

Case No. D30/06

Case stated – appeal – time – valid delivery – section 69 of the Inland Revenue Ordinance – section 3 of the Interpretation and General Clauses Ordinance

Panel: Anthony Chan Kin Keung SC (chairman), Lam Wing Wo and Paul David Stuart Moyes.

Date of hearing: 7 April 2006.

Date of decision: 21 June 2006.

The taxpayer's appeal to the Board was dismissed (the Decision) and he sought to apply to the Board to state a case pursuant to section 69 of the Ordinance by way of a letter dated 14 January 2006 (the Letter).

A copy the Decision was sent under a covering letter from the Office of the Clerk to the Board of Review (the Office) to the taxpayer on 13 December 2005 by registered mail. The Decision was delivered on 14 December 2005 to the taxpayer's home address and a domestic helper of the taxpayer acknowledged the receipt of the same. The taxpayer was away from Hong Kong on the 14 December 2005 and he did not come back until the 19 December 2005. A copy of the Letter, without a cheque (for the application), was sent by facsimile on 14 January 2006 (which was a Saturday) to the Office during office hours. A copy of the Letter together with a cheque were inserted under the door of the Office on 14 January 2006 shortly after the office hours.

The issues before the Board were

- (i) When did time begin to run for the purpose of the one month period under section 69(1) and
- (ii) Whether there has been valid delivery of the taxpayer's application to the Clerk to the Board in satisfaction of section 69(1).

Held:

1. This is a case where the Decision was notified to the parties in writing and therefore the last sentence of section 69(1) is the operative provision for the purpose of ascertaining when the period began to run. The critical words are 'the date of the

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communication by which the decision is notified to him'. This Board takes the view that, properly read and understood, section 69(1) does not provide that there must be actual knowledge of the Decision on the part of the taxpayer to trigger the running of the one month period. This Board holds that on a true and proper construction of section 69(1), 'the communication' is a process and it concludes when the communication reaches the intended address. The provisions of section 69(1) are expressed in mandatory terms – 'Such application shall not be entertained unless ...' This Board is of the view that there is no discretion on its part to allow an extension of time in the event of non-compliance.

2. Given the above conclusion, it is unnecessary for this Board to deal with the issues on delivery. With respect to the taxpayer, this Board feels that it has not been fully assisted on the arguments which may be advanced in his favour on the issue. In the premises, the better course is to reserve the ruling to another occasion should the issue arise.

Appeal dismissed.

Cases referred to:

Li Kam Ming v CIR (1990) 3 HKTC 419
D2/04, IRBRD, vol 19, 76

Taxpayer in person.

Tsui Nin Mei and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. By a decision dated 13 December 2005 ('the Decision'), this Board has dismissed the Taxpayer's appeal. By a letter dated 14 January 2006 ('the Letter'), the Taxpayer seeks to apply to this Board to state a case pursuant to section 69 of the Inland Revenue Ordinance, Chapter 112 ('IRO'). Important issues have arisen on the validity of the Taxpayer's application on which there is no direct authority.

Material facts

2. The material facts are simple and agreed by the parties as follows:

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- (i) A copy of the Decision was sent under a covering letter from the Office of the Clerk to the Board of Review ('the Office') to the Taxpayer on 13 December 2005 by registered mail;
- (ii) The Decision was delivered on the 14 December 2005 to the Taxpayer's home address and a domestic helper of the Taxpayer acknowledged the receipt of the same;
- (iii) The Taxpayer was away from Hong Kong on the 14 December 2005 and he did not come back until the 19 December 2005;
- (iv) A copy of the Letter was sent, without a cheque, by facsimile on 14 January 2006 (which was a Saturday) to the Office during the office hours. It was stated at the bottom of the Letter: 'Enclosed is a cheque of HK\$640 for the application';
- (v) A copy of the Letter together with a cheque were inserted under the door of the Office on the 14 January 2006 shortly after the office hours.

Section 69(1) of the Ordinance

3. This sub-section sets out the requirements which have to be met for purposes of exercising any right of appeal under section 69 of the IRO. It provides as follows:

*'(1) The decision of the Board shall be final :
Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of \$640, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.'*

4. One can immediately see that the right to appeal against a decision of the Board of Review is confined to a question or questions of law. In order to exercise this right, an application must be (a) in writing; (b) delivered with the requisite fee to the Clerk to the Board; and (c) the delivery has to be within the prescribed time.

The issues

5. There are two main issues before this Board (putting aside whether the Taxpayer has advanced any proper question of law in his application), namely:

- (i) When did time begin to run for purpose of the one month period under section 69(1)?
- (ii) Whether there has been valid delivery of the Taxpayer's application to the Clerk to the Board in satisfaction of section 69(1).

Running of the one month period

6. The word 'month' is not defined in the IRO. However, section 3 of the Interpretation and General Clauses Ordinance, Chapter 1 ('Cap. 1') defines the word to mean 'calendar month'.

7. This Board believes that the commentary at paragraph II[21064] of the Encyclopaedia of Hong Kong Taxation by Willoughby and Halkyard, Vol 4 correctly sets out how a calendar month is to be counted:

'... a calendar month, ie a period commencing on a particular date and expiring on the day in the succeeding month immediately preceding the day corresponding to the date upon which the period started, ...'

As an illustration, if this Board is to find that the one month period started on the 13 December 2005, the period would have ended on the 12 January 2006. The parties are in agreement on the way in which the one calendar month is to be counted as stated in the foregoing.

