Case No. D27/91

Salaries tax – additional assessment – whether issued within the time stipulated by the Inland Revenue Ordinance – section 60 of the Inland Revenue Ordinance – whether Commissioner bound by his determination.

Panel: William Turnbull (chairman), Barry J Buttifant and Jack Samuel Yuen.

Date of hearing: 23 April 1991.
Date of decision: 5 July 1991.

The taxpayer was employed by a limited company. An additional salaries tax assessment in respect of the year of assessment 1982/83 was issued bearing the date of issue of 13 March 1989. The assessment was sent to an address which did not in fact exist but which was similar to an existing address. The assessment was returned by the post office undelivered and the reason given was 'unknown'. The assessment was then redirected to the taxpayer on 15 May 1989 and was duly received by the taxpayer. The taxpayer argued that the additional assessment was invalid because it had been made after the time limit imposed by section 60 of the Inland Revenue Ordinance had expired.

Held:

The assessment had been made on 13 March 1989 being the date when the assessment was actually made and issued. The assessment had been made within the time specified by section 60 of the Inland Revenue Ordinance and accordingly was valid. The fact that it had been sent to a non-existent address did not invalidate the assessment.

The determination of the Commissioner had been based on other grounds. The Board held that the Commissioner is not bound when he comes before the Board of Review to limit his arguments to the points contained in his determination and he can introduce new reasons to justify the assessment if he so wishes.

Appeal dismissed.

Case referred to:

Honig & Others v Sarsfield 59 TC 337

Lee Yun Hung for the Commissioner of Inland Revenue.
Denis O'Dwyer of Ernst & Young for the taxpayer.

Decision:

This is an appeal by a taxpayer against an additional salaries tax assessment for the year of assessment 1982/83 and is based only on the ground that the assessment was outside the time limit set by section 60 of the Inland Revenue Ordinance. As the appeal was limited to this narrow ground of appeal we have limited the facts as stated by us to those which are relevant to this ground of appeal only. The facts are as follows:

1. The Taxpayer was employed as the managing director of a limited company.

2. An additional salaries tax assessment on the Taxpayer to bring to charge quarters expenses and overseas travelling expenses was made on the Taxpayer. The assessment stated on the face thereof that the date of issue was 13 March 1989 and was addressed to the Taxpayer at '[Flat/Room C, Block A, 11/F, XYZ Building, ABC Street, Hong Kong]'. The tax assessment stated that the tax was payable on or before 24 April 1989.

3. The assessment was sent by registered post but was returned to the Inland Revenue Department by the post office on 15 March 1989 with a statement on the envelope that it had been returned to sender for the reason 'unknown'. The assessment was redirected through the post to the Taxpayer on 15 May 1989 and was duly received by the Taxpayer.

4. There was no such address as that given on the assessment and to which the assessment was sent. The business address of the Taxpayer was '[Block A, 11/F, XYZ Commercial Building]' and there was no such location as '[Flat/Room C]'. The 11/F was divided into two units one called '[A]' and the other called '[B]'. The Taxpayer occupied the entire unit known as '[A]' on the 11/F.

5. Other communications addressed to the Taxpayer by the Inland Revenue Department to the incorrect address were duly delivered or were received by the Taxpayer.

6. The Taxpayer objected to this assessment and other assessments on various grounds which included a claim that the additional salaries tax assessment for the year of assessment 1982/83 was null and void because it was time-barred. The Deputy Commissioner by his determination dated 8 February 1991 determined that the various tax assessments against which the Taxpayer had objected should be reduced on other grounds but refused to accept that the tax assessment for the year of assessment 1982/83 was time-barred and therefore null and void.

7. The Taxpayer has appealed to this Board of Review in respect of the year of assessment 1982/83 only on the ground that the assessment is time-barred.

At the hearing of the appeal the Taxpayer was represented by his tax representative who submitted that the additional salaries tax assessment for the year of assessment 1982/83 was null and void because it had been made after the expiry of the six year limitation period specified in section 60.

Two points of law arise in this appeal. The first is the meaning of section 60. Section 60 imposes a six year time limit within which an assessor may assess a person to tax. At the hearing of the appeal the Commissioner's representative called to give evidence the assessor who had handled the salaries tax file of the Taxpayer at the relevant time. His evidence which we accept and which was not challenged by the representative for the Taxpayer was that on 9 March 1989 he had decided that an additional salaries tax assessment for the year of assessment 1982/83 should be raised on the Taxpayer and had given written instructions to the assessing officer to have the additional assessment raised. The assessing officer had followed his instructions and had the relevant assessment prepared on 9 March and before the demand note had been typed an assistant assessor had checked the assessment sheet also on 9 March 1989 to see that the assessor's instructions were being properly carried out. The additional salaries tax assessment was then issued on 13 March 1989.

The wording of section 60 of the Inland Revenue Ordinance clearly refers to the time limit being imposed upon the time when the assessor assesses a person and not on the giving of notice or delivery of the assessment to the person in question.

