

Case No. D31/12

Salaries tax – appeal out of time – sections 2(1), 58(2), 58(4), 66(1), 66(1A), and 82B(1A) of the Inland Revenue Ordinance (‘the IRO’).

Panel: Colin Cohen (chairman), Chau Cham Kuen and Chui Pak Ming Norman.

Date of hearing: 18 September 2012.

Date of decision: 26 October 2012.

The Taxpayer’s notice of appeal against the Determination dated 27 October 2011 made by the Deputy Commissioner was filed on 28 May 2012, some six months out of time. The issue before the Board was whether his late appeal should be entertained.

At the material time, the Taxpayer had appointed Mr C as his authorized tax representative. Mr C confirmed that he had received the Determination on 28 October 2011 and passed it by email to the Taxpayer.

The Taxpayer was absent from Hong Kong during the period from 27 October 2011 to 10 February 2012. He claimed that he did not receive the Determination until mid-May 2012. However, it was clear that the Taxpayer was in contact with Mr C and they did meet in City F in or around December 2011.

Held:

1. The provisions of section 66(1A) of the IRO are unambiguous, very clear and indeed, restrictive. An extension of time could only be granted whereby a taxpayer had been prevented from giving notice of appeal within the prescribed one-month period. The word ‘prevented’ cannot appropriately be used in a situation where a taxpayer is able to give notice but has failed to do so. A mere absence from Hong Kong obviously does not necessarily prevent a timely appeal within the statutory one-month period specified under section 66(1A). The word ‘prevented’ in section 66(1A) means ‘unable to’.
2. If a taxpayer appoints a tax representative and that tax representative receives the determination, the determination then is up to the taxpayer’s tax representative to deal with matters. The Taxpayer had appointed a tax representative and the Taxpayer should have given this matter the same attention whether he was residing inside or outside Hong Kong.

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3. Although the Taxpayer was not in Hong Kong during the period from 27 October 2011 to 10 February 2012, the time for the purpose of lodging an appeal under section 66(1A) did commence to run on 29 October 2011.
4. The Determination was duly addressed and posted to the Taxpayer at his last known postal address and that the Determination was also duly addressed and posted to Mr C on 28 October 2011. Mr C was entitled to receive the Determination on behalf of the Taxpayer. The transmission to Mr C amounted to the transmission to the Taxpayer. The one-month period therefore expired on 28 November 2011.
5. The Board did not accept the Taxpayer's assertion that he only received the Determination in mid-May 2012. The Board found that the Taxpayer was aware of the Determination and had been discussing this with Mr C.
6. The Board was not prepared to grant leave to appeal out of time in the circumstances.

Appeal dismissed.

Cases referred to:

Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379
D3/91, IRBRD, vol 5, 537
D124/97, IRBRD, vol 13, 78
D146/01, IRBRD, vol 17, 88

Taxpayer in person.

Wong Pui Ki, Leung Kin Wa and Yu Wai Lim for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A ('the Taxpayer') has objected to salaries tax assessed for the year of assessment 2007/08 raised on him. In short, the Taxpayer claims that certain income has not been received by him and therefore should not be assessed to tax.

2. By virtue of the Determination dated 27 October 2011, the Deputy Commissioner of Inland Revenue upheld the assessment but reduced the net chargeable income to HK\$603,969 with tax payable thereon of HK\$67,174.

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3. The notice of appeal by the Taxpayer was dated 24 May 2012 but was received by the Clerk to the Board of Review on 28 May 2012.

4. Hence, the issue which the Board has to consider is whether the Taxpayer's late appeal should be entertained. As can be seen, the appeal is some six months out of time.

The Relevant Facts

5. The Taxpayer gave evidence before us and confirmed that he had informed the Inland Revenue Department ('IRD') to change his postal address to Address B ('the Address'). At the same time he appointed Mr C as his authorized tax representative ('Mr C') whose address was the same as the Taxpayer.

6. The covering letter together with the Determination was sent by registered post and was delivered on 28 October 2011.

7. Mr C also gave evidence before us and confirmed that he had received the Determination and in turn, he advised us that he forwarded this by email to two separate email addresses to the Taxpayer.

8. A revised assessment dated 6 January 2012 and this was also sent to the Address. Again, Mr C confirmed that he received and passed the notice of the revised assessment to the Taxpayer by email on 7 January 2012.

