

## CASE NOT SUTAINED

CS/548

### COMPLAINT AGAINST THE INCOME TAX DEPARTMENT FOR DISCRIMINATING AGAINST THE COMPLAINANT BY REASON OF HER GENDER

The Complainant was a married woman who lived in Spain and worked in Gibraltar. She explained to the Ombudsman that her husband was disabled and could not work and for the past three years she had been claiming the Married Persons Allowance as a taxable allowance ('the allowance') against her income but it was suddenly stopped as from July 2003. Initially she thought that the Department had made a genuine mistake as that year her husband had not been asked to sign a form. However when she made some enquiries she was allegedly informed that she was no longer entitled to the allowance.

During the following months she was allegedly given several different reasons for the decision. The excuses ranged from the fact that she was not resident in Gibraltar, to women as a whole not being entitled to the allowance. When she challenged the fact that all of her male work colleagues who lived in Spain had not had theirs stopped, she was allegedly told that it was simply the 'new interdepartmental practice'

Aggrieved she wrote a letter of complaint to the Chief Minister and to the Department, writing to the Department once again on 2 September 2003.

The Department responded by letter dated 4 September 2003, informing her that with effect from 1<sup>st</sup> July 2003, the 'new approach' was not to allow transfer of allowances in the case where the husband was not in receipt of income chargeable to tax in Gibraltar. The Complainant stressed that the letter specified that this new 'approach' applied to all, irrespective of nationality and place of residence but it did not mention gender which was the issue at hand. The fact of the matter was that she was being discriminated against. Her male colleagues were all in receipt of the allowance even those whose wives were not working, but she was not.

### THE OMBUDSMAN'S ENQUIRY

In his enquiries with the Department, the Ombudsman verified all of the Complainant's allegations. The Department admitted that it had granted the allowance to the Complainant until July 2003 when it was stopped. It explained that it had erred in granting her the allowance and by stopping it, it was simply correcting its mistake.

The Department referred to Rule 7 of the Income Tax (Allowances, Deductions & Exemptions) Rules 1992, which stipulates that the assessable income of an individual is reduced by £2,025 per annum in respect of **a wife** (emphasis added) who is living with him or is wholly maintained by him (i.e. the Married Person's Allowance). By

comparison, in the Income Tax (Home Purchase Deductions) Rules, all of the references are to an individual and his spouse (as opposed to his wife).

The Department further explained to the Ombudsman that it sympathised with the Complainant but its role was to apply the law as it currently stood. Unfortunately the law stipulated that the allowance was only granted to men on behalf of their wives and not to women on behalf of their husbands. This could be seen to be discriminatory but such considerations were outside the ambit of the Department.

The Department added that under Rule 25 a working husband can transfer his allowances to his wife where she is earning more than he is but in this case since the husband had no income in Gibraltar he had no allowances to transfer. The Department further added that by virtue of the provisions of Rule 10(4) a married woman living with her husband may elect to have her income deemed to be the income of her husband. In that case the husband would get the allowance on behalf of his wife. Unfortunately however, Rule 20 stipulates that where the individual claiming a deduction is not resident in Gibraltar, the deduction is reduced by one twelfth for every complete calendar month that he is not so resident. This would completely nullify the effects of the election in the Complainant's case.

The Department concluded that unfortunately by reason of her gender on the one hand and of her residence in Spain in the alternative, there was no way of granting her the allowance.

In his considerations the Ombudsman pointed out that he derives his jurisdiction from the Public Services Ombudsman Ordinance. Section 5 of the Ordinance denies from the Ombudsman the authority to question a decision taken without maladministration, and maladministration covers the manner in which a decision is reached or discretion is exercised: but excluding the merits of the decision itself or of the discretion itself. A discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken, is excluded. (Lord Denning Mr in R V Local Commissioner for Administration for the North and East Area of England ex parte City of Bradford Metropolitan Council, (1979) QBD 287 ).

The Courts have provided the ombudsman with some guidance as to how to interpret maladministration. It will cover "bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness, and so on".

The following is the Oxford English Dictionary's definition of perversity:

*"(of a person or action) deliberately or stubbornly departing from what is reasonable or required."*

Taking this into account and in order to identify whether the Department had committed maladministration, the Ombudsman had to consider whether the Department had acted with perversity. For the purpose of this report the Ombudsman differentiated between the

State in the persona of the Income Tax Department and the dedicated professionals who run the Income Tax Department.

It was obviously unacceptable that in this day and age the State in the persona of the Income Tax Department should discriminate against women in such a blatant way.

In the Ombudsman's opinion the Income Tax Ordinance and the Income Tax (Allowances, Deductions & Exemptions) Rules 1992 were unfair and he urged those responsible to consider amending the legislation to meet the requirements of a modern society.

In practice however, the Ombudsman acknowledged that the Commissioner of Income Tax and his staff are bound by the Ordinance and its Rules and until Government amends the legislation they, as individuals are bound to uphold the law and apply it as is.

Section 51 of the recently enacted Equal Opportunities Ordinance 2004, requires the Government to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on grounds of sex or racial or ethnic origins. The body shall have the power *inter alia* to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination.

The Ombudsman welcomed this new ordinance pointing out that it was a welcome addition to our statute book. He went on to note that the matters dealt with in this report fall outside the ambit of the Equal Opportunities Ordinance and that the State was penalising the Complainant for being a woman.

The Ombudsman concluded that since the Department was merely applying the law as it stood, maladministration had not been committed. He pointed out however, that in the twenty first century it was no longer acceptable for women be discriminated against in the way that they are by the Income Tax (Allowances, Deductions & Exemptions) Rules 1992 and he suggested that the authorities give serious consideration to amend those rules.

With these comments the Ombudsman closed his report.