Case No. D43/08

Salaries tax – deduction of maintenance payments and married person's allowance – sections 12 and 29 of Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Panel: Anthony So Chun Kung (chairman), Francis Tak Kong IP and Kelly Wong Yuen Hang.

Date of hearing: 18 March 2008. Date of decision: 16 December 2008.

The appellant objected to the salaries tax assessment for the year of assessment 2006/07. The appellant claimed that he should be entitled to deductions of his maintenance payments and a married person's allowance.

The appellant and Madam A on 27 April 2005 executed a Divorce Agreement by which the appellant should pay C\$1,000 monthly to Madam A as maintenance. The Supreme Court of Country B issued the Certificate of Divorce on 13 June 2005, confirming that the marriage between the appellant and Madam A was formally dissolved on 11 June 2005.

The appellant did not dispute that the maintenance payments did not comply with the requirements for deduction under section 12(1) of the IRO; neither did he dispute that a divorcee did not comply with the requirements for entitlement to a married person's allowance under section 29 of the IRO. What the appellant disputed was that, given the payment in all three situations was in the nature of financial maintenance, why he would be entitled to such an allowance if he was married or separated but not if he was divorced. The appellant considered the IRO unfair and in ignorance of the objective world.

Held:

- 1. Maintenance payments, despite being ordered by the court, were expenses of a domestic or private nature, and could not be said to have been incurred in the production of the appellant's pension income. Therefore, the requirements under section 12(1) of the IRO were not satisfied and the deduction for such payments was not allowed.
- 2. According to section 29 of the IRO, the claimant for a married person's allowance must be married, and his spouse did not have assessable income, and if they were living apart, the claimant must be maintaining his spouse. Section 2

of the IRO defined spouse as married persons. Accordingly, 'married person's allowance' was not applicable to divorcees. (Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647)

- 3. In the present case, the marriage between the appellant and Madam A was formally dissolved on 11 June 2005. In the relevant year of assessment 2006/07, the appellant was not in a marriage with Madam A. Therefore, the appellant did not comply with the requirements under sections 29 and 2 of the IRO and was not entitled to a married person's allowance.
- 4. The Board agreed that the appellant's views were not without sense. However, whether the IRO was unfair to divorcees and should therefore be amended was a policy issue and was beyond the jurisdiction of the Board. (Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647; Sit Kwok Keung v Commissioner of Inland Revenue 6 HKTC 534)

Appeal dismissed.

Cases referred to:

Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647 D61/99, IRBRD, vol 14, 511 D82/03, IRBRD, vol 18, 824 Sit Kwok Keung v Commissioner of Inland Revenue 6 HKTC 534

Taxpayer in absentia.

Chan Sze Wai and Lai Wing Man for the Commissioner of Inland Revenue.

案件编号 D43/08

薪俸税 - 赡养费开支的扣除及已婚人士免税额 - 《税务条例》第12条及第29条

委员会:苏震共(主席)、叶德江及黄苑桁

聆讯日期:2008年3月18日 裁决日期:2008年12月16日

上诉人反对税务局向他作出的2006/07课税年度薪俸税评税。上诉人声称他应获 扣除赡养费开支及已婚人士免税额。

上诉人与A女士在2005年4月27日签订离婚协议书,上诉人须每月支付1,000元加币给A女士作赡养费。B国家最高法院在2005年6月13日签发离婚证书,证明上诉人与A女士的婚姻在2005年6月11日正式解除。

上诉人并没有争论赡养费开支是否不符合税例第12(1)条的扣除条件,亦没有争论离婚人士是否不符合税例第29条关于已婚人士免税额的规定。上诉人争论的是,所支付的同样是经济供养,为甚么已婚的他及分居的他可享免税额,而离婚的他就偏偏不可。上诉人认为这是税例的不公平及不合时宜,应作修订。

裁决:

- 1. 虽是被法庭颁令支付的,赡养费开支只属家庭性质或私人性质的开支, 不能说是为产生上诉人的退休金入息所招致的,因此不符合税例第12(1) 条规定,有关开支不获扣除。
- 2. 根据税例第29条规定,「已婚人士免税额」申索人必须是已婚人士,而配偶并无应评税入息,若分开居住,必须供养另一配偶方,才可获得「已婚人士免税额」。税例第2条规定配偶指已婚的婚姻者。因此,「已婚人士免税额」不适用于已离婚人士。(Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647)
- 3. 本案上诉人与 A 女士的婚姻已于 2005 年 6 月 11 日正式解除。在有关的 2006/07 课税年度内,上诉人与 A 女士之间已没有婚姻关系,因此上诉 人不符合税例第 29 及第 2 条规定,不能享有「已婚人士免税额」。

