Case No. D60/08

Case stated – salaries tax – application to state case – section 69 of Inland Revenue Ordinance ('IRO').

Panel: Horace Wong Yuk Lun SC (chairman), Vincent Mak Yee Chuen and Alan Ng Man Sang.

Stated Case, No hearing.
Date of decision: 9 March 2009.

By a Decision of this Board dated 28 March 2008, D50/07 ('the Decision'), the Board dismissed the Taxpayer's appeal against the Determination of the Deputy Commissioner of Inland Revenue ('Commissioner') dated 1 November 2007. By a letter dated 18 April 2008, the Taxpayer applied to the Board to state a case on a question of law for the opinion of the Court of First Instance ('CFI'). Subsequently, in response to the Board's request for the Taxpayer to identify the question or questions of law, with his submission on why it is proper for CFI to consider such question or questions, the Taxpayer wrote to the Board by a letter dated 14 July 2008 and identified certain matters purportedly as questions of law.

Held:

1. Section 69(1) of IRO provides that the decision of the Board shall be final. There is no general right of appeal. An appeal against the decision of the Board can only be made by way of case stated to CFI on a question of law. Appeals against the Board's finding of facts are generally not permissible except in those situations where the finding of facts or inference from the facts are perverse or irrational; or where there simply was no evidence to support the decision; or where the decision was made by reference to irrelevant factors or without regard to relevant facts (Edwards v Bairstow [1956] AC 14, Runa Begum v Tower Hamlets LBC [2003] 2 AC 430 and Chow Kwong Fai, Edward v The Commissioner of Inland Revenue, CACV 20/05, 7 October 2005 considered).

2. The Board should decline a request to state a case unless the applicant can show that a proper question of law can be identified (Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 considered).

3. A proper question of law is one which:

(a) is a question of law;
(b) relates to the decision sought to be appealed against;
(c) is arguable; and
(d) would not be an abuse of process for such a question to be submitted to CFI for determination. (D26/05 considered)

4. The Board has a power to scrutinise the question of law to ensure that it is one which is proper for CFI to consider: CIR v Inland Revenue Board of Review and another [1989] 2 HKLR 40 at 57I. The questions of law ' should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts' (at 48E), and an applicant for a case stated may not ' rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what material must be marshalled in their case' (at 50G). (D45/07 also considered)

5. Where the question raised is one of law, but is obviously a bad point, a case should not be stated: R v Special Commissioners of Income Tax (In Re G Fletcher) (1891) 3 Tax Cases 289.

6. None of the matters identified by the Taxpayer raised any proper question of law.

Application dismissed.

Cases referred to:

Edwards v Bairstow [1956] AC 14
Runa Begum v Tower Hamlets LBC [2003] 2 AC 430
Chow Kwong Fai, Edward v The Commissioner of Inland Revenue, CACV 20/05
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
D26/05, (2005-06) IRBRD, vol 20, 174
CIR v Inland Revenue Board of Review and another [1989] 2 HKLR 40
D45/07, (2007-08) IRBRD, vol 22, 1085
R v Special Commissioners of Income Tax (In Re G Fletcher) (1891) 3 Tax Cases 289

Decision:

On the application of the Taxpayer to state a case under section 69 of the Inland Revenue Ordinance ('IRO')

Introduction

1. By a Decision of this Board dated 28 March 2008, D50/07 ('the Decision'), we dismissed the Taxpayer's appeal against the Determination of the Deputy Commissioner of Inland Revenue ('Commissioner') dated 1 November 2007. A copy of the Decision is annexed and marked herein as 'Annexure A'.

2. Save where the context otherwise requires, the same terms and expressions as defined in the Decision are used and adopted in the following paragraphs.

3. By a letter dated 18 April 2008, the Taxpayer applied to the Board to state a case on a question of law for the opinion of the Court of First Instance ('CFI').

4. Subsequently, in response to the Board's request for the Taxpayer to identify the question or questions of law, with his submission on why it is proper for CFI to consider such question or questions, the Taxpayer wrote to the Board (by letter dated 14 July 2008) and purportedly identified the questions of law as follows:

> '**Part A (Professional Fee and Engineering fee)**
>
> 1/. According to the Board Decision page 28, point 50, part 5 "The Company would not use the new products invented by [Mr B] personally. The Company has not paid for the products used". It is not true. Please kindly refer to the attachment 1, in which it shown [Company A] wanted to take the right of my invention, and [Company A] can use it without paying myself any commission. As of today, [Company A] has been used the products related to my invented are Model: [XXXXXX] series' [Product I], All [Product H] like [XXXXX] sold to [Company P], and UNAUDTIED P/L of 2005 show the profit at 24%. As per attachment 2.
>
> 2/. On the page 28, point 50, parts 3, [Company A] stated the Model [XXXXXXX] was launched by [Mr B], but did not mentioned the P/L of 2005 in which the oven ([XXXXXXX]) Sold to Customer '[Company Q]" was reported at loss (3.4%). According to the contact, my income only fixed monthly salary $40,000 x 12 = $480,000. as per attachment 2.
>
> 3/. On the Page 34-35, Point 59, the Board is seem to have braise against myself by concluded that my invention was not used by [Company A]. In fact, [Company A] used my invented to manufacture the products and generate

income from Customers call [Company R], [Company Q], [Company P], which stated on unaudited P/L of 2005. All of these products are reported at profit, except Fan heater & Oven.

