

Case No. D3/11

Salaries tax – extension of time for appeal – sections 58(3), 66(1) & 66(1A) of Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung and Marianna Tsang Wai Chun.

Date of hearing: 24 September 2010.

Date of decision: 3 May 2011.

By a Determination dated 26 July 2007 ('the 2007 Determination'), the acting deputy commissioner determined the appellant's objection to 2 additional salaries tax assessments. The appellant sought to appeal against the 2007 Determination by a fax dated 15 April 2010 and received by the office of the Clerk to the Board of Review ('the Board') on 14 April 2010 in which she stated that she 'had just received an Inland Revenue Department Letter, dated February 22 as it was sent to [her] in-law's home in Hong Kong and [she] was [overseas]'.

A letter dated 22 February 2010, which contained a copy of the 2007 Determination ('the 22 February 2010 packet'), was sent by the Inland Revenue Department ('IRD') to the Hong Kong address of the appellant. According to the Immigration Department's movement records, the appellant was in Hong Kong between 25 February 2010 and 1 March 2010. But the appellant claimed that she only received the 2007 Determination on or around 16 April 2010.

Held:

1. The Board found as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010 at the latest, and that the copy 2007 Determination was served on the appellant by 26 February 2010 at the latest. (Section 58(3) of the IRO applied)
2. Accordingly, an extension of time was required for the appellant to appeal. However, the appellant had not made good any of the grounds under section 66(1A) of the IRO for extension of time. (Chow Kwong Fai v CIR [2005] 4 HKLRD 687 considered)
3. The Board declined to extend time and that was the end of the appellant's intended appeal.

Application refused.

Case referred to:

Chow Kwong Fai v CIR [2005] 4 HKLRD 687

Taxpayer in person.

To Yee Man and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

Introduction

1. By a Determination dated 26 July 2007 ('the 2007 Determination'), the acting deputy commissioner determined the appellant's objection to 2 additional salaries tax assessments by:

- (1) increasing the additional salaries tax assessment for the 2002/03 year of assessment; and
- (2) annulling the additional salaries tax assessment for the year 2003/04.

2. By fax dated '15 April 2010' and received by the office of the Clerk ('the Clerk') to the Board of Review ('the Board') on 14 April 2010, the appellant sought to appeal against the 2007 Determination and made, among other assertions and allegations, the following assertions and statements:

'I called to the HK Inland Revenue telephone number [number omitted here] around March 18 and spoke to [Ms A] to let her know that I had just received an Inland Revenue Department Letter, dated February 22 as it was sent to my in-law's home in Hong Kong and I was [overseas]. I explained I needed time to investigate the matter which dated back to 2002. She advised that [Ms B] was handling the case and agreed to note my request for an extension of deadline to look into the matter.

Subsequently I hoped to schedule a meeting in person with Inland Revenue when I visited Hong Kong during Easter break; unfortunately, this year the holiday extended until April 9¹, at which time I had already returned [overseas]. On April 11², I called to the office of [Ms B] and she explained that at this point I had to bring my case to the Board of Review.

¹ The Easter and Ching Ming holidays were from 2 – 6 April 2010.

² 11 April 2010 was a Sunday.

Accordingly, I appeal my case below to the Board of Review:

...

(Refer to Appendix D – “The EPP reflects a provisional allocation of [name omitted here] shares ...”)

(Refer to Appendix E – The actual award was not made until 2004 with the award dated ...)

...

Please mail correspondences (*sic*) to my in-law’s Hong Kong address³. I will call you from [overseas], and look forward to resolving this issue very soon ...

In advance, thank you for taking time to hear my appeal, and I look forward to resolving the matter expediently (*sic*) ...’

However, she did not give her ‘in-law’s’ address.

3. In the course of her intended appeal to the Board, she applied for a postponement of the hearing and also for permission to appeal outside the statutory one month time limit.

Application for postponement of hearing

4. By letter dated 20 April 2010, the Clerk acknowledged receipt of her notice of appeal and informed her that a hearing would be arranged for the Board to hear and decide whether to extend time for her to appeal.

5. By letter dated 5 August 2010, the Clerk gave notice to the appellant and the respondent that the appellant’s application to extend time for appeal would be heard on 24 September 2010.

6. More than a month after the Clerk’s letter of 20 April 2010 and just 11 days before the date listed for hearing, the appellant wrote to the Clerk by email sent on 13 September 2010 asking for a postponement of the hearing. No physical address was given in the email.