9. At the request of the Taxpayer, the IRD sent a further copy of the Determination to the Taxpayer's new postal address in City D, Country E on 14 May 2012.

10. From the movement records supplied by the Immigration Department, the Taxpayer was absent from Hong Kong during the period from 27 October 2011 to 10 February 2012. However, it is also clear that the Taxpayer also travelled frequently in and out of Hong Kong during the period from 11 February 2012 to 6 June 2012.

11. The Taxpayer during the course of giving his evidence told us that he had difficulties in Country E. The reason why he had not been able to travel back to Hong Kong was due to the fact that his travel documents were seized by the relevant Authorities due to an employment dispute. That employment dispute was only resolved in the early part of 2012 which enabled him to travel freely.

12. During the course of his evidence, he also accepted and made it clear that he had informed the IRD as to the fact that he had appointed Mr C as his Tax Representative and in turn, Mr C might very well have forwarded to him by email the Determination.

13. However, he told us that due to a breakdown of his relationship with Mr C, he might not have received the Determination. But what is clear is that he did appoint a tax representative. He himself had previously worked at a large accounting practice in their tax

department. He was fully aware as to the importance of responding to the IRD and knew fully well the fact that once he appointed a tax representative, it was up to that tax representative to look after his tax affairs in Hong Kong. It is also clear from the evidence given to us by Mr C that there were meetings in City F, Country E between the Taxpayer and Mr C in late December 2011 whereby he told the Taxpayer he did not wish to handle or be involved in his tax affairs. He also told us that he was fully aware of the dispute and issues which the Taxpayer had with the IRD.

The Relevant Statutory Provisions

14. Section 58(2) of the Inland Revenue Ordinance ('IRO') provides that:

'Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address

15. Section 58(4) of the IRO provides that:

'In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.'

16. Section 66(1) of the IRO provides that:

'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.'

17. Section 82B(1A) of the IRO provides that:

'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

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thinks fit the time within which notice of appeal may be given under subsection (1).'

18. Section 2(1) of the IRO defines 'authorized representative' as follows:

' authorized representative (獲授權代表) means a person authorized in writing by any other person to act on his behalf for the purposes of this Ordinance.'

19. In Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379, the Court of Appeal held that the giving of notice under section 58(2) does not imply that the taxpayer must have actual knowledge of the notice. The service will be completed when the requirements stipulated for service under section 58(2) have been fulfilled. Hon Cheung JA said at page 388 as follows:

' I am unable to accept the taxpayer's argument ... that the "giving" of notice implies "receipt" by the taxpayer, in the sense that he must have actual knowledge of the notice. Section 58(2) is the governing provision for giving notice by way of postal service. Once it is invoked the Commissioner does not need to show further that the notice had "actually" come to the knowledge of the taxpayer. This is because, first, the very fact that a mode of service other than personal service is permitted, is by itself an indication that service will be completed when the requirements stipulated for service have been fulfilled ... In my view, once the document was properly served under section 58(2), actual notice was treated to have been given to the taxpayer. It is then up to the taxpayer to ensure that the document which he had chosen to be sent to a specified address would be brought to his attention.'

20. It is quite clear that time limits are imposed and these must be observed. In D3/91, IRBRD, vol 5, 537, the taxpayer's notice of appeal was one day late. The Board refused to extend time in favour of the taxpayer and stated at page 541 as follows:

' The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time.'

21. In D124/97, IRBRD, vol 13, 78, the Board considered that as a copy of the Commissioner's determination was sent to and received by the taxpayer's authorized tax representatives, any non-receipt by the taxpayer personally of the Commissioner's determination did not of itself provide any reasonable excuse within the terms in section 66(1A) of the IRO. Again, the Board stated at page 81 as follows:

' In any event, the Commissioner's determination was sent to and received by the Taxpayers' authorised taxation representatives in the ordinary course of

mail. Therefore, in all the circumstances before us, any non-receipt by the Taxpayers personally of the Commissioner's determination does not of itself provide any reasonable excuse within the terms of section 66(1A).'