4/. According to my employment contract with [Company A], [Company A] should provide an audited P/L to show the calculation of my 5% commission on yearly basic. It is because which reported the breakdown of Sales generated by products, expense and investment which was involved in [Company A's] products and my invented products. Until today, [Company A] is failed to provide the Audited P/L even I repeatedly to push for it (as per attachment 3). [Company A] is not willing all commission, if I did not have the invention under patent pending, I could only receive HK$480,000 ANNUAL INCOME. The Board should be reviewed this prior to conclude the decision.

5/. On the pages 46, point 84, the Board' s view," the 2 of my invented products have nothing to do with my duties as employee of [Company A]." As already pointed out before, [Company A] reported that never use my invented products, it is not true. Also, [Company A] never paid the commission as part of my assessable income of 2005 for its products like [XXXXXXX] and Fan heater.

Part B Donation

On page 51,, point 101, the Board Decision made based on the case of (Sanford Yung – tao yung V Commissioner of Inland Revenue 1 HKTC 1181, 1979) is violated THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE' S REPUBLIC OF CHINA, Article 149: Non-governmental organizations in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, Social welfare and social work as well as religious organizations in the Hong Kong Special Administrative Regions may maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organizations. They may, as required, use the name "Hong Kong China" in relevant activities.

The SUM E was an International sport activity and approved by [Organization S] and [Organization T] to grant me the right to arrange a team representing Hong Kong China. If it is a gift, why the Basic Law, required, use the Name "Hong Kong China" and ANNEX III: The Design of the Regional flag of the Hong Kong administrative Region requires by National Laws.'

5. We would point out that, except for the first 4 pages of attachment 1, all the other documents purportedly attached to the Taxpayer' s letter of 14 July 2008 (that is, as attachments 1,

2 and 3) are entirely new documents. These documents had not been produced by the Taxpayer before the Board as evidence, and had not been relied upon by the Taxpayer at the hearing of the appeal. The Commissioner's representative had had no opportunity of cross-examining the Taxpayer on these documents, and we had not taken them into account when we made the Decision.

6. By a letter dated 12 August 2008, the Commissioner, acting through the Department of Justice, made submissions to the Board contending that there was no question of law properly raised by the Taxpayer, and inviting the Board to refuse the Taxpayer's application to state a case.

7. No further submission has been made by the Taxpayer (within the time allowed by the Board, namely, 4 weeks from the date of receipt of the Commissioner's submission) in response to the Commissioner's submission.

The relevant legal principles

8. Section 69(1) of IRO provides that the decision of the Board shall be final. There is no general right of appeal. An appeal against the decision of the Board can only be made by way of case stated to CFI on a question of law. Appeals against the Board's finding of facts are generally not permissible except in those situations where the finding of facts or inference from the facts are perverse or irrational; or where there simply was no evidence to support the decision; or where the decision was made by reference to irrelevant factors or without regard to relevant facts (see, Edwards v Bairstow [1956] AC 14, Runa Begum v Tower Hamlets LBC [2003] 2 AC 430 and Chow Kwong Fai, Edward v The Commissioner of Inland Revenue, CACV 20/05, 7 October 2005).

9. The Board should decline a request to state a case unless the applicant can show that a proper question of law can be identified: see, Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275, at page 283B (Chung J). A proper question of law is one which:

(e) is a question of law;
(f) relates to the decision sought to be appealed against;
(g) is arguable; and
(h) would not be an abuse of process for such a question to be submitted to CFI for determination.

See, D26/05, where it was held that 'plainly the function of this Board under section 69 is not simply to rubber stamp any application where a point of law can be formulated. Hence the requirement that such a point has to be proper, which involves meeting the requirement that it is arguable.'

10. The Board has a power to scrutinise the question of law to ensure that it is one which is proper for CFI to consider: see, CIR v Inland Revenue Board of Review and another [1989] 2 HKLR 40 at 57I. The questions of law 'should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts' (at 48E), and an applicant for a case stated may not 'rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what material must be marshalled in their case' (at 50G). See also, D45/07.

11. Where the question raised is one of law, but is obviously a bad point, a case should not be stated: see, R v Special Commissioners of Income Tax (In Re G Fletcher) (1891) 3 Tax Cases 289.

Determination

12. We refer to the 'questions of law' purportedly identified by the Taxpayer in his letter of 14 July 2008, and would deal with each of them in turn. References to the paragraph numbers hereinbelow are references to the corresponding paragraphs in the Taxpayer's letter of 14 July 2008.

13. As regards paragraphs 1 and 2 under Part A, we do not see any question of law properly identified by the Taxpayer that is fit for determination by the CFI. In paragraph 50 of the Decision, we referred to the contents of a letter dated 3 March 2007 sent by Company A to the Inland Revenue Department. The said letter was a letter sent by the Taxpayer's employer to the Revenue. At the appeal hearing, the taxpayer had not challenged the said letter and no evidence had been adduced by the Taxpayer to dispute what was purportedly stated in the said letter. It appears that the Taxpayer now wants to dispute the contents of the said letter, and seeks to do so by relying upon the documents purportedly included in attachments 1 and 2. As pointed out above, apart from 4 pages, all the other documents in attachments 1 and 2 are new documents which had not been tendered as evidence at the appeal hearing. It is obviously too late for the Taxpayer to seek to put in fresh evidence after we have already made the Decision on the evidence before us in the appeal. In any event, all the matters referred to in paragraphs 50(3) and (5) of the Decision are matters of fact. We cannot see any proper question of law raised by paragraphs 1 and 2.