4. 委员会虽然认同上诉人的观点不是没有道理的,但税例是否对离婚人士不公平并为此应否修订税例是政策性议题,超越了委员会的权限。(Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647; Sit Kwok Keung v Commissioner of Inland Revenue 6 HKTC 534)

上诉驳回。

参考案例:

Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647 D61/99, IRBRD, vol 14, 511 D82/03, IRBRD, vol 18, 824 Sit Kwok Keung v Commissioner of Inland Revenue 6 HKTC 534

纳税人缺席聆讯。 陈施维及黎咏文代表税务局局长出席聆讯。

决定书:

上诉

1. 上诉人反对税务局向他作出的 2006/07 课税年度薪俸税评税。上诉人声称他应获扣除赡养费开支及已婚人士免税额。税务局副局长(以下简称「副局长」)于 2007 年 12 月 6 日发出决定书,否决上诉人之反对。上诉人不服,向委员会提出本上诉。

事实

- 2. 本委员会核实下述事实是没有争议的:
 - (1) 上诉人与A女士在2005年4月27日签订离婚协议书[B1/25],上诉人须每月支付1,000元加币给A女士作赡养费。
 - (2) B国家最高法院在2005年6月13日签发离婚证书[B1/26],证明上诉人与A女士的婚姻在2005年6月11日正式解除。
 - (3) 上诉人是一名退休公务员。在2006/07课税年度的个别人士报税表内 [R1/1-4],上诉人声称A女士为他的配偶,申报扣除赡养费开支及已婚人士免税额,资料如下:

(a) 本人于本年度内获得的入息

退休金 298,409元

(b) <u>扣除</u>

支出及开支 - 赡养费 (1,000元加币x12个月x汇率:约7.5元 90,000元 港币兑1元加币)

(c) 已婚人士免税额

(i) 本人已与配偶分居,配偶在本年度 是 内并没有任何应课薪俸税的入息

90,000元

(ii) 本人在本年度内已付给配偶的生活费用

(4) 评税主任认为上诉人所申索扣除的赡养费开支属家庭性质或私人性质的开支,因此不能获得扣除;而上诉人在 2006/07 课税年度内并非已婚人士,故他亦不能享有已婚人士免税额[R1/8]。评税主任遂向上诉人作出以下 2006/07 课税年度薪俸税评税:

元 入息[事实第2(3)(a)项] 298,409 <u>减</u>:基本免税额 100,000 应课税入息实额 198,409 应缴税款 13,598

(5) 上诉人反对上述薪俸税评税,理由如下[R1/12]:

「假设夫妻二人全年入息为500,000元,可获免税额200,000元。

如果女方无收入,即男方的500,000元,可获免税额200,000元。分居亦获此计算,为何离婚不能?两人每年开支亦是男方入息500,000元之内也!离婚后,男方再婚,即拥有夫妻二人合计的免税额,这时,赡养费才属个人额外开支。女方再结婚,她属于新夫婿的二人合计的免税额内,当然不能再享受前夫的免税额,前夫有权不付赡养费,仍继续付则属私人开支了。因此,结论是:夫妇离婚,任何一方没有再婚,都应该继续享有二人合计的免税额!...」

(6) 评税主任就上诉人的反对回复说[R1/14]:

「去年,你就同样的申索已向本局提出反对。本局遂去信向你解释 在《税务条例》下,有关所述的赡养费属私人开支,不能以开支的 形式作税项扣除。另外,本局亦没有就赡养费开支设立免税项目, 所以,你申索扣除给予前妻的赡养费开支,不获接受。

另外,为使你更明白法庭就此类申索的判决,本局曾于2006年11月29日去信给你并附上Sit Kwok Keung v Commissioner of Inland Revenue的判案书[高等法院(上诉法庭)民事诉讼判案书号码2005年第23号][R2/61-69],以供参考。高等法院(上诉法庭)已裁定赡养费支出不可获得扣除。

后来,本局发现你在2005年6月13日才正式离婚。由于你在正式离婚前及与妻子分居期间有供养或经济上支持她,所以你符合《税务条例》规定,可获给予已婚人士免税额。因此,遂主动向你建议就你的2005/06课税年度最后评税给予已婚人士免税额。但是,由于你在2006/07课税年度已属单身,本局未能在有关年度(则2006/07)给予已婚人士免税额。」

(7) 上诉人就评税主任回复争议说[R1/14-15]:

「分居付赡养费与离婚后双方没有再结婚所付的赡养费,均是男方的家庭支出,为何不能/不应同样处理?!