8. The provisions of section 69(1) are expressed in mandatory terms – 'Such application shall not be entertained unless ...'. This Board is of the view that there is no discretion on its part to allow an extension of time in the event of non-compliance. Support for this view can be found in Li Kam Ming v CIR (1990) 3 HKTC 419 where the appellant made an application pursuant to section 69(1) to the Board to state a case for the opinion of the High Court. The Board duly stated a case, but the appellant failed to transmit it to the High Court within the prescribed time under section 69(2). It was held by Barnett J that the sub-section was mandatory and there was no jurisdiction to allow an extension of time. The parties here take no issue with the lack of discretion.

9. Ms Tsui, who appears for the Inland Revenue, contends that the one month period in this case started to run on the 13 December 2005 when the Decision was posted to the Taxpayer. On the other hand, the Taxpayer maintains that the period did not start until he actually had notice of the Decision on 19 December 2005.

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10. This is a case where the Decision was notified to the parties in writing and therefore the last sentence of section 69(1) is the operative provision for the purpose of ascertaining when the period began to run. The critical words are ‘the date of the communication by which the decision is notified to him’. Ms Tsui’s contention is that the ‘date of the communication’ is the date when the Decision was posted. The Taxpayer’s argument is founded on the words ‘notified to him’.

11. Dealing firstly with the Taxpayer’s argument, he further submits, relying on the word ‘communication’, that (a) there could have been no communication of the Decision when he was not in Hong Kong and (b) communication could not be a unilateral act. This Board takes the view that, properly read and understood, section 69(1) does not provide that there must be actual knowledge of the Decision on the part of Taxpayer to trigger the running of the one month period. The words of the sub-section must be read in context.

12. It appears to this Board that the words ‘by which the decision is notified’ actually follow, and are consistent with, the beginning of the sentence in question where the scenario of notification in writing is prescribed. Those words, read in context, do not mean or reflect an intention that the appellant must have actual notice of the decision.

13. The words ‘date of the communication’ are the most important for the present purpose. That date is identified to be the ‘date of the decision’ and the one month period runs from that date. In the Shorter Oxford English Dictionary, the word ‘communication’ is assigned, *inter alia*, the following meaning:

‘the action of communicating; the imparting, conveying, or exchange of ideas, knowledge, etc. (whether by speech, writing, or signs); that which is communicated, as a letter, or its contents; interchange of speech; converse, intercourse; access or means of access between two or more persons or places’.

14. Bearing in mind the ordinary meaning of ‘communication’ and the use of the words ‘date of the communication’ in the context of the sub-section, it is quite plain to this Board that those words refer to the action of communicating. It would be straining the meaning of the sub-section by construing it to the effect that the ‘date of the communication’ means the date when the Taxpayer actually had notice of the communication. Had that been the intention, the sub-section could easily have been formulated in a different way which made explicit such intention. Accordingly, this Board rejects the Taxpayer’s submission.

15. Before turning to Ms Tsui’s submission, it should be noted that the foregoing interpretation of section 69(1) can withstand the test of common sense. If the date of actual knowledge of the Board’s decision were the trigger for the appeal period, there can be much uncertainty in the final resolution of the dispute in question. Indeed, as Ms Tsui has pointed out, an appellant can control the time for appeal by, for example, refusing to accept any mail from the Office. Further, one has to bear in mind that the subject matter of appeal concerns public revenue,

the right of appeal is a limited one and a one month period is not short for purposes of appeal. In the premises, one can see why the legislature opted for certainty in section 69(1).

16. Ms Tsui's submission turns on what are the possible parameters of the action of communicating. Her contention is that 'the communication' was the posting of the Decision on the 13 December 2005. There is certainly force in Ms Tsui's submission. On the other hand, there is a respectable argument that an action of communicating does not simply begin and stop at, in the case of posting, the act of posting. It can be said that the action of communicating is a process which ends when the communication reaches the address to which it was sent.

17. It appears to this Board that the drafting of section 69(1) contains an ambiguity on this point. In the case of D2/04, IRBRD, vol 19, 76, the Board of Review had to consider the meaning of the phrase 'after the transmission to him' under section 64(4) of the IRO and it was held, at page 80, that:

'... unless the intention is clear, we should not impute to the legislative an intention that time begins to run even before the determination could have reached the taxpayer for him to have any chance of dealing with it. We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.'

18. This Board agrees with the above *ratio* which is equally applicable to the point in issue. It should be added that this interpretation of 'the communication' has the support of the learned authors of the Encyclopaedia of Hong Kong Taxation [see vol 4, paragraph II[21065]-[21105]]. This Board holds that on a true and proper construction of section 69(1), 'the communication' is a process and it concludes when the communication reaches the intended address. Accordingly, we disagree with Ms Tsui and hold that the one month period in this case started to run on the 14 December 2005.

19. The one month period in question ended on the 13 January 2006. In the premises, the Taxpayer's application to state a case is out of time and should be dismissed.

Delivery of the Taxpayer's application

20. Given the above conclusion, it is unnecessary for this Board to deal with the issues on delivery, namely, (a) whether the service by facsimile of the Letter on the 14 January 2006 without the cheque met the requirements of section 69(1) and (b) whether the insertion of the Letter with the cheque under the door of the Office when it was closed constituted delivery under that sub-section. With respect to Taxpayer, this Board feels that it has not been fully assisted on the arguments which

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may be advanced in his favour on the second issue. In the premises, the better course is to reserve the ruling to another occasion should the issue arise.

21. Last but not least, this Board wishes to acknowledge the assistance rendered to it by Ms Tsui. Her submissions are fair and based on diligent research.