Case No. D135/02

Salaries tax – what the Board could or should do when the taxpayer cannot be effectively served with a notice of hearing – reasonable attempts had been made to communicate the hearing date to the taxpayer – whether the Board has the power to dismiss the appeal under section 68(2B)(c) – the Chinese version of the Inland Revenue Ordinance ('IRO') has equal status as the English version – it is incumbent upon a party who has commenced an appeal under the IRO to take active steps to prosecute the appeal – meaning of having 'failed' to attend any meeting of the Board – non-communication for four years with the Board regarding the appeal – sections 58(2), 58(3), 66(1), 68(1) and 68(2B)(c) of the IRO.

Panel: Benjamin Yu SC (chairman), Vincent Mak Yee Chuen and Tang Chi Chuen.

Date of hearing: 27 December 2002.
Date of decision: 19 March 2003.

In May 1995, the taxpayer objected to the salaries tax assessment for the year of assessment 1990/91. At that time, she notified the Inland Revenue Department ('IRD') that she was on a business trip and would not be back in Hong Kong until January 1996. She left an address in Ontario, Canada for correspondence purposes.

The taxpayer had, at other times, also raised objections to the salaries tax assessments for the years of assessment 1989/90, 1991/92, 1992/93 and the additional salaries tax assessment for the year of assessment 1993/94 raised on her.

By a determination dated 11 June 1997, the Commissioner of Inland Revenue overruled her objection and confirmed the assessments. The determination was communicated to the taxpayer by a letter dated 11 June 1997 sent to her in her address in Ontario, Canada.

By a letter addressed to the clerk to the Board of Review ('the Clerk') and dated 19 June 1997 but only received by the Board on 7 July 1997, the taxpayer asked for a 'review' of the assessments.

The Clerk wrote to the taxpayer by a letter dated 11 July 1997 pointing out that the notice of appeal was incomplete in that the taxpayer had omitted to send in a copy of the determination and appendices issued by the Commissioner.

The letter was sent to the taxpayer's address in Ontario, Canada. In that same letter, the Clerk asked the taxpayer whether she wished to return to Hong Kong to attend the hearing in person or would appoint a representative. She was given copies of relevant sections, that is, sections 65 to 69 of the IRO, and an information leaflet of the Board.

The taxpayer duly replied to this letter by a letter dated 23 July 1997 by which she rectified her omission and sent in a copy of the determination and appendices. She also informed the Board that she would like to attend the hearing in person and indicated that she would be returning to Hong Kong around mid 1999. The letter was received by the Board on 12 August 1997.

On 12 May 1999, the Clerk issued a notice to the taxpayer informing her that the appeal was scheduled to be heard on 26 July 1999 at 5:15 p.m. The notice was sent by registered post to the taxpayer's address in Ontario, Canada.

This notice was returned to the Board on 11 June 1999 through the post with the following stamp on the envelope: 'Return to Sender'. The hearing on 26 July 1999 was vacated.

In November 2002, a fresh notice of hearing was sent by the Board to the taxpayer at the same Ontario address calling upon the taxpayer to attend the hearing scheduled on 27 December 2002. That notice was again returned undelivered.

In the meantime, nothing had been heard from the taxpayer. Inquiries by the IRD revealed that she had long ceased working for her employer and was no longer at her original Hong Kong address. The taxpayer's current address is unknown either to the Board or to the respondent.

The Board was thus confronted with a situation where the appellant cannot be effectively served with a notice of hearing, and the question was what the Board could or should do in the circumstances.

The facts appear sufficiently in the following judgment.

Held:

1. During the hearing, the Revenue asked the Board to take the easy way out of declaring that the taxpayer had not commenced any valid appeal on the ground that the letter she sent within one month from the date of the determination was not accompanied by a copy of the determination, as required under section 66(1) of the IRO.

2. The Board was not disposed to rule the appeal invalid on that ground. According to the experience of the Board, such omission on the part of prospective appellants

were not uncommon, and if, as in this case, the omission was quickly remedied, the Board would usually be disposed to grant an extension of time.

3. The Revenue next urged upon the Board that it should either dismiss the appeal under section 68(2B)(c) of the IRO or alternatively directed that a fresh notice of hearing be delivered to the taxpayer by ordinary post. The latter course was suggested because hitherto the notices of hearing had been sent by registered post and these had been returned. The suggestion that a fresh notice be sent by ordinary post is aimed at avoiding the notice being returned.

4. The Board was not attracted to the idea of directing a fresh notice to be served on an address which the Board knew from the evidence would not achieve the purpose of giving notice to the taxpayer. A hearing conducted pursuant to a notice which the Board knew would not have reached the taxpayer would be no different from the present one.

5. The only questions which remain were (i) whether in these circumstances the Board had the power to dismiss the appeal under section 68(2B)(c) and (ii) if so whether it should exercise the power to do so in the present case.

6. Section 66(1) provides that any person who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may appeal within one month.