你们真的没有考虑一件事的处理是否合理,完全没有为市民应有权益着想!连『判例』也只知有其事,而没有细心研究是否/能否修改现有条例!请细读该『判例』第22段,尤其是最后一句'Any reform in this regard is a matter entirely for the Legislature, and not for the Courts'! 很明显指出修不修改现有条件,是你们肯不肯花费功夫在行政上立法修订而已!…」

(8) 就 2006/07 课税年度关于赡养费扣减及已婚人士免税额的争议,副局长作出了书面决定,驳回上诉人的反对,维持 2006/07 课税年度薪俸税评税,理由如下[B1/23-24]:

「在本个案中,上诉人向[A]女士所支付的赡养费很明显是家庭性质或私人性质的开支,与其退休金入息并无关系,因此不能在薪俸税下获得扣除。事实上,税务上诉委员会在D61/99, IRBRD, vol 14,511及D82/03, IRBRD, vol 18,824两宗上诉案中已清楚指出赡养费开支不能符合税例第12(1)(a)条所指的『完全、纯粹及必须为产生应评税入息而招致』及『不属家庭性质或私人性质的开支』的规定;而上诉

庭在<u>Sit Kwok Keung</u>一案中亦认同根据现行的税例,赡养费开支是不能获得任何税务宽免的。

至于上诉人申请已婚人士免税额一事,上诉人于2005年6月11日与 [A]女士离婚,他在2006/07课税年度内并非已婚人士,因此他不能符合税例第29(1)条有关『已婚』的条件。虽然上诉人在该课税年度内须向[A]女士支付赡养费,但[A]女士已不再是上诉人的配偶,故此税例第29(4)条亦不适用于本个案。总括而言,本人认为上诉人并不符合税例第29(1)及(4)条的规定,是以他不能享有已婚人士免税额。

本人明白上诉人须向前妻支付赡养费却未能就有关开支取得任何税务宽免而感失望,但正如上诉庭在Sit Kwok Keung案的判辞中指出,立法会亦曾在2002年7月10日的会议上就赡养费开支的税务宽免问题作出讨论,而当时的财经事务及库务局局长亦已清楚表示政府不支持为有关开支设立免税项目。在此情况下,本人只能依循现行的税例作出决定。」

上诉人的上诉理由

3. 上诉人不服副局长的决定,向本委员会上诉,书面陈述理由如下[B1/1-3] ·

「这次税务纠纷,本人曾向税务局再三申述不公平的不合时宜的条例,应该修订。奈何税务局从下至上的官员,只识墨守成规,拿着2002年法官也感遗憾的判案,当作上方宝剑,完全没有一点说明考虑本人的反对理由是否合理,亦没有反驳本人的申说不当,只是重复认为有先例可援,维持应缴税项。

...本人的反对理由...现再引述如下:

假设男方年入300,000元,女方无入息。

- 1. 男女婚后,可获 200,000 元免税额,两方开支由男方负责。
- 2. 男女分居,亦同样可获 200,000 元免税额,亦即同意两方开支由男方 负责。
- 3. 男女离婚,双方没有再结婚,男方付赡养费,等同分居负担女方生活费,为何不能享用同样的免税额?

.:结论: 男方离婚,双方没有再结婚,男方付赡养费,应享用同样的免税额!

