

Case No. D2/11

Salaries tax – extension of time – other reasonable cause – sections 66 and 66(1A) of the Inland Revenue Ordinance ('IRO').

Panel: Cissy K S Lam (chairman), Clement Chan Kam Wing and Amy Wong Fung King.

Date of hearing: 18 February 2011.

Date of decision: 27 April 2011.

The taxpayer's notice of appeal was 9 months out of time when it was received by the Board. The taxpayer explained that the delay was due to his 'family problem' and he also claimed that after his wife had received the Determination she did not give it to him in good time.

Held:

The reason for delay given by the taxpayer fell apart in the face of correspondence exchanged between the taxpayer and the Inland Revenue Department ('IRD'). As to his allegation that the Determination did not come to his attention in good time, the law is always that once a document is sent by proper means to a person at his corresponding address, it must be deemed to have been duly received and time will start to run against him. Whether and when a person actually opens his letter and reads it and deals with it is not an enquiry that a tribunal can feasibly make. It is an allegation that is simple to make but difficult, if not impossible, to disprove. Even if we were to enquire into the allegation and accept it as true, this would be the taxpayer's own negligence. Such unilateral mistake falls far short of 'other reasonable cause' under section 66(1A).

Application refused.

Cases referred to:

Chow Kwong Fai v CIR [2005] 4 HKLRD 687
D2/04, IRBRD, vol 19, 76
D9/79, IRBRD, 354

Taxpayer in person.

Chan Tsui Fung, Leung Wing Chi and Yau Yuen Chun for the Commissioner of Inland Revenue.

Decision:

1. The taxpayer wishes to appeal against the Determination of the Acting Deputy Commissioner of Inland Revenue dated 24 September 2009 ('the Determination') in respect of his salaries tax assessment for the year of assessment 2007/08.
2. He has been married twice and has two daughters, one in each marriage. He disputes the apportionment of child allowance granted to him in respect of his first daughter from his first marriage. The first daughter was born in October 1992 and the second daughter in January 1996.
3. The first issue the Board has to decide is whether he should be allowed to appeal out of time under section 66(1A) of the Inland Revenue Ordinance Chapter 112 ('the IRO').
4. The Determination was sent under cover of a letter also dated 24 September 2009 by registered post to the taxpayer. The covering letter detailed the taxpayer's right to appeal and the appeal procedure and the full text of section 66 of the IRO was enclosed.
5. Information from the Hongkong Post showed that the Determination was delivered to the taxpayer's residential address at [Address B] on 25 September 2009 and signed by the taxpayer's wife.
6. The one month time limit for the appeal under section 66(1)(a) of the IRO thus commenced on 26 September 2009 and expired on 26 October 2009.
7. The notice of appeal was received by the Board on 28 July 2010, 9 months out of time. The delay was substantial.
8. The Board may extend the one month time limit under section 66(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)'.
9. The taxpayer relies on 'other reasonable cause'. The burden of proof of a reasonable cause lies on the taxpayer.
10. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687, Woo VP had this to say at para. 20:

'In my opinion, while a liberal interpretation must be given to the word "prevented" used in section 66(1A), it should best be understood to bear the meaning of the term "未能" in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means "unable to". The choice

(2011-12) VOLUME 26 INLAND REVENUE BOARD OF REVIEW DECISIONS

of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute.....'