7. Under section 68(1), every appeal under section 66 shall be heard by the Board in accordance with that section and the Clerk shall, as soon as may be after the receipt of the notice of appeal, fix a time and place for the hearing of the appeal and shall give 14 clear days' notice thereof to the appellant and the Commissioner.

8. Section 68(2B) provided:

'If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative, the Board may –

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal under subsection (2D); or

(c) dismiss the appeal.'

9. In the present case, the Clerk had fixed the date for hearing pursuant to section 68(1) and had taken the proper step to give notice of the hearing to the taxpayer. The notice was given to the taxpayer at her last known address pursuant to section 58(2) of the IRO which reads:

> *'Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which he is chargeable to tax under Part II.'*

10. Now, under section 58(3), any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. Here, because the notices were returned, section 58(3) could not be relied on to prove, if that were necessary, the date when the notice would have arrived. This, however, did not mean that the service was not effective under section 58(2).

11. The Board was of the view that where an appeal had been commenced, and the Clerk had fixed the date for hearing and served a notice of hearing to the appellant in accordance with section 58(2) of the IRO, and the appellant failed to attend that hearing, the Board may exercise any one of the powers listed in section 68(2B) of the IRO.

12. On the last occasion, that is, in July 1999, the Board saw fit to adjourn the hearing of the appeal because at that time it was not known whether the taxpayer could be reached.

13. When this matter was brought before the Board again, this time in December 2002, some four and a half years after the appeal was first lodged, the Board did in its view have the power to dismiss the appeal under section 68(2B) and it saw no valid reason why it should not do so.

14. The Board was conscious that it may be argued that the taxpayer had not 'failed' to attend the hearing, since the taxpayer had not received the notice of hearing. The Board was of the view that this would be reading section 68(2B) unduly restrictively and would be wrong.

15. First, such a reading failed to take account of the Chinese version of the IRO, which has equal status as the English version. The words which appear in the Chinese

version are '**如上訴人在編定的上訴聆訊日期沒有親自……出席委員會會議**'. There was no necessary connotation in the section that the appellant must first have received a notice of hearing.

16. Secondly, the Board had to construe section 68(2B) in the context of the IRO as a whole.

17. When one has regard to the fact that the procedure under section 68(1) has been complied with by the Clerk, and to the fact that section 68(1) mandates that every appeal 'shall be heard by the Board', there can be no escape from the conclusion that the Board's powers under section 68(2B) come into play when, at the date fixed for the hearing, the appellant did not attend.

18. The Board was of the view that this result was consonant with the justice of the case. It must be incumbent upon a party who had commenced an appeal under the IRO to take active steps to prosecute the appeal.

19. A person who had not communicated with the Board for up to four years on the appeal could properly be regarded as having 'failed' to attend any meeting of the Board which had been properly fixed by the Clerk after reasonable attempts had been made to communicate that hearing date to him.

20. The Board thereby dismissed the appeal under section 68(2B) and confirmed the assessments appealed against.

Appeal dismissed.

Ng Yuk Chun for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

1. In May 1995, the Taxpayer objected to the salaries tax assessment for the year of assessment 1990/91. At that time, she notified the IRD that she was on a business trip and would not be back in Hong Kong until January 1996. She left an address in Ontario, Canada for correspondence purposes. She had, at other times, also raised objections to the salaries tax assessments for the years of assessment 1989/90, 1991/92, 1992/93 and the additional salaries tax assessment for the year of assessment 1993/94 raised on her.

2. By a determination dated 11 June 1997, the Commissioner of Inland Revenue overruled her objection and confirmed the assessments. The determination was communicated to the Taxpayer by a letter dated 11 June 1997 sent to her in her address in Ontario, Canada.

3. By a letter addressed to the clerk to the Board of Review ('the Clerk') and dated 19 June 1997 but only received by the Board on 7 July 1997, the Taxpayer asked for a 'review' of the assessments. The Clerk wrote to the Taxpayer by a letter dated 11 July 1997 pointing out that the notice of appeal was incomplete in that the Taxpayer had omitted to send in a copy of the determination and appendices issued by the Commissioner. The letter was sent to the Taxpayer's address in Ontario, Canada. In that same letter, the Clerk asked the Taxpayer whether she wished to return to Hong Kong to attend the hearing in person or would appoint a representative. She was given copies of relevant sections, that is, sections 65 to 69 of the IRO, and an information leaflet of the Board.

4. The Taxpayer duly replied to this letter by a letter dated 23 July 1997 by which she rectified her omission and sent in a copy of the determination and appendices. She also informed the Board that she would like to attend the hearing in person and indicated that she would be returning to Hong Kong around mid 1999. The letter was received by the Board on 12 August 1997.

5. On 12 May 1999, the Clerk issued a notice to the Taxpayer informing her that the appeal was scheduled to be heard on 26 July 1999 at 5:15 p.m. The notice was sent by registered post to the Taxpayer's address in Ontario, Canada. This notice was returned to the Board on 11 June 1999 through the post with the following stamp on the envelope: 'Return to Sender'. The hearing on 26 July 1999 was vacated.