14. As regards paragraph 3, we have some difficulty in understanding the meaning of the statement that *'the Board is seem to have braise against myself by concluded that my invention was not used by [Company A]'*. In paragraph 59 of the Decision, what we found as a matter of fact was that the 2 products (as mentioned in paragraph 55 of the Decision) were the Taxpayer's personal inventions, and that (as admitted by the Taxpayer) his work on these products had nothing to do with his duties as the employee of Company A. We also referred to Company A's letter of 3 March 2007 which stated that '….the company has not paid for the products used. After new products are launched, the company sells the products to customers introduced by [the Taxpayer]'. The Board has not made any finding on whether the Taxpayer's personal inventions

had generated income for Company A, nor has the Board made any finding regarding any profit reported by Company A that might have been derived from such products. It was not necessary for the Board to make any such findings (which, if they had been made, would have been finding of facts), as they were immaterial to the issues before the Board. Paragraph 3 does not raise any question of law, and in any event the matters purportedly raised in that paragraph do not relate to anything material to the Decision at all.

15. As to paragraph 4, it appears that the Taxpayer wishes to argue that the professional fees and engineering fees incurred by him in connection with the inventions and the patent applications are deductible expenses because, if he had not made the inventions in the first place, it would not have been possible for him to earn the commission from Company A. We have however found, as a matter of fact, that the inventions were the Taxpayer's personal inventions, and the patent applications were made for the registration of the Taxpayer (not Company A) as the inventor and holder of the patents. We have found that the patent applications had nothing to do with the Taxpayer's duties as the employee of Company A, and the expenses incurred for the invention and patent registration were, as a matter of fact, not incurred by him in the course of the performance of his duties as the employee of Company A. It seems to us that paragraph 4 is directed to challenging our findings of facts as aforesaid. No question of law has been raised by that paragraph.

16. On paragraph 5, as we pointed out above, it is clearly too late for the Taxpayer to seek to challenge the evidence provided by Company A in their correspondence. In any event, the matters in question are matters of facts and no question of law has been raised.

17. Turning to Part B, it would appear that the Taxpayer wishes to argue that, insofar as we hold (in paragraph 101 of the Decision) that Sum E is not a donation within the meaning of section 2 of IRO, our decision contravenes Article 149 of the Basic Law. Put in this manner, it might have the appearance of a question of law. However, in our view, if it is a question of law, it is not one that relates to the Decision, and is plainly and obviously unarguable. What we held was that Sum E was not a donation (and if it was, it has not been shown by the Taxpayer to be an 'approved charitable donation'). What we have not held is that the Taxpayer did not have a right to use the name 'Hong Kong, China' to represent Hong Kong in the model helicopter competition. That the Taxpayer may have the right to represent Hong Kong by using the name 'Hong Kong, China' does not entail that the expenses incurred by him participating in such event are 'donations' within the meaning of section 2 of IRO. We take the view that the reference to Article 149 is wholly misconceived in that it has nothing to do with our reasons for holding that Sum E was not an 'approved charitable donation', and it is also plainly and obviously unarguable for the Taxpayer to rely on Article 149 as raising a proper question of law for the determination by CFI.

18. For the reasons set out above, we dismiss the Taxpayer's application.

ANNEXURE A

D50/07

BOARD OF REVIEW

Appeal by The Appellant

(Date of Hearing: 15 February 2008)

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D E C I S I O N

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Case No. D50/07

Salaries tax – whether the appeal was out of time – section 66 of the Inland Revenue Ordinance ('IRO') – whether the failure to serve the Appendices within the appeal period rendered the Appeal out of time – whether Appendices are part of the statement of facts within the meaning of section 66(1) of IRO – intention of the legislature in section 66(1) of the IRO – jurisdiction to extend time on non-compliance with requirement under section 66(1)(a) – reasonable cause for failure to serve on time – the discretion to extend time – whether the expense was wholly, exclusively and necessarily incurred in the production of the income – whether the nature of the sum is donation

Panel: Horace Wong Yuk Lun SC (chairman), Vincent Mak Yee Chuen and Alan Ng Man Sang.

Date of hearing: 15 February 2008.
Date of decision: 28 March 2008.

The appellant was employed by Company A as a Director of Sales and Marketing. Before the appellant became an employee of Company A, he ran his own business by the name of Company D and Company E. The appellant also claimed to be the inventor of two products. The appellant began work on the invention of the two products while he was in Company D and Company E, and brought over his inventions to Company A after he became employed by that company. The appellant had continued his work on the development and improvement of his inventions while he was working as an employee of Company A, and had incurred engineering fees in the prosecution of such work. However the appellant's work on the products had nothing to do with his duties as the Director of Sales and Marketing of Company A. His duties were in sales and marketing. Company A paid the appellant commission for the profits made from selling the products to the customers introduced by him.

