

Case No. D14/06

Penalty tax – appeal out of time – section 66(1A) of the Inland Revenue Ordinance (‘IRO’) – whether or not extra time required to gather information including researching and taking advice to substantiate an appeal can constitute a reasonable cause for lodging the appeal out of time

Panel: Colin Cohen (chairman), James Mailer and James Wardell.

Date of hearing: 23 March 2006.

Date of decision: 27 April 2006.

By a determination dated 3 June 2005, additional salaries tax was imposed on to the appellant. On 18 June 2005, the appellant sent a letter by fax to seek clarification from the Inland Revenue Department before deciding whether to appeal. On the next day, the appellant sent a second letter to seek clarification from the Inland Revenue Department before deciding whether to appeal. On 20 June 2005, the Inland Revenue Department wrote to reply to the appellant’s letter of the 19 June 2005.

On 30 June 2005, the appellant wrote to the Clerk to the Board of Review to lodge an appeal and to ask for a three months extension to 3 September 2005 so that he can fully prepare the appeal. In the said letter, the appellant did not state any ground of appeal nor did she attach any documents with the said letter.

On 4 July 2005, the Clerk to the Board of Review wrote to the appellant to acknowledge receipt of her letter dated 30 June 2005 and referred to the appellant sections 66(1) and 66(1A) of the IRO which stipulated the time required to file the notice of appeal.

On 8 August 2005, the appellant wrote again to the Clerk to the Board of Review and in turn referred to the Clerk’s letter dated the 4 July 2005 and asked for a further indulgence for late submission. On 11 August 2005, The Clerk to the Board of Review reminded the appellant the requirement of the notice of appeal under section 66(1) of the IRO. On 31 December 2005, the appellant wrote to the Clerk to the Board of Review and enclosed the grounds of appeal. On 3 January 2006, the Clerk to the Board of Review replied that the notice is prima facie invalid as it falls outside the statutory one month period.

The issue is to consider whether or not the appellant’s late appeal should be entertained. The Inland Revenue Department submits that the appellant’s appeal is out of time and no extension can be granted to validate her appeal.

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Held:

1. After considering matters carefully and having listened to the parties, the only authority the Board to grant an extension of time to file an appeal is limited to the conditions as specified in section 66(1A). The Board is of view that the appellant had every opportunity to file a notice of appeal and was able to do so within the relevant period of time. Extra time required to gather information including researching and taking advice to substantiate an appeal cannot constitute a reasonable cause for lodging the appeal out of time (D11/89 IRBRD, vol 4, 230; D72/04 (unpublished); D18/92 IRBRD, vol 17, 144; Chow Kwong Fai, Edward v CIR (CACV 20/2005) considered).

Appeal dismissed.

Case referred to:

D11/89, IRBRD, vol 4, 230
D72/04 (unpublished)
D18/92, IRBRD, vol 17, 144
Chow Kwong Fai, Edward v CIR (CACV 20/2005)

Taxpayer represented by her husband.

Tsui Siu Fong and Lau Wai Sum for the Commissioner of Inland Revenue.

Decision:

1. By a Determination dated 3 June, 2005, the Deputy Commissioner made the following assessments:
 - (1) Additional salaries tax assessment for the year of assessment 1996/97 under Charge Number 9-2624101-97-0, dated 24 March 2003, showing additional assessable income of HK\$450,000 with tax payable thereon of HK\$79,700 is hereby reduced to additional assessment income of HK\$390,476 with tax payable thereon of HK\$70,771.
 - (2) Additional salaries tax assessment for the year of assessment 1999/2000 under Charge Number 9-2176608-00-7, dated 5 December 2003, showing

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additional net chargeable income of HK\$484,000 with tax payable thereon of HK\$82,280 is hereby confirmed.

- (3) Additional salaries tax assessment for the year of assessment 2001/02 under charge number 9-3364758-02-A, dated 5 December 2003, showing additional net chargeable income of HK\$333,000 with tax payable thereon of HK\$56,610 is hereby confirmed.

2. The Determination was sent under cover of a letter dated 3 June 2005 from the Deputy Commissioner to the Appellant drawing her attention to section 66 subsections (1), (1A) and (2) of the Inland Revenue Ordinance (Chapter 112) ('IRO') ('the Letter'). The Letter quoted the subsection in full and gave the address of the Clerk to the Board of Review. The Letter was sent by registered mail.

3. The Appellant's representative and the Appellant confirmed at the hearing before us that the Letter was received shortly after 3 June 2005.

4. On the 18 June 2005, the Appellant sent a letter by fax whereby she referred to the Determination and in turn, sought clarification from the Inland Revenue Department ('IRD') as regards section 9A of the IRO before deciding whether to appeal.

5. On the next day, the Appellant sent a second letter by fax which superseded the previous one she had sent and again sought clarification from the IRD as regards section 9A of the IRO before deciding whether to appeal.

6. During the course of the hearing, we were informed by the Appellant's representative and the Appellant that she had a meeting with her accountants whereby she sought advice as to whether or not to appeal the Determination received from the Deputy Commissioner. We were also informed that her accountants advised her that they could not see any grounds of appeal and indicated to her that they would need further time to look into matters.

7. On the 20 June 2005, the IRD wrote to the Appellant setting out their comments and views in response to the Appellant's letter of the 19 June 2005.

8. On the 30 June 2005, the Appellant wrote to the Clerk to the Board of Review. She referred to the Determination and stated:

'I wish to lodge an appeal. However as I am now on assignment in [Country A] (between May and August 2005), I wish to ask for a three month extension to 3.9.2005 so that I can fully prepare the appeal.'

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9. On the 4 July 2005, the Clerk to the Board of Review wrote to the Appellant acknowledging receipt of her letter of the 30 June 2005 in which she sought an extension to file a notice of appeal to the 3 September 2005 and stated as follows:

‘ ...