如果,贵委员会认为本人言之有理而且充分,则应判我得直,然后再继续讨论如何修订不合时宜的现有条例。」

聆讯

4. 上诉人因事未能出席聆讯,委员会指示并根据《税务条例》第 68(2D)条在上诉人缺席的情况下进行了聆讯。

赡养费开支的扣除

- 5. 税例第12条规定:
 - 「(1) 在确定任何人在任何课税年度的应评税入息实额时,须从该人的 应评税入息中扣除—
 - (a) 完全 纯粹及必须为产生该应评税入息而招致的所有支出及 开支,但属家庭性质或私人性质的开支以及资本开支则除 外;
- 6. 税例第12(1)条指定了凡「为产生该应评税入息而招致的所有支出及开支」 必须扣除,不过,条件是该支出及开支是「完全、纯粹及必须」为产生该应评税入 息而招致的,并且该支出及开支是不属于家庭性质或私人性质以及不属资本开支。
- 7. <u>D82/03</u>, IRBRD, vol 18, 824—案上诉人同样要求扣除向前妻支付的赡养费。 委员会裁定上诉人的赡养费开支与其工作并无关系,不符合税例第12(1)(a)条所指完全、纯粹及必须为产生该应评税入息而招致」的规定,不可予以扣除[R2/76]。
- 8. 在 Sit Kwok Keung v Commissioner of Inland Revenue 5 HKTC 647 [以下简称「薛国强(第一)案」〕,上诉庭裁定上诉人被法庭颁令支付的赡养费是不符合税例第 12(1)条规定,不获税务扣减[R2/33]。相关判辞的英文原文节录如下(第 659 页 8 段):
 - "..as a matter of statutory construction the appellant is not entitled to the married person's allowance,...Maintenance payments made to Madam Yim pursuant to the court order are not deductible under section 12(1) of the Ordinance because they do not satisfy the conditions of that section."
- 9. 在<u>Sit Kwok Keung v Commissioner of Inland Revenue</u> 6 HKTC 534 [以下简称「薛国强(第二)案」〕中,上诉人就上诉法庭在薛国强(第一)案中的判决申请司法复核。原讼法庭法官夏正民拒绝向上诉人发出准予申请司法复核的许可。他在判辞中指出赡养费是家庭性质或私人性质的开支,并不符合税例第12(1)(a)条的扣除规定。

即使该项开支是在法庭颁令的情况下支付亦不会将其性质改变[R2/65]。相关判辞的英文原文节录如下(第538页15段):

'I am reminded by the applicant, although the matter was not earlier canvassed, that he also relies on section 12(1)(a) of the [Inland Revenue] Ordinance. Section 12(1)(a) says that, in ascertaining the net assessable income a person for any year of assessment, there shall be deducted from the assessable income of that person all outgoings and expenses other than expenses of a domestic or private nature. In my view, maintenance payments are manifestly expenses of a domestic or private nature. They are not, for example, business expenses nor are they are in any other way public expenses. The fact that a court orders payment of family support does not thereby convert the payment into one of a public as opposed to a private nature. In my view, therefore, section 12(1)(a) is not applicable.'

10. 根据上述案例,虽是被法庭颁令支付的,赡养费开支只属家庭性质或私人性质的开支,不能说是为产生退休金入息所招致的,因此不符合税例第12(1)条规定,有关开支不获扣除。

已婚人士免税额

- 11. 税例第29条规定:
 - 「(1) 任何人如在任何课税年度内任何时间属已婚并有以下情形·则须根据本条在该课税年度获给予一项免税额(『已婚人士免税额』)—
 - (a) 该人的配偶在该课税年度并无应评税入息;
 - (4) 如丈夫与妻子分开居住,则只有在申索已婚人士免税额的配偶是在 供养或经济上支持该另一名配偶的情况下,方可给予该免税额。
- 12. 税例第2条则规定:

「"婚姻" (marriage)指—

- (a) 香港法律承认的任何婚姻;或
- (b) 在香港以外任何地方由两个有行为能力结婚的人按照当地法律而缔 结的婚姻,不论该婚姻是否获香港法律承认...而'结婚'(married)一词 须据此解释;

"配偶" (spouse)指丈夫或妻子;

"丈夫"(husband)指已婚男士,而其婚姻是本条所指的婚姻者;

"妻子"(wife)指已婚妇女,而其婚姻是本条所指的婚姻者; 」

- 13. 根据税例第29条规定,申索人必须是已婚人士,而配偶并无应评税入息,若分开居住,必须供养另一配偶方,才可获得「已婚人士免税额」。税例第2条规定配偶指已婚的婚姻者。因此,「已婚人士免税额」不适用于已离婚人士。
- 14. 在「薛国强(第一)案」,上诉人在离婚后按照法院的判令支付前妻及两名儿子的生活费,他认为他应获给予「已婚人士免税额」。委员会、高等法院原讼法庭及上诉法庭均驳回上诉人的观点,分别一致裁定离了婚的上诉人不是已婚人士,不获税例第29(1)条的「已婚人士免税额」。至于税例第29(4)条关于供养已分居的配偶,只适用于有婚姻关系的「丈夫」与「妻子」。上诉人与他的前妻已离婚,不再是「丈夫」与「妻子」的关系,他的前妻亦不再是他的「配偶」,故此上诉人不能引用税例第29(4)条申索已婚人士免税额。相关的委员会及法院判辞的英文原文节录如下:

(i) 委员会(第651页10段)[R2/25]

'The Appellant is not within section 29(1) as he was not married at any time within the year of assessment 1998/99. His case is not within section 29(4) as the Appellant and Madam Yim were not "husband and wife" and the Appellant was not a "spouse" within the meaning of the [Inland Revenue] Ordinance in that year of assessment.'