The appellant appealed against the salary tax assessment. The determination was delivered to the appellant on 7 November 2007. The appellant's notice of appeal was accompanied by a copy of the determination but the appellant had omitted to send to the Clerk the Appendices. The appellant delivered the Appendices to the Clerk on 11 December 2007. A preliminary issue was whether the appeal was raised out of time.

The major issue raised in the appeal is whether the appellant should be allowed deductions of the expenses in the Sum A, B, C, D and E for the years of assessment. The appellant argued that he had incurred Sum A in order to cultivate his business connections with his customers, which he had transferred to Company A. The appellant also argued that professional fees and

engineering fees in Sum B was incurred in inventing, developing and patenting the products by the appellant.

Sum C was telephone expenses incurred in other years of assessment. Sum D were transportation expenses incurred for traveling to his customers' office to see customers. The appellant further argued that Sum E was sponsorship expense and donation.

Held:

1. As clearly provided in section 66 of IRO, the one month period for appeal only commenced to run 'after the transmission' to the appellant of the documents specified in section 66(1)(a). This means that time would only begin to run after the process of transmission has been completed. The process of transmission 'would normally end when the determination reaches the address that it was sent to' (D2/04, IRBRD, vol 19 76 followed).

2. The failure of the appellant to serve on the Clerk the Appendices within the appeal period did not render the Appeal out of time. No distinction should be drawn between the notice of appeal and the accompanying documents specified in section 66(1), as both are requirements for the entertainment of the notice of appeal. The statement of facts referred to in section 66(1) of IRO is a statement of the facts relied upon by the Commissioner in reaching his determination. In our view, when the section refers to the statement of facts, it refers to the facts stated by the Commissioner, not the supporting evidence (D16/07, (2007-08) IRBRD, vol 22, 454 followed).

3. Appendices in the present case are not part of the statement of facts within the meaning of section 66(1) of IRO. These Appendices are merely documentary evidence in support of the facts stated by the Commissioner. What section 66(1) requires is a statement of facts, not the evidence in support or in proof of those facts. Nothing in section 66(1) requires the appellant to serve the supporting documents referred to in the Statement of Facts (whether included as appendices or not) when he gave his notice of appeal.

4. The Board adopted a purposive approach in the construction of section 66(1). The requirement under section 66(1) is imposed to ensure that when the appellant files his appeal, the Board will be apprised of the nature of the appeal, the determination that is being appealed against, the facts upon which the determination is based, and the reasons for the determination – in other words, the basic information that would enable the Board and its Clerk to know what the appeal is about. Such basic information is required to enable the Clerk and the

Board to process the appeal administratively and expeditiously. The requirement for such documents has more to do with ensuring expeditious processing of the appeal by the board than with ensuring fairness to the Commissioner as a respondent to the appeal (Mangin v Inland Revenue Commissioner [1971] AC 739; Ramsay v Inland Revenue Commissioner [1981] 2 WLR 449; Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1991] 2 AC 427; Barclays Finance Ltd v Mawson [2005] 1 AC 684 and Lam Soon Trademark Limited v Commissioner of Inland Revenue [2006] 9 HKCFAR 391 considered).

5. The Board does not consider that it is the intention of the legislature, in providing for such requirement in section 66(1), to require the appellant to furnish the Board with documents that contained the evidence supporting the determination of the Commissioner, whether or not such documents are included as appendices to the Statement of facts. The Board does not think that the furnishing of evidence to the Board is necessary for the Board' s processing of the appeal administratively. The Board does not see any good reason why, merely because the appellant has not supplied the Board with the supporting documents or evidence at the time when he gives notice of appeal, he should be disqualified from pursuing his appeal and the Board is of the view that this is not the legislative intention behind section 66(1). And if it is not the legislative intention to require the appellant to furnish supporting documents or evidence to the Board at that stage, it makes no difference whether or not the documents concerned have been made appendices to the statement of facts.

6. There can be no rational reason why the legislature would refer an appellant who has failed to give any notice of appeal at all within the appeal period to an appellant who has given such notice within the time allowed but failed to comply with the requirement regarding the service of the requisite documents on the Clerk. The effect of D2/07 is that in the former case, the Board has jurisdiction to extend time to the appellant, but it would have no such power in the latter case. The Board does not think that such patently unfair result could have been intended by the legislature. The Board has jurisdiction to extend time in all cases of non-compliance with the requirement under section 66(1)(a) (D48/05, (2005-06) IRBRD, vol 20, 638; D62/06, (2006-07) IRBRD, vol 21, 1154; and D2/07, (2007-08) IRBRD, vol 22, 219 not followed; D16/07, (2007-08) IRBRD, vol 22, 454 followed).

7. The Board considers that the appellant did have a reasonable cause for his failure to serve on the Clerk the Appendices at the time when he gave notice of appeal. It may be said that it was a mistake on the appellant' s part, but we are of the view that in the special circumstances of the case, that mistake was the result of a reasonable cause. And if the appellant had failed to satisfy the requirement under section

66(1)(a) because of such a reasonable cause, he has 'satisfied the requirement' for the exercise of discretion under section 66(1A) (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 followed).