It would appear that our Inland Revenue Ordinance is based upon early practice which was used in the United Kingdom. According to the United Kingdom decision of Honig & Others v Sarsfield 59 TC 337 the procedure in the United Kingdom was for an inspector of taxes to make an entry in a district assessment book which book was an official record maintained for this purpose. The Court of Appeal held that the assessments had been duly made on 16 March 1970 when the Inspector of Taxes had signed the certificate in the relevant assessment book. The difference between Hong Kong and the United Kingdom is the comparatively informal way in which the Commissioner of Inland Revenue maintains his records in Hong Kong and the very formal way in which the records are maintained in the United Kingdom. It is not for this Board of Review to dictate to the Commissioner how he operates his department and in this case there is quite clear evidence that the assessment was made on 13 March 1989. It is interesting to note that the representative for the Commissioner submitted at first that the assessment had been made on 9 March 1989 being the date when the assessor had given instructions for the assessment to be made. However after consideration the representative agreed that the appropriate date was 13 March 1989 when according to the evidence the assessment was actually made and issued.

Unfortunately for the Taxpayer the fact that the assessment was sent to the Taxpayer addressed to a non-existent address is of no help. The limitation period in section

60 clearly refers to the making of the assessment and not to the giving of the same to the taxpayer nor of the giving of notice thereof to the taxpayer. It was clear from the submission made by the representative for the Taxpayer that the Taxpayer had a considerable sense of grievance in this case which was reinforced by the Deputy Commissioner and his department saying that other incorrectly addressed communications had been received by the Taxpayer. Though it is of no assistance to the Taxpayer we find as a fact that the assessment in question was addressed to a non-existent address and was not delivered to the Taxpayer in the ordinary course of post but was returned to the Inland Revenue Department.

The second submission made on behalf of the Taxpayer was that the Commissioner should be bound by similar rules to those which apply to a taxpayer in appeal proceedings coming before the Board of Review. Where a person wishes to appeal against a determination of the Commissioner, he must under section 66 of the Inland Revenue Ordinance give notice of appeal to the Board of Review and must send to the Board of Review a copy of the Commissioner's determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal. Section 66(3) states that an appellant may not, except with the consent of the Board, at the hearing of the appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal. The representative for the Taxpayer submitted that the Commissioner should be bound by the contents of his own determination and the reasons therefor. He pointed out that in the present appeal the Deputy Commissioner in his determination had made no reference to what his representative was now submitting. He pointed out that the reasons given by the Deputy Commissioner in his determination were stated as follow:

> ' (1) With respect to the first question the Taxpayer claims that the assessment is time-barred and is null and void because the notice of assessment was served on the Taxpayer after 31 March 1989. I cannot accept the Taxpayer's claim. The notice of assessment was sent to the Taxpayer at [Flat/Room C, Block A, 11/F, XYZ Building, ABC Street, Hong Kong]. For unknown reasons the notice was undelivered and was subsequently redirected to the Taxpayer at [Block A, 11/F, XYZ Building, ABC Street, Hong Kong] on 15 March 1989.
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> (2) It is a fact that [Block A, 11/F, including Flat/Room C, XYZ Building, ABC Street, Hong Kong] was the business address of the Taxpayer's employer during 1989 and the property, including [Flat/Room C], was owned, during the period, by the Taxpayer's wife. It is also a fact that all blank salaries tax returns and subsequent assessments for the years of assessment 1982/83 to 1987/88 were sent to the Taxpayer at [Flat/Room C, Block A, 11/F, XYZ Building, ABC Street, Hong Kong] during the period 2 May 1983 to 2 August 1988 without being undelivered.
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> (3) Section 58(2) of the Inland Revenue Ordinance provides amongst other things that every notice given by virtue of the 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.

(4) As the notice of additional assessment was sent to the Taxpayer at his employer's business address, where the Taxpayer was employed as managing director, the notice was, in my opinion, validly served on the Taxpayer on 13 March 1989.'

The representative for the Taxpayer said that the reasons given by the Commissioner were manifestly incorrect because the assessment had been addressed as a matter of fact to a non-existent address and had not been delivered. The Commissioner had accepted that for the purposes of this case the limitation period was six years from the date when the assessment was delivered to the Taxpayer and not six years from the date when the assessment was made. He said that in the same way that a taxpayer is bound by his grounds of appeal, the Commissioner likewise is bound by his determination and the reasons therefor. He pointed out that when a taxpayer appeals against the Commissioner's determination he does so on the basis of the determination as set out by the Commissioner and could be seriously prejudiced if he set out his grounds of appeal based on the determination and then finds at the hearing that the Commissioner has changed his stance.

Once again we find ourselves with considerable sympathy for the Taxpayer because clearly the reasons given by the Deputy Commissioner are wrong. The assessment was not addressed correctly to the Taxpayer. It was incorrectly addressed and, as an uncontrovertable matter of fact was not delivered to the Taxpayer but unfortunately sympathy in taxation matters is of little avail. Section 66(3) refers to the taxpayer only and we do not know of any authority which says that the Commissioner is bound to restrict his arguments to the matters contained in the determination. The Commissioner is not bound when he comes before the Board of Review to limit his arguments to the points contained in his determination and can introduce new reasons to justify the assessment if he so wishes. If the change of stance by the Commissioner were to prejudice the Taxpayer that we have no doubt that any Board of Review would allow the Taxpayer to amend his grounds of appeal to cover the point.

For the reasons given we dismiss this appeal and confirm the Commissioner's determination dated 8 February 1991.