(ii) 原讼法庭(第654页9段)[R2/28]

'I agree with the Board's decision because even section 29(4) refers to a "husband and wife ... living apart ...". The use of the words "husband and wife" clearly shows that although 2 people may not be living together, their relationship must still be that of a married couple before section 29 can be relied upon.'

(iii) 上诉法庭(第659页7段)[R2/33]

'Given the statutory meanings ascribed to those terms in subsections (1) and (4) of section 29, the decision of the Board to the effect that the appellant was not "married" for the purposes of section 29(1) in the relevant year of assessment was unassailable and the judge was plainly right in upholding the decision of the Board in that regard.'

15. 根据上述案例,要申索税例第 29 条的「已婚人士免税额」,上诉人必须 在有关的课税年度内是税例第 2 条所规定的婚姻者。 16. 本案上诉人与 A 女士的婚姻已于 2005 年 6 月 11 日正式解除〔事实第 2(2) 项〕。在有关的 2006/07 课税年度内,上诉人与 A 女士之间已没有婚姻关系,因此上诉人不符合税例第 29 及第 2 条规定,不能享有「已婚人士免税额」。

税例不公平不合时官

- 17. 根据其呈交的上诉理由,上诉人不服的是现行税例对他离婚后所负担的赡养费没有给予税务宽免。上诉人并没有争论赡养费开支是否不符合税例第12(1)条的扣除条件,亦没有争论离婚人士是否不符合税例第29条关于已婚人士免税额的规定。上诉人争论的是,所支付的同样是经济供养,为甚么已婚的他及分居的他可享免税额,而离婚的他就偏偏不可。上诉人认为这是税例的不公平及不合时官,应作修订。
- 18. 上诉人的上述观点不是没有道理的。事实上,上诉庭大法官Le Pichon JA 在「薛国强(第一)案」对离婚人士就赡养费开支不获税务宽免亦表同情,认为现行税例似有不公,应予检讨。相关判辞的英文原文节录如下(第659页9段)[R2/33]:

'The rationale for not according a divorced person the equivalent of the married person's allowance when he is nonetheless legally liable to support his former spouse is difficult to fathom. For my part, I have considerable sympathy with persons (of which there must be many) in the position of the appellant. The position under the legislation as it stands does seem to be both unfair and inequitable. It may be more than passing interest to note the position in other jurisdictions. For example, under UK tax legislation, some form of tax relief has always been available...

Quite why some form of tax relief is not available in Hong Kong is not readily apparent. However, redress lies not in the hands of the court but the legislature. It is perhaps timely to invite its attention to this "iniquity".

- 19. 不过,修订税例是立法机关的权辖,税例一天未修订好,我们都得遵照现 行税例执行,没有斟酌余地。
- 20. 事实上,上诉庭在「薛国强(第二)案」亦指出对离婚人士支付赡养费不享免税额的不公平现象,立法会曾在「薛国强(第一)案」审结后于2002年7月10日的会议上作出讨论〔见R1/26-28〕,但结果并没有为赡养费开支设立任何税务宽免。政策依旧,婚离人士支付赡养费给前配偶仍不获任何税务宽免。相关判辞的英文原文节录如下(第542页22段)[R2/69]:

'I also have considerable sympathy with persons in the position of the appellant who receive no tax relief for maintenance payments made to a former spouse. The Legislature's attention was directed to this "iniquity" in the judgment of Le Pichon JA. This matter was debated in the Legislative Council on 10 July 2002

following the decision in Civil Appeal 3137. It is clear from the press release of that debate supplied to us that the Government did not consider it appropriate to introduce a tax allowance to persons in the position of the appellant for alimony or maintenance payments to a former spouse. Any reform in this regard is a matter entirely for the Legislature and not for the Courts.'

21. 据上所述,依循现行税例,上诉人作为离婚人士是不能获得「已婚人士免税额」的。至于税例是否对离婚人士不公平并为此应否修订税例是政策性议题,超越了本委员会的权限。

总结

22. 税例第68(4)条规定:

「证明上诉所针对的评税额过多或不正确的举证责任,须由上诉人承担。」

- **23**. 综合上述对现行相关税例的分析,本委员会裁定上诉人并未完成其举证责任,证明副局长所决定的评税额过多或不正确。
- 24. 据此,本委员会驳回上诉人的上诉并维持副局长的决定。