8. In considering whether to exercise the discretion to extend time, the Board also bears in mind the fact that the delay is small in the present case and the total absence of prejudice to the Commissioner. The Appendices are documents in the possession of the Commissioner and there is no question of the Commissioner suffering any prejudice at all as a result of the delay by the appellant in serving the same on the Clerk (B/R 19/71, IRBRD, vol 1, 58 and D91/06, (2007-08) IRBRD, vol 22, 206 considered).

9. Having considered the evidence, the Board was of the view that sum A is clearly not an expense which was wholly, exclusively and necessarily incurred in the production of the Appellant's income. The appellant was not even an employee of Company A when Sum A was allegedly incurred. The claim for Sum A to be deductible had been rejected in D29/06, the Board agreed with the observation of the Board in D29/06 and was of the view that Sum A is not a deductible expense (Rickets v Colquhoun [1926] AC 1 followed).

10. Sum B were not expenses incurred in the course of the performance of his duties as an employee of Company A, and it can hardly be said that he could not perform his duties without incurring these expenses (CIR v Franco Tong Sui Lun [2006] 21 IRBRD 947 considered).

11. The part of Sum C which was incurred in other years of assessment cannot possibly be deducted against the appellant's income for the year of assessment in issue. There is no evidence to show that the Sum C was telephone expense incurred 'wholly, exclusively and necessarily in the performance of the appellant's duties a s an employee of Company A.'

12. Statutory requirement under section 12(1) is a very stringent one. To be deductible, it must be shown that the appellant could not have performed his duties without incurring the expenses in question. This has not been shown in the present case. The Board accordingly holds that Sum D is not deductible.

13. Having considered the evidence, the Board considered that Sum E is plainly not a donation in the first place. In its nature, a donation is a gift, and a gift is 'a transfer of property in a thing voluntarily and without any valuable consideration'. Even if Sum E was a donation, the appellant has not shown that it was made to 'a charitable institution or trust of a public character which is exempt from tax under section 88'. Accordingly, the appellant has failed to discharge his onus in showing

that Sum E is an approved charitable donation. Sum E is therefore not a deductible expense (Sanford Yung-tao yung v Commissionerof Inland Revenue [1979] 1 HKTC 1181).

Appeal dismissed.

Cases referred to:

D2/04, IRBRD, vol 19, 76
D16/07, (2007-08) IRBRD, vol 22, 454
Mangin v Inland Revenue Commissioner [1971] AC 739
Ramsay v Inland Revenue Commissioner [1981] 2 WLR 449
Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1991] 2 AC 427
Barclays Finance Ltd v Mawson [2005] 1 AC 684
Lam Soon Trademark Limited v Commissioner of Inland Revenue [2006] 9 HKCFAR 391
D48/05, (2005-06) IRBRD, vol 20, 638
D62/06, (2006-07) IRBRD, vol 21, 1154
D2/07, (2007-08) IRBRD, vol 22, 219
D29/06, (2006-07) IRBRD, vol 21, 554
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
B/R 19/71, IRBRD, vol 1, 58
D91/06, (2007-08) IRBRD, vol 22, 206
CIR v Humphrey 1 HKTC 451
D25/87, IRBRD, vol 2, 400
D36/90, IRBRD, vol 5, 295
Rickets v Colquhoun [1926] AC 1
CIR v Burns 1 HKTC 1181
Hillyer v Leek [1976] STC 490
Perrons v Spackman [1981] STC 739
Brown v Bullock 40 TC 1
Lomax v Newton 34 TC 561
CIR v Franco Tong Sui Lun [2006] 21 IRBRD 947
D6/06, (2006-07) IRBRD, vol 21, 1137
Sanford Yung-tao yung v Commissioner of Inland Revenue [1979] 1 HKTC 1181

Taxpayer in person.
Tsui Nin Mei and Tang Hing Kwan for the Commissioner of Inland Revenue.

Decision:

Appeal

1. This is an appeal by the Appellant against the Determination ('**the Determination**') of the Deputy Commissioner of Inland Revenue dated 1 November 2007. For convenience, the Commissioner of Inland Revenue, and the Deputy Commissioner, will be referred to in this Decision as 'the Commissioner', and no distinction is made of them.

2. By the Determination, the Commissioner determined that:

(a) the salary tax assessment for the year of assessment 2004/05 under charge number 9-2018382-05-9 dated 24 November 2006, whereby the Appellant was assessed with net chargeable income of $585,400 and with tax payable thereon at $106,280, be reduced to net chargeable income of $543,400 and with tax payable thereon at $97,880;

(b) the salary tax assessment for the year of assessment 2005/06 under charge number 9-1655102-06-4 dated 27 November 2006, whereby the Appellant was assessed with net chargeable income of $1,339,500 and with tax payable thereon at $214,320, be reduced to net chargeable income of $1,282,200 and with tax payable thereon at $205,152;

(c) the additional salaries tax assessment for the year of assessment 2005/06 under charge number 9-1810369-06-5 dated 15 January 2007, whereby the Appellant was assessed with additional net chargeable income of $66,000 and with additional tax payable thereon at $10,560, was to be annulled.

