#### Case No. D29/12

**Salaries tax** – dependent parent allowance – sections 30(1) and 68(4) of the Inland Revenue Ordinance. [Decision in Chinese]

Panel: Chow Wai Shun (chairman), Cheng Chung Hon Neville and Carlye W L Tsui.

Date of hearing: 5 July 2012.

Date of decision: 24 September 2012.

The Appellant in his individual tax return for the year of assessment 2010/11 applied for a dependent parent allowance in respect of his parents. The Inland Revenue Department did not allow the application on the ground that the two dependents were not ordinarily residents in Hong Kong during the said year of assessment. According to the movement records of the Immigration Department, in the year of assessment 2010/11, the Appellant's father stayed in Hong Kong for 7 days (including entries not on the strength of a Hong Kong identity card), and his mother stayed in Hong Kong for 12 days. And in the 4 preceding years of assessment (2006/07 to 2009/10), their days of stay in Hong Kong were mostly in the single digits.

#### Held:

- 1. In the present case, the dependents had in the relevant year of assessment stayed in Hong Kong for 7 and 12 days respectively, and had principal members of family and financial connections in Hong Kong. Compared them to dependents who were absent from Hong Kong during the whole year of assessment and had no connections with Hong Kong, the present case may seem to be a better one, but actually there is no difference in substance. Although the dependents in the present case had stayed in Hong Kong, they did not comply with the principles laid down in Ng Shun Loi and lacked the required normal, consistent, and continuous habitualness. It is therefore hard for the Board to accept that they were at any time during the relevant year of assessment 'ordinarily resident' in Hong Kong, taking Hong Kong as a place where they lived and conducted their daily life, and living in Hong Kong as an ordinary member of the community.
- 2. In recent years there had been an upward trend in the number of tax appeals concerning the keywords 'ordinarily resident'. As mentioned by the Appellant, various departments of the government had different criteria of assessment in respect of the same keywords 'ordinarily resident', which the

general public were unaware of and could not really understand. The Appellant submitted that, if the provisions could list the conditions clearly such that one could readily understand, he would never bring this appeal. The Board takes the view that the Appellant's suggestions may help to reduce the number of unnecessary appeals, and save government resources and public money so that they could be spent on other public affairs. The relevant authorities may consider the suggestions.

### Appeal dismissed.

#### Cases referred to:

HKSAR v Cheung Kwun Yin (2009) 12 HKCFA 565
D57/02, IRBRD, vol 17, 829
D18/11, (2011-12) IRBRD, vol 26, 319
D116/99, IRBRD, vol 14, 660
Director of Immigration v Ng Shun-loi [1987] HKLR 798
D29/07, (2007-08) IRBRD, vol 22, 638
Vallejos Evangeline Banao, also known as Vallejos Evangeline B v Commissioner of Registration and Registration of Persons Tribunal HCAL 124/2010
R v Barnet London Borough Council Ex parte Shah [1983] 2 AC 309
In re Norris (1888) 4 TLR 452

### Taxpayer in person.

To Yee Man and Chan Wai Yee for the Commissioner of Inland Revenue.

# 案件编号 D29/12

薪俸税-供养父母免税额-《税务条例》第30(1)条及第68(4)条

委员会: 周伟信(主席)、郑宗汉及徐尉玲

聆讯日期: 2012年7月5日 裁决日期: 2012年9月24日

上诉人在其 2010/11 课税年度个别人士报税表中,就其父母申请供养父母免税额。税务局不接受上诉人的申请,理由是其两名受养人在该年度内,并非通常在香港居住。根据入境事务处提供的出入境纪录,在 2010/11 课税年度,上诉人父亲在香港逗留 7天(包括非持香港身份证出入境),其母亲则在香港逗留 12天。而在之前的四个课税年度(2006/07至 2009/10),他们在香港逗留的天数大多是单位数。