Section 66(1) of the Inland Revenue Ordinance (Cap.112) (IRO) stipulates that any person who wishes to appeal to the Board should file a written notice of appeal, together with a copy of the Commissioner’s determination and a statement of grounds of appeal, within one month from the date of the Commissioner’s determination. As a matter of practice, any appeal filed beyond the one-month period would be treated as a late appeal and that an application for an extension of time under section 66(1A) of the IRO will be considered by the Board at the hearing. If the Board accepts the appellant’s reasons for being late in lodging an appeal, it will proceed to hear the merits of his/her appeal in the usual way either on the same day as appropriate, or on the other date(s) of be fixed later on.

As such, please forthwith ensure compliance with section 66(1) of the IRO should you intend to lodge an appeal with this Board.

...’

10. It should be noted that in the Appellant’s letter of the 30 June 2005, she did not state any ground of appeal nor did she attach any documents with her letter.

11. On the 8 August 2005, the Appellant wrote again to the Clerk to the Board of Review and in turn referred to the Clerk’s letter dated the 4 July 2005 and asked for a further indulgence for late submission. At the same time, she enclosed the written determination.

12. On the 11 August 2005, the Clerk to the Board of Review responded and again drew to the Appellant’s attention the following:

‘ ...

According to section 66(1) of the Inland Revenue Ordinance (Cap.112), your notice of appeal must be given in writing and is accompanied by a copy of the Commissioner’s determination and a statement of grounds of appeal within one month from the date of the Commissioner’s determination. As your letter is not accompanied by a statement of grounds of appeal, your application cannot be entertained. Should you wish to appeal in accordance with the above provisions, you should forthwith ensure due compliance with each of the requirements.

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...’

13. It was also agreed that from the 29 September 2005, the Appellant remained in Hong Kong and only left Hong Kong for a short trip on two occasions respectively on the 29 September 2005 and the 8 December 2005 returning to Hong Kong in the evening of those particular dates.

14. On the 31 December 2005, the Appellant wrote to the Clerk to the Board of Review and enclosed the grounds of appeal. On the 3 January 2006, the Clerk to the Board of Review responded to her confirming that he had received her letter purporting to give notice of appeal in respect of the relevant assessments and again drew the Appellant’s attention to sections 66(1) and 66(1A) of the IRO. In the letter, the Clerk stated as follows:

‘ ...

The determination issued by the Deputy Commissioner of Inland Revenue is dated 3 June 2005 and your grounds of appeal was not received by this Board until 31 December 2005. Subject to such submission as you may wish to make, your notice is prima facie invalid as it falls outside the statutory 1 month period and you may wish to consider invoking the jurisdiction of the Board to grant you an extension of time.

...’

15. The issue before us is to consider whether or not the Appellant’s late appeal should be entertained. The IRD submits that the Appellant’s appeal is out of time and no extension can be granted to validate her appeal.

16. The Appellant’s notice of appeal was clearly out of time under section 66(1). The question for our decision is whether the Appellant has made out her case for us to extend the time for appeal under section 66(1A). Subsections (1) and (1A) of section 66 provide that:

‘(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within-

(a) 1 month after the transmission to him under section 64(4) of the Commissioner’s written determination together with the reasons therefor and the statement of facts; or

(b) such further period as the Board may allow under subsection (1A),

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either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.

(1A) *If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1).'*

17. As can be seen, the provisions of section 66(1A) are very clear and indeed restrictive. During the course of submissions put to us by the Appellant's representative, it was clear that the Appellant was not out of Hong Kong at the relevant time and that she was fully aware of the Determination. At the same time there was no assertion of any illness. Indeed, the only reason put to us by the Appellant was that further time was needed to prepare and obtain advice as to whether or not she was able to appeal.

18. Miss Tsui Siu-fong on behalf of the IRD drew our attention to various authorities which show that the provisions of section 66(1A) are very clear and restrictive. Indeed, we would refer to the D11/89, IRBRD, vol 4, 230 where the Board made the following comments:

'... The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed within the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.

Furthermore, even if he had been prevented, he had no reasonable excuse because he had had more than sufficient time to put his house in order.'

19. Our attention was also drawn to D72/04 (unpublished). In that decision, the Board held that a clear statement of grounds of appeal is a critical element in constituting a valid appeal and that Board again relied on D18/92, IRBRD, vol 7, 144. We also refer to the recent Court of Appeal decision in Chow Kwong Fai, Edward v CIR (CACV 20/2005) which again clearly shows

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that section 66(1A) imposes a higher threshold which is more than a mere excuse and as such, reasonable cause cannot possibly be extended to cover unilateral mistakes made by a taxpayer.

20. After considering matters carefully and having listened to the parties, the only authority we have to grant an extension of time to file an appeal is limited to the conditions as specified in section 66(1A). It is clear that the Appellant had received the Determination and indeed was in Hong Kong on 18 and 19 June 2005 when she had the opportunity to visit her tax advisers and did receive advice. Thereafter, she had left Hong Kong but still was in a position to dispatch correspondence. We are of the view that the Appellant had every opportunity to file a notice of appeal and was able to do so within the relevant period of time. In our view, we accept the IRD's submissions that extra time required to gather information including researching and taking advice to substantiate an appeal cannot constitute a reasonable cause for lodging the appeal out of time. Indeed, one has to note that the Appellant did not lodge or file her grounds of appeal until the 31 December 2005.

21. Hence, having considered all matters, we are not satisfied that the Appellant was prevented by any reasonable cause from giving a notice of appeal within a time limit laid down by section 66(1). We are not satisfied that the Appellant has made out any basis for an extension of time and we decline to extend the time for appealing.