The preliminary issue

3. A preliminary issue has arisen as to whether the appeal of the Appellant ('**the Appeal**') was raised out of time.

4. It is the submission of the Respondent that the Appeal was late.

The relevant facts

5. The chronology of the relevant events (which we find as proved) is as follows:

(a) according to the post office records, the Determination was delivered (by registered post) to the Appellant on 7 November 2007;

(b) as usual, the Determination in the present case contained a statement of the facts upon which the Determination was arrived at ('**the Statement of Facts**'). In the Statement of Facts, the Commissioner referred to various documents in support of the facts stated therein. Some of these documents that were referred to were attached to the Determination as appendices. There were in fact 12 appendices (collectively as '**the Appendices**') to the Determination which ran up to over 170 pages;

(c) as usual, the Determination in the present case also contained the reasons for the Determination;

(d) the Appellant's notice of appeal, which was dated 28 November 2007 was in fact received by the Clerk to the Board ('**the Clerk**') on 3 December 2007;

(e) the Appellant's notice of appeal was accompanied by a copy of the Determination. However, he had omitted to send to the Clerk the Appendices;

(f) by a letter dated 5 December 2007, the Clerk wrote to the Appellant to request for the Appendices;

(g) the Appellant delivered the Appendices to the Clerk on 11 December 2007.

The statutory period for appeal

6. Section 66(1) of the Inland Revenue Ordinance ('**IRO**') provides as follows:

'*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.*'

7. In the present case, the Determination was delivered to the Appellant on 7 November 2007. As clearly provided in section 66 of IRO, the one month period for appeal only commenced to run '<u>after</u> the transmission' to the Appellant of the documents specified in section 66(1)(a). This means that time would only begin to run after the process of transmission has been completed. As held by the Board in <u>D2/04</u>, IRBRD, vol 19, 76, the process of transmission 'would normally end when the determination reaches the address that it was sent to'. In the present case, the process of transmission was completed on 7 November 2007 when the Determination was delivered to the Appellant on that date. This is accepted by Ms Tsui for the Commissioner.

8. Hence, the one month period referred to in section 66(1)(a) commenced on 8 November 2007 and expired on 7 December 2007.

The Commissioner's submission

9. Ms Tsui, representing the Commissioner, submitted that the Appendices were an integral part of the Statement of Facts. By failing to send to the Clerk the Appendices before 7 December 2007, the Appellant had failed to send to the Clerk the complete Statement of Facts. Hence there was a failure to comply with section 66(1), which expressly provides that a notice of appeal shall not be entertained unless it is given in writing to the Clerk and is accompanied by, inter alia, a copy of the statement of facts. According to Ms Tsui, a copy of the statement of facts must mean a full and complete copy, including any appendix that is 'embodied in and formed part' thereof.

10. Ms Tsui further submitted that in the present case, the Appendices were only delivered by the Appellant to the Clerk on 11 December 2007. That was four days after the one month period for appeal had expired.

11. Relying on the recent decision of the Board in <u>D16/07</u>, (2007-08) IRBRD, vol 22, 454, Ms Tsui submitted that the Appeal was out of time. She drew our attention to pages 463-464 of the Board's decision in that case where the Board held:

> '*9. We do not think that one can draw a distinction between the notice of appeal and the specified accompanying documents. Both are requirements for the entertainment of the notice of appeal….*
>
> *11. As the notice must be served on the Clerk within the one month time limit, the specified <u>accompanying</u> documents must also be served on the Clerk within the same time limit. If the written notice and the specified*

> *accompanying documents are not served on the Clerk within the one month time limit, the appeal is out of time.'*

Is the Appeal out of time?

12. We are unable to accept Ms Tsui's submissions. We are of the view that the failure of the Appellant to serve on the Clerk the Appendices within the appeal period did not render the Appeal out of time.

13. We agree with the Board's decision in D16/07 and would hold that no distinction should be drawn between the notice of appeal and the accompanying documents specified in section 66(1), as both are requirements for the entertainment of the notice of appeal. However, the accompanying documents specified in section 66(1) are merely the following:

(a) a copy of the Commissioner's written determination;

(b) a copy of the reasons therefor;

(c) a copy of the statement of facts; and

(d) a statement of the grounds of appeal.

14. An appeal cannot be entertained unless the accompanying documents are served on the Clerk in accordance with section 66(1). As the right of an appellant to have his appeal entertained depends on his being supplied by the Commissioner with the written determination, the reasons therefor and the statement of facts (indeed the appeal period would not start until these documents have been transmitted to the appellant), it is clear that under section 66(1), the Commissioner has an implied statutory obligation to provide the appellant with the documents in question, namely a written determination, the reasons therefor and the statement of facts, to enable him to validly exercise his right of appeal.

15. It is the usual practice for the Commissioner to include the determination, the reasons therefor, and the statement of facts in one single document. This is what was done in the present case. As pointed out above, the Determination in the present case contained the Statement of Facts and the reasons for the Determination. The Statement of Facts, consisting of 16 paragraphs, set out ' the facts upon which the Determination was arrived at' .

16. In stating or setting out the facts upon which he arrived at his determination, the Commissioner may sometimes refer to other documents that support the facts relied upon by him. It is however important to remember that these supporting documents are not in themselves statement of facts. They are referred to by the Commissioner as the ***evidence*** in support of the facts stated by him. Such supporting documents may consist of copies of correspondence, emails, relevant

contracts, invoices, receipts or other documents of whatever kind which the Commissioner may consider it relevant to refer to in support of the facts stated by him.