6. In November 2002, a fresh notice of hearing was sent by the Board to the Taxpayer at the same Ontario address calling upon the Taxpayer to attend the hearing scheduled on 27 December 2002. That notice was again returned undelivered.

7. In the meantime, nothing has been heard from the Taxpayer. Inquiries by the IRD revealed that she had long ceased working for her employer and was no longer at her original Hong Kong address. The Taxpayer's current address is unknown either to the Board or to the Respondent.

8. We are thus confronted with a situation where the appellant cannot be effectively served with a notice of hearing, and the question is what the Board can or should do in the circumstances.

9. Before us, Miss Ng has asked us to take the easy way out of declaring that the Taxpayer has not commenced any valid appeal on the ground that the letter she sent within one month from the date of the determination was not accompanied by a copy of the determination, as

required under section 66(1) of the IRO. We are not disposed to rule the appeal invalid on that ground. In our experience, such omission on the part of prospective appellants are not uncommon, and if, as in this case, the omission was quickly remedied, the Board would usually be disposed to grant an extension of time.

10. Miss Ng next urged upon us that we should either dismiss the appeal under section 68(2B)(c) of the IRO or alternatively direct that a fresh notice of hearing be delivered to the Taxpayer by ordinary post. The latter course was suggested because hitherto the notices of hearing had been sent by registered post and these had been returned. The suggestion that a fresh notice be sent by ordinary post is aimed at avoiding the notice being returned.

11. We are not attracted to the idea of directing a fresh notice to be served on an address which we know from the evidence would not achieve the purpose of giving notice to the Taxpayer. A hearing conducted pursuant to a notice which we know would not have reached the Taxpayer would be no different from the present one.

12. The only questions which remain are (i) whether in these circumstances this Board has the power to dismiss the appeal under section 68(2B)(c) and (ii) if so whether it should exercise the power to do so in the present case.

13. Section 66(1) provides that any person who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may appeal within one month. Under section 68(1), every appeal under section 66 shall be heard by the Board in accordance with that section and the Clerk shall, as soon as may be after the receipt of the notice of appeal, fix a time and place for the hearing of the appeal and shall give 14 clear days' notice thereof to the appellant and the Commissioner. Section 68(2B) provides as follows:

> '*If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative, the Board may –*
>
> *(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;*
>
> *(b) proceed to hear the appeal under subsection (2D); or*
>
> *(c) dismiss the appeal.'*

14. In the present case, the Clerk had fixed the date for hearing pursuant to section 68(1) and had taken the proper step to give notice of the hearing to the Taxpayer. The notice was given to the Taxpayer at her last known address pursuant to section 58(2) of the IRO which reads:

> '*Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which he is chargeable to tax under Part II.*'

15. Now, under section 58(3), any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. Here, because the notices were returned, section 58(3) cannot be relied on to prove, if that were necessary, the date when the notice would have arrived. This, however, does not mean that the service was not effective under section 58(2).

16. In our view, where an appeal has been commenced, and the Clerk has fixed the date for hearing and served a notice of hearing to the appellant in accordance with section 58(2) of the IRO, and the appellant fails to attend that hearing, the Board may exercise any one of the powers listed in section 68(2B) of the IRO. On the last occasion, that is, in July 1999, the Board saw fit to adjourn the hearing of the appeal because at that time it was not known whether the Taxpayer could be reached. When this matter is brought before us again, this time in December 2002, some four and a half years after the appeal was first lodged, this Board does in our view have the power to dismiss the appeal under section 68(2B) and we see no valid reason why it should not do so.

17. We are conscious that it may be argued that the Taxpayer had not 'failed' to attend the hearing, since the Taxpayer had not received the notice of hearing. In our view, this would be reading section 68(2B) unduly restrictively and would be wrong. First, such a reading fails to take account of the Chinese version of the IRO, which has equal status as the English version. The words which appear in the Chinese version are '**如上訴人在編定的上訴聆訊日期沒有親自……出席委員會會議**'. There is no necessary connotation in the section that the appellant must first have received a notice of hearing. Secondly, we have to construe section 68(2B) in the context of the IRO as a whole. When one has regard to the fact that the procedure under section 68(1) has been complied with by the Clerk, and to the fact that section 68(1) mandates that every appeal 'shall be heard by the Board', there can be no escape from the conclusion that the Board's powers under section 68(2B) come into play when, at the date fixed for the hearing, the appellant did not attend. In our view, this result is consonant with the justice of the case. It must be incumbent upon a party who has commenced an appeal under the IRO to take active steps to prosecute the appeal. A person who has not communicated with the Board for up to four years on the appeal can properly be regarded as having 'failed' to attend any meeting of the Board which has been properly fixed by the Clerk after reasonable attempts have been made to communicate that hearing date to him.

18. In the event, we would dismiss the appeal under section 68(2B) and confirm the assessments appealed against.