11. It is clear that it is not sufficient that the delay is excusable.
12. In a letter to the Board dated 28 January 2011 the taxpayer explained that the delay was due to his 'family problem' as his second daughter 'in the age of 12, has teenage problem since 2009, always left home and missing, the worse case was that she was reported missing for a month to Hong Kong Police. In hope of my daughter to keep away from her friends, the family was busy to move home several times from [Address A] to [Address B] and then to [Address C] in two years' time. As the result, family members had not paid much attention to correspondence during the period of home moving, including those letter issued by Inland Revenue Department.'
13. The taxpayer repeated these reasons at the hearing before the Board. In addition he claimed that after his wife had received the letter with the Determination, she did not give it to him. Rather the letter was left in a drawer with a pile of other letters and it was not until they moved to their present address at Address C that he finally got the chance to settle down and clear his mail. They moved to Address C in April 2010. According to him, he discovered the letter with the Determination in around June/July 2010.
14. A number of correspondence between the taxpayer and the Inland Revenue Department ('the IRD') have been produced to the Board:
 - a. Tax return 2007/08 was filed in June 2008.
 - b. Assessment 2007/2008 was issued on 26 November 2008. No child allowance at all was allowed to him in respect of his first daughter.
 - c. Objection to the 2007/08 assessment was sent by fax to the IRD on 27 November 2008 (that is the following day).
 - d. The assessor wrote to the taxpayer in reply on 17 December 2008.
 - e. The taxpayer responded on 31 December 2008 and submitted a large number of documents supporting his objection.
 - f. The assessor wrote to him on 18 February 2009 asking for more information.
 - g. The taxpayer replied on 11 March 2009 producing more documents.
 - h. It is to be noted that the address stated on this letter of 11 March 2009

(2011-12) VOLUME 26 INLAND REVENUE BOARD OF REVIEW DECISIONS

was the relevant address at Address B. Prior to this letter, the corresponding address was an address at Address A.

- i. The significance of this is that (1) he was able to respond promptly to the assessor despite the house move and (2) his second daughter must have been in trouble well before February/March 2009.
- j. By a letter of 5 June 2009, the assessor informed the taxpayer that in respect of the child allowance of his first daughter she would apportion it between the taxpayer and his ex-spouse and his portion would be \$9,839. He was asked to either confirm his acceptance of such apportionment or if he did not, to state his basis of apportionment with documentary evidence.
- k. The taxpayer replied by letter of 21 June 2009 stating his disagreement.
- l. His objection was determined by the Acting Deputy Commissioner of Inland Revenue resulting in the Determination dated 24 September 2009. By the Determination, the assessor's apportionment was confirmed.
- m. As a result of the reassessment the taxpayer was entitled to a tax refund of \$418.
- n. The notice of reassessment together with a cheque for the refund was sent to the taxpayer on 1 December 2009. While the taxpayer was vague on the point, he did not dispute that this notice was received and the cheque was duly deposited.

15. In the meantime correspondence were also exchanged between the taxpayer and the IRD in respect of the year of assessment 2008/09. Of particular significance was the Application for Holdover of 2009/10 Provisional Tax which was emailed to the IRD by the taxpayer on 19 October 2009, that is within the 1-month period in which the appeal in the present case could have been lodged.

16. In the face of these correspondence, the reason for delay given in his letter of 28 January 2011 must fall apart. Despite the problem with his second daughter and despite the house move, the taxpayer was clearly able to pursue his tax affairs and exchange correspondence with the IRD, and indeed had been actively doing so.

17. As to his allegation in court that the Determination did not come to his attention until June/July 2010, the law is always that once a document is sent by proper means to a person at his corresponding address, it must be deemed to have been duly received and time will start to run against him [see Case No.D2/04, para.7, IRBRD, vol 19, 76, p.80]. Whether and when a person actually opens his letter and reads it and deals with it is not an enquiry that a tribunal can feasibly make. It is an allegation that is simple to make but difficult, if not impossible, to disprove.

(2011-12) VOLUME 26 INLAND REVENUE BOARD OF REVIEW DECISIONS

18. In any event, even if we were to enquire into the allegation and accept it as true, this would be the taxpayer's own negligence. Such unilateral mistake falls far short of 'other reasonable cause' under section 66(1A) [see Chow Kwong Fai v CIR [2005] 4 HKLRD 687, p.701; Case No.9/79 IRBRD 354, p.355].

19. We have listened carefully to the Taxpayer and are sympathetic to his family predicaments. But the Board is not satisfied that an extension under section 66(1A) can be granted in these circumstances. The appeal is hereby dismissed.