## 裁决:

- 1. 虽则本个案的受养人在相关课税年度分别曾留港 7 天及 12 天,而且在港有直系亲属和经济连系,相对那些受养人在整个相关课税年度都没有在港,而且与香港没有甚么联系的案例,看似比较优胜,但实在却没有两样。本个案受养人虽在有关课税年度曾留港,但并不符合 Ng Shun-loi案确立的原则,欠缺了所要求的常规和连贯和持续性的惯性,所以委员会难以接纳他们在有关课税年度的任何时间内,「通常居住」在香港,以香港作为他们日常生活的地方,以香港社会一般成员的身份在这里生活。
- 2. 年来有关「通常居住」这关键词的税务上诉个案有增多趋势。正如上诉人在陈词中提及,政府不同部门,对类同关键词「通常居住」的审定标准有别,对普罗大众而言,往往不知,亦不明所以。上诉人提出,若条文能清晰地列明条件,一目了然,他绝不会提案上诉。委员会认为,上诉人建议或有助减低不必要的上诉个案,从而节省政府资源和公帑,用于其他的公共事务开支,有关部门不妨参详考虑。

## 上诉驳回。

### 参考案例:

HKSAR v Cheung Kwun Yin (2009) 12 HKCFA 565

D57/02, IRBRD, vol 17, 829

D18/11, (2011-12) IRBRD, vol 26, 319

D116/99, IRBRD, vol 14, 660

Director of Immigration v Ng Shun-loi [1987] HKLR 798

D29/07, (2007-08) IRBRD, vol 22, 638

Vallejos Evangeline Banao, also known as Vallejos Evangeline B v Commissioner of Registration and Registration of Persons Tribunal HCAL 124/2010

R v Barnet London Borough Council Ex parte Shah [1983] 2 AC 309

In re Norris (1888) 4 TLR 452

纳税人亲自出席聆讯。

陶绮雯及陈慧仪代表税务局局长出席聆讯。

# 决定书:

1. 上诉人反对税务局向他发出的 2010/11 课税年度薪俸税评税 °税务局副局长于 2011 年 12 月 16 日发出决定书,裁定上诉人反对无效。上诉人提出上诉。

# 有关事实

- 2. 上诉人基本同意上文第 1 段所述决定书所载的决定所据事实,没有提出任何争议,同时经参考双方于聆讯前提交的文件,本委员会裁定与本上诉案的有关事实如下:
  - (1) 上诉人在其 2010/11 课税年度个别人士报税表中,就其父母申请供 养父母免税额;他所填报的资料中,表示他或其配偶在有关课税年 度内,给予受养人不少于 12,000 元的金钱作生活费,然而,两名受养人在该年度内,并非通常在香港居住。
  - (2) 评税主任不接受上诉人供养父母免税额的申请,并向他发出下列 2010/11 课税年度薪俸税评税:

	<u>元</u>
入息	301,929
减:慈善捐款	(1,000)
退休计划供款	(12,000)
	288,929

点元减:基本免税额(108,000)应课税入息实额180,929应缴税款(已扣除税款宽减)12,757

- (3) 上诉人反对上述评税,评税主任去信向上诉人解释《税务条例》中 有关供养父母免税额的规定,并邀请上诉人撤回反对;上诉人并没 有把反对撤回,回复并提交了下列文件副本以支持其反对:
  - (a) A银行就上诉人持有的银行帐户发出的月结单,显示上诉人于有关课税年度中,每月转账\$4,000 予其父。
  - (b) 三份由内地 B 城市 C 医院分别于 1995 年 4 月 13 日、2005 年 1 月 13 日及 2009 年 7 月 14 日发出,上诉人父亲的检查/诊断报告书。
  - (c) 内地 B 城市 C 医院于 2007 年 9 月 17 日发出,上诉人母亲的 MRI 报告单。
- (4) 根据入境事务处提供的出入境纪录,在 2010/11 课税年度,上诉人父亲在香港逗留7天(包括非持香港身份证出入境),其母亲则在香港逗留12天。而在之前的四个课税年度(2006/07至 2009/10),他们在香港逗留的天数大多是单位数。

## 上诉理由及上诉人陈词

- 3. 上诉人在其上诉理由陈述书中提出的上诉理由, 归纳如下:
  - (1) 据税务局所言,「通常居住」决定于有关个案的事实,要视当事人的离境动机及该永久居民是否以原居住地为其生活中心来判断,并非单以居住日数定案。事实上,上诉人是其父母在香港唯一亲人,子孙均在香港居住,过往亦曾一同居住,其父母只是因病离港,并非自愿离开亲人,而其父母所有的经济活动均在香港,他们在港有长期使用的银行户口。
  - (2) 税务局引用的案例,分别为 1987年及 2007-2008年间,然而,在争议的课税年度前,上诉人申请供养父母免税额均获税务局接纳,故质疑税务局选择性执法,有违公平原则。