7. The appellant wrote a further email to the Clerk on 14 September 2010. No physical address was given by the appellant.

³ Referred to as ‘the Hong Kong address’ in this Decision.

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8. By letter dated 15 September 2010 sent to the appellant at the Hong Kong address, the Clerk informed the appellant that the chairman of the hearing panel was not persuaded to postpone the hearing date.

9. The appellant wrote 2 more emails, one on 15 September 2010 and the other on 16 September 2010. No physical address was given by the appellant in either email.

10. The Clerk replied by letter dated 16 September 2010 sent to the appellant at the Hong Kong address informing the appellant that she could make an application for postponement at the hearing on 24 September 2010.

11. The ground given by the appellant for a postponement was that she needed time to obtain evidence of the sale of the overseas residential unit at the overseas address referred in paragraph 16 below in order to support her allegation that she had not received the 2007 Determination sent to the overseas address.

Application for permission to appeal outside the statutory one month time limit

12. The appellant's case was that she had not received the 2007 Determination sent in 2007 and she was adamant that she only received a copy of the 2007 Determination on or around 16 April 2010. We quote from the transcript of the hearing:

‘Chairman: So, you haven't received the determination?’

Appellant: Only afterwards.

Chairman: As it was originally sent?

Appellant: It was not, that's right. I did not.

Chairman: When did you receive a copy?

Appellant: This would have been when they replied to me, which was in this year, a couple of months-, let me see what date this letter is dated. This was in-, I would have received this one in April.

Chairman: April?

Appellant: April 16 2010.

Chairman: It can't be. It can't be.

Appellant: This is the, this is the ...

Chairman: It can't be. You couldn't have received it on April 16 when your notice of appeal was lodged on the 14th.

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Appellant: Well, this is, I am looking at this. No, pardon me.

Chairman: You couldn't have presented the appeal before you received it.

Appellant: Let me see here. I have seen that but, let me see when this packet was-, this packet came together. This is the July 26 2007 ...

Chairman: I am telling you that your notice of appeal sent here was received by this office on the 14th of April so ...

Appellant: 14th of April?

Chairman: So, you must have received it before you appealed against it.

Appellant: Yes, so this was here on the 16th of April but this says 16th of April. This one I received. Maybe the dates, some of these dates got crossed or something but this is-, OK, this appeal was made on April 15th. I have this letter dated April 15th that I sent to the appeal, to the board of review. I sent a letter April 15th.

Chairman: Right, which this board received on the 14th.

Appellant: On the 14th? Well, maybe it was faxed to you guys. I apologise. I don't know why these dates are off by a few days. I apologise. I don't know but this Inland Revenue letter, because I simultaneously wrote to the board of appeal as well as to approach you guys in the Inland Revenue. It was through the Inland Revenue they told me that, since the determination had been made, I had to appeal it to the board of review. They could no longer handle the case without going through a board of review. But I guess these dates are off by a couple of days but anyway right about that time. But I received this package it should be, well, I don't know, this is, here this is Inland Revenue letter. It says April 16th.

Chairman: Well, you present your case. The Revenue will respond later. You can't really ask them questions as you go along.'

Authorities on extension of time for appeal

13. Section 66(1) & (1A) of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') provide that:

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- ‘(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), 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).’

14. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687 at paragraph 20, Woo VP stated that the word ‘prevented’ should best be understood to bear the meaning of the term ‘未能’ (‘unable to’) in the Chinese version.

‘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 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. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:

“ It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community.”’

It should be noted that the citation from Case U175 was made in the context of the ‘rationale for the stringent time limit for raising tax objections and appeals’.

Both Cheung JA⁴ and Barma J⁵ agreed with the judgment of Woo VP.

15. Cheung JA formulated the following test:

‘If there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement. It is not necessary to put a gloss on the word “prevent” in its interpretation. If an appellant does not file the notice of appeal within time because of that reasonable cause, then it must be the reasonable cause which has “prevented” him from complying with the time requirement’⁶.

Barma J⁷ agreed with the Cheung JA’s additional observation.

Board’s decision on application for adjournment and extension of time for appeal

16. By letter dated 23 August 2005, the appellant stated that she was distressed by 2 letters⁸ from the Inland Revenue Department (‘IRD’). She gave an overseas address (‘the overseas address’) as her address.

17. By letter dated 20 September 2005, the assessor wrote to the appellant at the overseas address asking for further information about her objection to the assessments.

