

INLAND REVENUE BOARD OF REVIEW DECISIONS

CACV 287/2003

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL**

CIVIL APPEAL NO. 287 OF 2003

(ON APPEAL FROM HCIA 2 OF 2003)

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BETWEEN

Wong Tai Wai, David

Appellant

and

Commissioner of Inland Revenue

Respondent

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Before: Hon Rogers VP, Hon Cheung JA and Hon Kwan J in Court

Date of Hearing: 10 June 2004

Date of Judgment: 23 June 2004

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J U D G M E N T

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**Hon Rogers VP:**

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1. I agree with judgment of Cheung JA and the order he proposes. The judge below had carefully set out his reasons and they were correct.

### **Hon Cheung JA:**

2. The appellant, Mr Wong Tai Wai, David ('Mr Wong') and his wife ('Mrs Wong') derived income from their employment and also rental income from a property which was jointly owned by them.

3. These two sources of income were subject to salaries tax and property tax for the years 1998/99, 1999/2000 and 2000/01. For each of the three years, Mr Wong and his wife elected 'personal assessment'. As a result the total income of Mr Wong and his wife was aggregated and the tax liability of Mr Wong and his wife was accordingly assessed.

4. Mr Wong and his wife raised objections against the personal assessment. The respondent by a letter dated 8 February 2002 made a determination and rejected the objection. Mr Wong and his wife appealed to the Inland Revenue Board of Review ('the Board'). The appeal was dismissed on 25 September 2002. By way of Case Stated, Mr Wong and his wife appealed against the board's decision to the Court of First Instance of the High Court. Deputy High Court Judge To dismissed the appeal. Mr Wong now appeals against the decision.

### **The questions of law**

5. The two questions of law stated for the judge's consideration are:

- '(1) Whether the provisions in the *Inland Revenue Ordinance*, Cap. 112 ('the *Ordinance*') which enable a married couple to elect for personal assessment and which may produce the result that such married couple will end up having a greater tax liability on the same income than if they had not been married to each other are null, void and of no effect for the reason that they contravene the Basic Law, in particular, Articles 8, 11 and 25 thereof ("Question 1").
- (2) Whether in making an assessment for tax against a married couple who have elected for personal assessment or in considering an objection against an assessment by such married couple, the Commissioner of Inland Revenue ('the Commissioner') is bound by the Basic Law, in particular, Articles 8, 11 and 25 thereof, to exercise her discretion to adjust the assessment in such a way so that the tax liability of such married couple is no different from their tax liability on the same income if they had not been such married couple ("Question 2").'

The judge answered both questions in the negative.

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### **The complaint**

6. The gist of Mr Wong's complaint is that as a result of his and his wife's election for personal assessment they were required to pay a higher amount of tax than each of them is liable to pay if they had not been married. He claims that the result is unjust, absurd and contrary to the rules of construction of a tax statute. He further claims that this is contrary to certain provisions of the Basic Law.

### **The tax regime**

7. Property tax is charged under section 5 of the *Ordinance*. Salaries tax is charged under section 8 of the *Ordinance*. Property tax is charged at the standard rate which since 1989/90 has been fixed at 15%. Salaries tax is charged at progressive rate set out in Schedule 2 of the *Ordinance*.

### **Personal assessment**

8. A taxpayer may elect for 'personal assessment' of his total income from property, profits and employment. The main advantage of an election for personal assessment stems from the fact that the concessionary deductions, personal allowances and reduced marginal rates available for salaries tax are not available for property or profits taxes which are assessed at the standard rate without the benefit of progression. A person with a relatively low total income can, however, obtain the benefit of the same progression that is available for salaries tax by electing for personal assessment. Other benefits include the benefit of deduction of interest that has been paid on money borrowed for the purpose of acquiring land for the production of rental income and tax relief is not otherwise available: see Willoughby & Halkyard: *Encyclopaedia of Hong Kong Taxation* Vol 3, Para 628. The rate of tax charged on personal assessment is based on Schedule 2 of the *Ordinance*.