17. When referring to these supporting documents, the Commissioner may sometimes exhibit or annex them to the Determination as appendices. Sometimes, however, the Commissioner may simply refer to a document as evidence in support of the fact or facts stated, without including it as an appendix. In the present case, the Statement of Facts referred to various documents, but only some of the documents referred to were included as appendices to the Statement of Facts. For example, paragraph 1(3) of the Statement of Facts referred to a letter dated 12 March 2002, and that letter was appended to the Statement of Facts as Appendix A. In paragraph 1(4) and (5), the Commissioner referred to the employer's returns and the tax returns submitted by the Appellant's employer and the Appellant respectively, but those documents were not annexed as appendices. In paragraph 12, the Commissioner referred to certain facts based on information provided by the Appellant's employer. It is plain that those information were provided by the Appellant's employer in a letter dated 3 March 2007, but that letter was not annexed as an appendix to the Statement of Facts.

18. Whether or not the supporting documents referred to are appended to the statement of facts, it is plain that these documents are merely documents providing, or are conceived by the Commissioner as providing, evidence in support of the facts stated by him. The supporting documents are not in themselves statements of facts. In this connection, one must not confuse facts from the underlying evidence that tends to support, show, or prove the facts.

19. The statement of facts referred to in section 66(1) of IRO is a statement of the facts relied upon by the Commissioner in reaching his determination. In our view, when the section refers to the statement of facts, it refers to the facts stated by the Commissioner, not the supporting evidence. The Commissioner may, for easy reference, choose to append some of the supporting documents as appendices to the statement of facts, but making them as appendices do not alter the nature of the documents – they are documents that evidence the facts – they are not the facts themselves. The Commissioner does not state the facts through production of the supporting documents: he does so by setting them out in a statement. If he chooses to append to the statement of facts some of the supporting documents, he is merely providing the reader of the statement of facts with a means of easy reference to the underlying evidence. The Commissioner is under no statutory obligation to do so, and if he chooses to do so, he does not thereby extend the statutory requirements imposed by section 66(1) on the appellant when he gives notice of appeal. The supporting documents that the Commissioner chooses to append to the statement of facts do not define the scope of evidence at the appeal hearing. Nor do they define the evidence that the Commissioner has examined himself before he comes to his determination. As shown in the present case, there are clearly other documents that the Commissioner has looked at which has not been appended to the Statement of Facts.

20. In our view, the Appendices in the present case are not part of the statement of facts within the meaning of section 66(1) of IRO. Physically, and perhaps as a matter of form, they are documents appended to the Statement of Facts and in that sense may loosely be described as forming 'part' of the Statement of Facts. But the description is only true to its physical sense. Legally, these Appendices are merely documentary evidence in support of the facts stated by the Commissioner. What section 66(1) requires is a statement of facts (to be provided by the Commissioner to the Appellant and to be served by the Appellant on the Clerk when he gave his notice of appeal), not the evidence in support or in proof of those facts. Nothing in section 66(1) requires the Appellant to serve the supporting documents referred to in the Statement of Facts (whether included as appendices or not) when he gave his notice of appeal.

21. We are fortified in our view by adopting a purposive approach in the construction of section 66(1). Such an approach is mandated by section 19 of the Interpretation and General Clauses Ordinance (Chapter 1) and represents the modern approach to be adopted for the construction of revenue statutes: see: Mangin v Inland Revenue Commissioner [1971] AC 739 at 746E, Ramsay v Inland Revenue Commissioner [1981] 2 WLR 449 at 456F, Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue [1991] 2 AC 427 at 437F, Barclays Finance Ltd v Mawson [2005] 1 AC 684, and recently by the Hong Kong Court of Final Appeal in Lam Soon Trademark Limited v Commissioner of Inland Revenue [2006] 9 HKCFAR 391 (paragraph 20).

22. When adopting a purposive approach to section 66(1), we ask ourselves what is the purpose behind the section and what if any, is the 'mischief' that the section is intended by the legislature to address. We bear in mind that the requirement that the appellant has to serve on the Clerk a copy of the written determination, the reasons therefor, and the statement of facts is plainly not a requirement intended to inform the Commissioner of the contents of these documents. This is plain as the documents are issued by the Commissioner and the Commissioner are clearly aware of their contents and would have copies of the same in his records (for that reason it is not surprising that section 66(2) only requires the appellant to serve on the Commissioner a copy of the notice of appeal and the statement of the grounds of appeal). The requirement, we believe, is imposed to ensure that when the appellant files his appeal, the Board will be apprised of the nature of the appeal, the determination that is being appealed against, the facts upon which the determination is based, and the reasons for the determination – in other words, the basic information that would enable the Board and its Clerk to know what the appeal is about. Such basic information is required to enable the Clerk and the Board to process the appeal administratively and expeditiously. Hence the provision that the appeal will not be 'entertained' unless the specified documents are served on the Clerk in accordance with section 66(1). The requirement for such documents has more to do with ensuring expeditious processing of the appeal by the Board than with ensuring fairness to the Commissioner as a respondent to the appeal.