22. Similarly, in D146/01, IRBRD, vol 17, 88, the Board again rejected the taxpayer's late appeal and said at page 92 as follows:

*'In the event, the Commissioner's determination was sent to the Appellant's authorised tax representatives on 7 August 2001 and received by them on 8 August 2001. On 9 August 2001 the Representatives acted expeditiously and informed the Appellant's personal assistant in Hong Kong with details of the determination ... In these circumstances, we cannot see how the **subsequent** difficulties faced by the Representatives in contacting the Appellant ... can be said to "prevent" a timely appeal being lodged within the normal one-month period.'*

Discussion

23. Therefore, the provisions of section 66(1A) are unambiguous, very clear and indeed, restrictive. As has been seen from the relevant case law and various authorities, an extension of time could only be granted whereby a taxpayer had been prevented from giving notice of appeal within the prescribed one-month period. Again, the word 'prevented' cannot appropriately be used in a situation where a taxpayer is able to give notice but has failed to do so. A mere absence from Hong Kong obviously does not necessarily prevent a timely appeal within the statutory one-month period specified under section 66(1A). The Board has held on numerous occasions that absence from Hong Kong does not confer an automatic right for extension of time, it was for taxpayers to satisfy the Board that they were prevented from giving the requisite notices. Of course, if a taxpayer appoints a tax representative and that tax representative receives the determination, the determination then is up to the taxpayer's tax representative to deal with matters.

24. Here, it is quite clear from the evidence and from the facts of this case that Mr C received the Determination on 28 October 2011 and this in turn was passed to the Taxpayer in Country E.

25. We have no hesitation in accepting that although the Taxpayer was not in Hong Kong during the period from 27 October 2011 to 10 February 2012, the time for the purpose of lodging an appeal under section 66(1A) of the IRO did commence to run on 29 October 2011.

26. It is clear that the Determination was duly addressed and posted to the Taxpayer at his last known postal address and that the Determination was also duly addressed and posted to Mr C on 28 October 2011. Hence, Mr C was entitled to receive the Determination on behalf of the Taxpayer. Therefore, we accept that the transmission to

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Mr C amounted to the transmission to the Taxpayer. The one-month period therefore expired on 28 November 2011.

27. We also accept however that the Board does have jurisdiction to extend the time under section 66(1A) of the IRO if it is satisfied that the Taxpayer was prevented by illness or absence from Hong Kong or other reasonable cause from giving a notice of appeal in accordance with subsection (1)(a).

28. As we have previously indicated above, the provisions under section 66(1A) are clear and restrictive and we have said on many occasions, time limits must be observed. We also accept the word 'prevented' in section 66(1A) means 'unable to'.

29. We also accept that the Taxpayer must satisfy the Board that he was prevented by such illness, absence or reasonable cause to lodge an appeal within the time prescribed. Here, the Taxpayer made no assertion of any illness.

30. The Taxpayer, however, does claim that his lateness in filing his appeal was due to his absence from Hong Kong and non-receipt of the Determination. However, the mere absence from Hong Kong does not confer upon the Taxpayer an automatic right to an extension of time for filing the appeal. The Taxpayer has to show that he was prevented from lodging the appeal in a timely fashion. It is clear that the mere fact of absence from Hong Kong does not prevent him from doing so.

31. He had appointed a tax representative and the Taxpayer should have given this matter the same attention whether he was residing inside or outside Hong Kong.

32. The Taxpayer claimed that he did not receive the Determination until mid-May 2012, however, this cannot be correct. We are of the view that it is quite clear that Mr C received the Determination on 28 October 2011 and Mr C asserted that this was also passed on to the Taxpayer. It is also clear that the Taxpayer was in contact with Mr C and indeed, they did meet in City F in or around December 2011.

33. We do not accept the evidence of the Taxpayer that he had no knowledge or notice of the Determination and indeed, it is also quite clear that Mr C had made it clear that he was fully aware as to the Determination and indeed, this was passed on by email to the Taxpayer in Country E.

34. There was no evidence before the Board to show to us that the email server system had collapsed nor was there any evidence that was drawn to our attention to show that he did not receive the Determination.

35. We note it is quite clear that the Taxpayer was able to travel freely in early 2012, he did travel extensively in and out of Hong Kong. It is also clear from the evidence we heard from the Taxpayer and Mr C that he was aware of the Determination and had been discussing this with Mr C.

Conclusion

36. Hence, we are not prepared to grant leave to appeal out of time in respect of this matter.