph 15 of the Scheme, payment will only be calculated from the later of the date of receipt of application by the SWD or the date of eligibility. Our decision does not therefore affect SWD's determination in respect of the grant of the allowance. Quite simply at no time did the SWD ever consider whether Madam X was eligible at any time during the year of assessment 1995/96.

(3) Is there any evidence that Madam X was eligible in the year of assessment 1995/96?

Mr Tam argued that the physical condition of Madam X was not the only condition that must be satisfied in determining her eligibility under the Scheme. We agree. But apart from condition (c) in paragraph 4 of the Scheme, there is no dispute whatever that the other conditions (which relate to whether she was in prison and whether she was resident in Hong Kong) were satisfied in Madam X's case.

Accordingly, we need only confine ourselves to the two matters focused upon by Mr Tam.

- (a) Was Madam X severely disabled at any time in 1995/96 within the meaning of the Scheme as certified by an appropriate medical officer (fact 3, paragraph 5)?

It is true (notwithstanding the Medical Assessment Form attached to the Taxpayer's letter of 3 November 1997), that we have no medical certificate stating explicitly that Madam X was severely disabled during the year. But let us look at the facts. She was hospitalised at least from late 1994 and diagnosed as suffering from lymphoma; treatment continued for the next two years; in early 1996 her condition took a turn for the worse; she was hospitalised from 17 February to 10 April 1996; she then returned to hospital; she undertook a medical assessment in June 1996; she was found severely disabled as a result of lymphoma; it was this condition which entitled her to receive the Normal

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Disability Allowance; she died in October 1996; the death certificate stated that the cause of death was lymphoma.

At no time during the hearing did Mr Tam ever deal with any evidential issue before us as to Madam X's physical and medical condition. He never put to us (quite properly we believe) that on the facts before the Board there may have been a significant change in Madam X's physical and medical condition between March and 18 June 1996. He acknowledged (again quite properly) that an objective bystander would conclude that Madam X was severely disabled during 1995/96. On the facts before us there can be no doubt at all that Madam X was severely disabled within the terms of the Scheme during 1995/96.

- (b) Was Madam X in receipt of any other allowance under the Scheme (fact 3, paragraph 4(C))?

Madam X received Higher Old Age Allowance throughout the year of assessment 1995/96 (fact 5(d) refers). But this does not mean that she was thus not eligible for Normal Disability Allowance for that year. This condition is purely formal and mechanical. If she was eligible to be paid Normal Disability Allowance, then from the date of grant of that allowance she would not be paid Higher Old Age Allowance (and this is precisely what happened with effect from 18 June 1996: see fact 5(d)). To hold that this mechanistic condition could disentitle a taxpayer who was otherwise eligible to claim Disabled Dependant Allowance offends any purposive interpretation of section 31A(1) as well as the terms of the Scheme itself.

Before concluding, we state unambiguously that we have interpreted section 31A in accordance with section 19 of the Interpretation and General Clauses Ordinance. We have thus deemed this provision to be remedial and we have endeavoured to place upon it a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the provision according to its true intent, meaning and spirit. In the Budget proposals for 1995/96 the Financial Secretary stated his intention in introducing the disabled dependant allowance: 'I have been able to respond in particular to the case put to me by Members for salaries tax concessions for those with special needs.' (emphasis added)

If we were to accept the Commissioner's arguments that essentially this tax concession is solely dependent upon approval by SWD, we consider that the object of the legislative provision would not properly be attained. To give an obvious example. It is quite possible that a taxpayer may have a disabled dependant but that the family simply does not wish to be a recipient of social welfare. If the Commissioner's argument was accepted, the taxpayer could never have the advantage of the tax concession provided by section 31A.

The Taxpayer's case seems even stronger. His mother suffered a long-standing illness which rendered her severely disabled. It was not disputed, and we infer from the

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documents before us, that he found out about the existence of the Scheme after the end of the 1995/96 tax year. His mother then made application for Normal Disability Allowance in June 1996. She was found eligible by the SWD which then granted approval for payment of the allowance. From the end of 1995/96 to the date of application, his mother's medical condition had not altered. She had been, and was then, suffering from a long-term terminal illness. Should the Taxpayer be denied a tax concession in these circumstances? In our view this could not have been the intention of the legislature in enacting a provision to assist families with special needs.

For all the above reasons, the Taxpayer's appeal is hereby allowed.

It is left for us to record our appreciation to both parties. They assisted us greatly during this appeal. For reasons too obvious to state, this was a difficult and trying case for the Taxpayer: yet he presented his case with clarity and dignity. For equally obvious reasons, we sense that Mr Tam also experienced similar feelings: yet his presentation, although put compassionately and with dignity, did not suffer from lack of vigour.