9. The following is a summary of the relevant principles in respect of personal assessment:

- (1) An individual may elect for personal assessment on his total income (section 41(1));
- (2) A married couple cannot elect for personal assessment separately if both have income and are not living apart. In other words there must be a joint election by such a married couple (section 41(1A));
- (3) Where a married couple had made a joint election for personal assessment, the assessor is required to make a single assessment from the joint total income less the appropriate allowances (section 42A);

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### Interpretation of the Ordinance

10. There are numerous judicial expressions on the approach to be adopted in construing a tax statute. There is no need to repeat them. The interpretation of a tax statute, like any statute, is for the court to ascertain the intention of the legislature. The fundamental point is that one is taxed no more and no less than is stated in the statute.

11. In this case the provisions dealing with personal assessment for married couple are very clear. A married couple must elect for personal assessment jointly and the assessor has to make a single assessment based on their joint income after deducting the prescribed allowances.

12. In this case, had Mr Wong and his wife not elected for personal assessment, the total assessment of tax charged on them would be higher because they would not be able to deduct the interest expenditure of the property. This point can be shown in the following two tables showing the tax payable for the relevant years of assessment with and without personal assessment.

#### Tax payable with personal assessment

	1998/99	1999/00	2000/01
Mr Wong	\$62,914	\$94,782	\$12,460
Mrs Wong	\$55,627	\$52,530	\$44,704
Total tax payable by Mr & Mrs Wong	\$118,541	\$147,312	\$57,164

#### Tax payable without personal assessment

		1998/99	1999/00	2000/01
Mr Wong	Salaries tax	\$62,135	\$106,147	\$973
	Property tax	\$8,198	\$7,072	\$6,778
	Total tax	\$70,333	\$113,219	\$7,751
Mrs Wong	Salaries tax	\$45,906	\$30,665	\$50,550
	Property tax	\$8,198	\$7,072	\$6,778
	Total tax	\$54,104	\$37,737	\$57,328
Total tax payable by Mr & Mrs Wong		\$124,437	\$150,956	\$65,079

13. However, having elected for personal assessment Mr Wong and his wife must take both the benefit and the burden resulting from such an assessment. Mr Wong cannot turn around and say that had he not been married, he and his wife would be separately assessed for personal assessment and their total tax liability would have been less. This is not open to him because the legislation requires a married couple in the position of Mr Wong and his wife to make a joint

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election and their tax liability will be based on their joint total income. A separate assessment is simply not open to them. This is the clear intention of the legislature and there is nothing inherently unjust or inequitable under the tax regime.

### **Discretion**

14. The Assessor is required by section 42A to make a single assessment for personal assessment by a married couple. This being the case, neither he nor the Commissioner has a discretion to do otherwise.

### **Basic Law**

15. Mr Wong's reliance on the provisions of the Basic Law misses the point altogether.

16. Article 8 preserves the system of law that was in place before the unification in 1997. The system of law includes the 'rules of equity' which simply means the law historically developed by the Chancery Court in England in order to complement the law developed by the 'Common Law' Court. These two branches of law were applied in Hong Kong when it was under the former English rule. Equity is not synonymous with justice in the broad sense: see Hanbury & Martin: *Modern Equity*, 16<sup>th</sup> Ed page 3.

17. Article 11 provides for the supremacy of the Basic Law over the other legislation in Hong Kong. I do not see how the provision on personal assessment of married couple can be in breach of the Basic Law.

18. Article 25 provides that all Hong Kong residents are equal before the law. Mr Wong and his wife are indeed equal before the law. They are taxed no more and no less than is allowed by the law.

19. Another relevant provision is Article 37 which recognizes the freedom of marriage. In my view this does not provide the juridical basis for a challenge of the personal assessment provisions.

### **Conclusion**

20. The judge was correct in his decision. I would dismiss the appeal with costs to the respondent.

**Hon Kwan J:**

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21. I agree. Section 64(2) of the *Ordinance* relied on by Mr Wong does not assist him. It cannot be construed as giving the Commissioner the power to determine an objection to an assessment in a manner contrary to the provisions for personal assessment in Part VII.

(Anthony Rogers)  
Vice-President

(Peter Cheung)  
Justice of Appeal

(Susan Kwan)  
Judge of the Court  
of First Instance

Representation:

Appellant, in person, present.

Mr Eugene Fung, instructed by Department of Justice for the respondent.