- 4. 上诉人于聆讯前提交书面陈词大纲,并于聆讯中阐释。上诉人强调:
  - (1) 有关供养父母免税额条文的立法原意,在于鼓励年青人承传孝道, 达致家庭幸福,社会和谐。
  - (2) 「通常居住」的定义,在法律上及地域上都有不同诠释;事实上, 其父母为香港永久居民,有投票权,当然是社区成员。他们的社会 关系、经济来源、儿孙均在香港,过往亦曾长期居港,返回内地治 病基于病因,并非自愿。
  - (3) 税务局引述案例,需考虑个案的相似性和法理基础。
  - (4) 《税务条例》中对「通常居住」没有以天数来规定,则税务局为何以天数为基础作推断?
  - (5) 上诉人多年来如实申报,税务局亦予其供养父母免税额多年,现突然个别执法,有欠公允及一致性。

# 案情分析

- 5. 本个案须裁决的是上诉人可否就其父母获给予供养父母免税额。
- 6. 就供养父母免税额,《税务条例》第30(1)条规定:

「在以下情况下,任何人可在任何课税年度内获给予一项免税额-

- (a) \$\frac{1}{2}p -
  - (i) 该人;或
  - (ii) 并非与该人分开居住的该人的配偶,

在该年度内供养该人的或其配偶的父或母;及

- (b) 该名父或母在该年度内任何时间-
  - (i) 通常居住于香港;及
  - (ii) 符合以下的描述 -
    - (A) 年龄为60岁或以上;或

- (B) 未年满 60 岁,并有资格根据政府伤残津贴计划申索津贴。」
- 7. 上述条文文意清晰,委员会认为不需要再对条文的立法意图加以推敲,这符合已经香港终审法院确立的有关法例释义的原则,包括 HKSAR v Cheung Kwun Yin (2009) 12 HKCFA 565,而本委员会除了下文提述的 D57/02, IRBRD, vol 17, 829 外,在 D18/11, (2011-12) IRBRD, vol 26, 319 亦有相关原则的综合论述。按上述条文文意,上诉人若要在 2010/11 课税年度获给予供养父母免税额,就必须符合以下条件:
  - (a) 上诉人在该年度内供养其或其配偶的父或母;
  - (b) (i) 受养人在该年度内任何时间通常居住于香港;及
    - (ii) 在该年度内任何时间:
      - (A) 受养人年龄为60岁或以上;或
      - (B) 受养人未年满60岁,并有资格根据政府伤残津贴计划申索津贴。
- 8. 条文所列的条件,除第(b)(ii)(A)及(B)款只需其一外,必须全部符合,缺一不可。当中虽有先后次序,却没有主次之分,虽然上诉人符合(a)及(b)(ii)(A)款,即已符合三个条件中的两个,包括已经供养其父母,但委员会必须裁决,受养人是否在2010/11 年度内任何时间通常居住于香港,若受养人在2010/11 年度内任何时间通常居住于香港,则上诉人获有关的供养父母免税额,否则上诉人则不能获得该项免税额。
- 9. 本委员会曾就有关条文作出裁决。在 D116/99, IRBRD, vol 14, 660 中,纳税人自 1995 年开始供养其母,认为在 1997/98 课税年度应可就其母获给予供养父母免税额,然而其母自 1992 年便与丈夫移居内地,在相关课税年度并未踏足香港。委员会驳回纳税人的上诉,不信纳其母在相关课税年度通常在香港居住,因为纳税人的母亲在香港没有任何资产,其丈夫则一生在外地营商,在香港没有落地生根,自 1992 年起已再没有来港,但夫妇二人却在内地盖有房子,面积非常宽敞,在香港断不能找到,而除了纳税人外,亲属全在内地。虽然纳税人的母亲曾于 1995 年返港更换身份证,但委员会认为其母只希望保留来港便利,而非将香港视为其居住地,而纳税人当时亦未能在香港提供地方让其母居住。相关判词(第 664 页第 18 段)原文抄录如下:
  - 'We are however not satisfied that Ms A was ordinarily residing in Hong Kong in the year of assessment. Her husband Mr. E did not have any root in Hong Kong having spent his business life in Country F. Ms A did not have any asset in Hong Kong. The couple erected a house in China which is much more spacious than any accommodation that could have been made available to them in Hong Kong. Apart from the Taxpayer, their relatives were in China.