18. The appellant’s case is that:

- (1) the property at the overseas address was sold in late October 2005;
- (2) she did not inform the IRD of (1) above and the reason given by her was that:

‘there was really no reason at that time from my standpoint to have advised Inland Revenue that I had a change of address or anything like that’; and

- (3) she had not received the documents sent to the overseas address.

19. We reject the reason given by the appellant as quoted in paragraph 18(2) above for not informing IRD. It is plainly bad and unacceptable. The appellant knew from the

⁴ At paragraph 38.

⁵ At paragraph 47.

⁶ At paragraph 46.

⁷ At paragraph 47.

⁸ Dated 5 August 2005 and 10 August 2005.

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letter dated 20 September 2005 that IRD was beginning to investigate her objection to 2 salaries tax assessments and had asked for further information from her. She has made no allegation of having responded to the assessor's 20 September 2005 letter. Tax cannot be avoided by trying to be incommunicado.

20. A lot of paper work was generated and IRD wasted considerable resources as a result of the appellant's decision not to inform IRD of her new contact address.

21. Be that as it may, assuming in favour of the appellant that she did not receive the 2007 Determination sent to the overseas address in 2007, the next question for our decision is: when was a copy of the July 2007 Determination transmitted to her?

22. It is clear from the notice of appeal referred to in paragraph 2 above that the appellant had received a copy of the Determination sent with the assessor's letter of 22 February 2010. The assessor could have been more helpful had she made it a point to identify in her letters the document she was responding to and had also listed the enclosures to her letters. That would have saved the Board a lot of time trying to follow the correspondence and to make proper findings of fact. Be that as it may, the assessor appeared to be responding to the appellant's letter dated 2 February 2010. The appellant wrote as follows:

‘I am shocked and outraged with the action your department has taken on my bank account at [names of 2 banks omitted here] without responding to my inquiry dated August 2 2008 and July 2 2009 (see attached). Without a clear explanation, your action is legally improper. I hereby request a formal explanation within the next 10 working days.

It is unacceptable to have such unjustified action from a government department.’

As with most of her letters, the appellant did not give her address. However, the assessor noted that the appellant had enclosed a letter dated 19 January 2010 from one of her banks sent to the appellant and her husband at the Hong Kong address. The assessor sent her 22 February 2010 letter to the Hong Kong address.

23. By letter dated 22 March 2010 which IRD received on 8 April 2010, the appellant wrote as follows:

‘I called last week and spoke to [Ms B], Assessor, [omitted], to let her know that I had just received the letter of notice from the HK Inland Revenue Department and I needed some time to investigate the matter since it was so long ago.

...

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I am currently [overseas]. After reviewing your package of letters and documents, I have questions, but I must clarify what benefits I am in fact entitled to ...

...

Please continue to mail correspondences (*sic*) to my in law's Hong Kong address you have on record. I will call you from [overseas], and look forward to resolving this issue very soon.'

24. By letter dated 16 April 2010, the assessor replied to the appellant's letter dated 22 March 2010 and reminded her that if she disagreed with the 2007 Determination, she must lodge her appeal directly to the Board.

25. The Immigration Department's movement records showed that between February and April 2010, the appellant was in Hong Kong during the following periods:

<u>Date</u>		<u>Date</u>	
11-02-10	Arrival	14-02-10	Departure
25-02-10	Arrival	01-03-10	Departure
01-04-10	Arrival	05-04-10	Departure
29-04-10	Arrival		

26. We have no hesitation in rejecting, and do reject, the appellant's allegation that she did not receive a copy of the 2007 Determination until on or about 16 April 2010. It is plain and obvious from her letter dated 22 March 2010 that she had already received the 22 February 2010 packet.

27. Significantly, she has made no allegation of the date when the 22 February 2010 packet was delivered to the Hong Kong address, in contrast with the date when she chose to read the contents.

28. Section 58(3) of the Ordinance provides that:

'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.'

29. We find as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010, at the latest, and that the copy 2007 Determination was served on the appellant by 26 February 2010, at the latest.

30. Thus, the appellant was out of time by the time when her notice of appeal was transmitted to the Clerk on 14 April 2010.

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31. She has not made good any of the grounds under section 66(1A) for extension of time.

32. As we have assumed in favour of the appellant that she had not received the 2007 Determination sent to the overseas address in 2007, the date of sale of the property at the overseas address becomes irrelevant. That is why we refuse to postpone the hearing.

Conclusion

33. The appellant has failed to make out a case for extension of time. We decline to extend time and that is the end of the appellant's intended appeal. The merits or otherwise of her intended appeal do not arise for our decision and we express no views on the merits