Mr. E did not visit Hong Kong since 1992. The Taxpayer laid considerable stress on the fact that Ms A came to Hong Kong to renew her identity card in 1995. We are of the view that Ms A was merely trying to preserve her convenient access into Hong Kong. She was not treating Hong Kong as her home. The Taxpayer was not then in a position to accommodate her...'

10. 在 D57/02 中,纳税人 2000/01 课税年度就其父母及岳母申索供养父母免税额,同时就其祖母申索供养祖父母免税额。然而,纳税人的祖母、岳母及父母,分别于 1993 年 9 月 18 日、1997 年 5 月 26 日及 1998 年 10 月 11 日离港,在相关课税年度内并未返回香港。虽然纳税人声称他们离港前均在港居住了 50 年以上,又声称自己及妻子都在金钱上供养他们,而其妻更与他们同住,以便照顾,委员会终亦驳回其上诉。委员会引用了 Hunter 法官在 Director of Immigration v Ng Shun-loi [1987] HKLR 798 一案中有关「通常居住」的解释,根据 Hunter 法官的判词,「通常居住」指该人一般惯性居住于某地,他以该地为日常生活的地方,并以该社区一般成员身份生活。委员会应用该解释,认为个案中的受养人在相关课税年度内任何时间,不是通常居住在香港。相关判词原文(第 65 页第 6 及 7 段)抄录如下:

'The Hong Kong Court of Appeal has defined the term "ordinarily resident" in <u>Director of Immigration v Ng Shun-loi</u> [1987] HKLR 798, per Hunter J:

"The words 'ordinarily resident' mean that the person must be habitually and normally resident here apart from temporary or occasional absences of long or short duration" (<u>Levene v IRC</u> [1928] AC 217 applied).

A person is resident where he resides. ... When is he ordinarily resident? I think that is when he resides there in the ordinary way. That must be the meaning of the adverb. The expression is therefore contemplating residence for the purposes of everyday life. It is residence in the place where a person lives and conducts his daily life in circumstances which lead to the conclusion that he is living there as an ordinary member of the community would live for all the purposes of his daily life" (R v Barnet London Borough Council, ex parte Nilish Shah [1982] 1 QB 688 applied)."

Applying Ng Shun-loi to the facts of this appeal, there can be no doubt that none of the dependants were ordinarily resident in Hong Kong at any time during the year of assessment 2000/01. Not one of them physically resided in Hong Kong at any time for at least 17 months prior to the beginning of the year of assessment; and then not one of them returned to Hong Kong at any time during that year. Physical absence of such duration is, without proper explanation as to the circumstances of the dependants' daily life, fatal to the Appellant's claims. This conclusion is not based simply on counting the number of days and seeing that the dependants did not stay in Hong Kong most

of the time. Rather, since leaving Hong Kong the dependants did not reside here at any time. There is not one scintilla of evidence to suggest that, following their departure from Hong Kong, any of the dependants was "habitually and normally resident" in Hong Kong or resident in Hong Kong "for the purposes of everyday life". Indeed, the facts before us point totally the other way."

- 11. 在 <u>D29/07</u>, (2007-08) IRBRD, vol 22, 638 中,纳税人的父母是内地居民,长居内地,他们没有香港居民身份证,亦无打算移居香港,然而纳税人认为,税务局应确认和尊重其供养父母的事实,准予扣减供养父母免税额。委员会引用上述案例,认为纳税人父母不是通常居住在香港,纵然纳税人供养父母,也不能获给予相关免税额,所以驳回上诉。
- 12. 上述案例与本个案在细节上不尽相同,而事实相同的个案绝无仅有;然而,上述案例确立的适用法律原则包括:
  - (1) 条文所列的条件,除第(b)(ii)(A)及(B)款只需其一外,必须全部符合。
  - (2) 判断某人是否「通常居住」于某地,取决于对有关个案的事实裁断是否符合「通常居住」的法律定义。其中逗留在某地的天数,并非单一和绝对的条件,决定该人是否「通常居住」于该地。同样地,该人拥有香港永久居民身份与否,亦不足以决定该人是否「通常居住」于香港。
- 13. 外佣居港权一案 <u>Vallejos Evangeline Banao</u>, also known as <u>Vallejos Evangeline B v Commissioner of Registration and Registration of Persons Tribunal</u> HCAL 124/2010 (30 September 2011),虽非涉及税务问题,但因包括阐释相同关键词「通常居住」,亦有参照价值。
- 14. 林文瀚法官在阐释「通常居住」一词时,亦有提及 Ng Shun-loi 案(林法官判词第 147 及 155 段),更追本溯源,复述 Ng Shun-loi 案引用的 Shah 案,在英国上议院上诉(R v Barnet London Borough Council Ex parte Shah [1983] 2 AC 309)时 Lord Scarman 引述远至十九世纪的 In re Norris (1888) 4 TLR 452 的判词。纵然一个人可以同时在两处地方通常居住,但要证明在某一地方通常居住,Lord Scarman 明言,必须证明该人为一个明确的目的,自愿地选择在该处常规和惯常地生活,虽然容许暂时的缺席,但仍需具有连贯和持续性的,林法官亦在他的判词中引述(第 149 段)这观点。Lord Scarman 的相关判词(第 344 页 F部份)原文抄录如下:

'For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.'

- 15. 委员会并没有发现林法官在其判词的其他部份,对 Shah 及 Ng Shun-loi 二案提出任何批评,或推翻其中任何的原则。
- 16. 由此,某人是否通常居住在某一地方,仍须符合 Shah 及 Ng Shun-loi 二案所归纳的原则。本委员会过往阐释《税务条例》第 30(1)条的案例,与林法官在 Vallejos Evangeline Banao 案中对「通常居住」这关键词的分析,同出一辙,并无二致。
- 17. 《税务条例》第68(4)条规定:

「证明上诉针对的评税额过多或不正确的举证责任,须由上诉人承担。」

所以,本个案的判断,取决于上诉人能否证明受养人通常居住在香港。

- 18. 虽则本个案的受养人在相关课税年度分别曾留港7天及12天,而且在港有直系亲属和经济连系,相对那些受养人在整个相关课税年度都没有在港,而且与香港没有甚么联系的案例,看似比较优胜,但实在却没有两样。本委员会认为,本个案受养人虽在有关课税年度曾留港,但并不符合 Ng Shun-loi 案确立的原则,欠缺了所要求的常规和连贯和持续性的惯性,所以难以接纳他们在有关课税年度的任何时间内,「通常居住」在香港,以香港作为他们日常生活的地方,以香港社会一般成员的身份在这里生活。
- 19. 上诉人表示受养人因身体条件日差,若留在香港,医疗及看护支出不菲,不得不迁回国内起居,实在情非得已。然而,上诉人陈词亦提及,受养人认为在此等情况下,还是回到国内生活较好。委员会接纳税务局局长代表的陈词,疗养因素虽然促使受养人移居国内的决定,但没有褫夺他们选择的自由。即若他们的主观意愿是在香港居住,按 Ng Shun-loi 案,该等主观意图所占比重,非常有限,不足以扭转从其他客观现实推论的裁断。
- 20. 至于上诉人提出他多年来按事实申索并获给予供养父母免税额,所以税务局就2010/11课税年度向他撤回该项免税额,前后不一致,并不公允。然而,税务局一贯采用「先评后核」机制,即是先以纳税人提交的资料作基础,进行评税,其后才就有关资料,作出复核,过往课税年度的申索获予准许,并不代表往后的课税年度中,一旦不获同样允许则该年度的评税必属错误。归根究底,就本个案的焦点而言,能否获给予供养父母免税额,取决于上诉人是否符合有关条文的规定。

## 总结

21. 经详细考虑所有文件、证供和双方的陈词,与及基于上文的分析,委员会驳回上诉人的上诉。

# 后记

22. 近年来有关「通常居住」这关键词的税务上诉个案有增多趋势,然而,从上述的分析来看,相关法则已极为确立,难有商榷余地,而因为事实有明显差异而需作出不同裁决的个案,亦极为少数。基于已确立的法律原则,与及参照相关的案例,本个案可谓难有胜算。委员会虽认为,有条件的免税额,并非不寻常,亦非不合理,特别在香港这处奉行地域来源税制的地方,只对来源于香港的收入征税,同时法律条文义清楚规定某些免税额须符合若干条件,并没有不妥当之处;然而,正如上诉人在陈词中提及,政府不同部门,对类同关键词「通常居住」的审定标准有别,对普罗大众而言,往往不知,亦不明所以。上诉人提出,若条文能清晰地列明条件,一目了然,他绝不会提案上诉。委员会亦认为,上诉人建议或有助减低不必要的上诉个案,从而节省政府资源和公帑,用于其他的公共事务开支,有关部门不妨参详考虑。