23. With that purpose or mischief in mind, we do not consider that it is the intention of the legislature, in providing for such requirement in section 66(1), to require the appellant to furnish the Board with documents that contained the evidence supporting the determination of the

Commissioner, whether or not such documents are included as appendices to the statement of facts. We do not think that the furnishing of evidence (or part of the evidence) to the Board is necessary for the Board's processing of the appeal administratively. Such evidence would only be required when the Board hears the appeal. By the time when the appeal comes on for a hearing, the appeal bundles would be prepared and the parties would submit the documents intended to be relied upon as evidence for inclusion in the appeal bundles. In the present case, for example, under cover of a letter dated 1 February 2008, the Commissioner submitted to the Board the documents that he intended to rely upon at the appeal hearing. The documents included in the Appendices could have been supplied to the Board at that time if they had not been supplied before.

24. In these circumstances, we do not see any good reason to read into section 66(1) a requirement that requires an appellant to serve on the Clerk, in addition to the statement of facts itself, the supporting documents that may have been referred to in the statement of facts, or appended thereto. The consequence of reading such a requirement into section 66(1) can be serious for the appellant, for the omission to serve the requisite documents will result in the disqualification of the appeal from being 'entertained'. For reasons mentioned above, we do not see any good reason why, merely because the appellant has not supplied the Board with the supporting documents or evidence at the time when he gives notice of appeal, he should be disqualified from pursuing his appeal and we are of the view that this is not the legislative intention behind section 66(1). And if it is not the legislative intention to require the appellant to furnish supporting documents or evidence to the Board at that stage, it makes no difference whether or not the documents concerned have been made appendices to the statement of facts.

25. We have therefore come to the conclusion that there is no statutory provision that would require the Appellant to serve on the Clerk the Appendices. In the premises, we hold that the Appeal is not out of time.

Extension of Time

26. In the light of our conclusion above, there is no need for us to consider granting extension of time to the Appellant to pursue the Appeal.

27. However, we would make it clear that if we were wrong in our conclusion above, and if the Appeal ***was*** out of time, we would be prepared to grant to the Appellant an extension of time under section 66(1A) of the IRO.

28. Ms Tsui has very fairly informed us that if the Appellant seeks an extension of time, she would not object to the same. The Appellant has told us that he would seek such extension of time if that is necessary for him to pursue the substantive appeal.

29. Obviously such extension of time would only be necessary if we were wrong in holding that the Appeal is not out of time. In considering whether to extend time, we shall proceed

on the assumption that, contrary to our view above, the Appendices are part of the requisite documents required to be served by the Appellant on the Clerk under section 66(1), and for that reason, this Appeal is out of time.

30. Despite Ms Tsui' s stance, which we consider as very fair, we need to be satisfied that we do have jurisdiction to grant such extension of time, and that this is a proper case for the exercise of our discretion to extend time.

31. The first question to consider is whether we have power to extend time in the present case under section 66(1A) of IRO. In a number of decisions, namely D48/05, (2005-06) IRBRD, vol 20, 638, D62/06, (2006-07) IRBRD, vol 21, 1154 and D2/07, (2007-08) IRBRD, vol 22, 219, this Board has held that it has no jurisdiction to extend time in cases where some or all of the requisite documents were not served by the appellant on the Clerk within the appeal period allowed by section 66(1)(a).

32. We would refer to D2/07. The case was decided by the Board in April 2007. In that case, the Board, after referring to D48/05 and D62/06 held as follows:

> '*14. … On a proper reading of s.66(1A), it is quite clear that the power to enlarge time is confined to cases whether there is no notice of appeal given within the prescribed 1 month period and that the power is not applicable to cases where there is a notice of appeal given within time but the notice is an invalid one by reason of the absence of the relevant determination.*
>
> *15. This interpretation is clear because the enlargement power is only engaged when the appellant was prevented by illness, etc., from giving notice. In other words, no notice could have been given within time by reason of illness, etc. By definition, the Invalidity [referring to failure of the appellant to serve the requisite documents within the 1 month period] does not involve such a situation.*
>
> *16. Can it be said that on a purposive construction of s.66(1A), either (i) "giving notice" means giving a valid notice or (ii) there is nothing to stop an appellant from giving a fresh notice with an enlargement of time? This Board is not attracted by such propositions. Firstly, they would do violence to the clear wording of the sub-section. Secondly, it is apparent that an invalid notice is nevertheless recognised as a notice, because s. 66(1) refers to "no such notice shall be entertained…". Thirdly, there is no compelling reason to strain the meaning of s.66(1A).*

> *17. Might it be said that if the construction set out in para. 14 above is correct, then an appellant who has given an invalid notice is in a worse position than one who has not given any notice within time (in the latter case s. 66(1A) may be invoked)? On mature reflection, this "unfairness" is more apparent than real. Two things must be remembered. Firstly, the discretion given to the Board under s.66(1A) is very narrow. It is one of three (possibly a combination thereof) "reasons", namely, illness, absence from Hong Kong and other reasonable cause. Secondly, pursuant to s. 66(1)(a) the 1 month period would not begin to run until all the requisite documents have been supplied to the appellant.*
>
> *18. In the premises, in a case where an appellant has given a notice within time which was not accompanied by the requisite document(s), he cannot in any event maintain that he was prevented by illness or absence from Hong Kong from giving a valid notice (one accompanied by the requisite documents). As regards other reasonable cause, it is not easy to envisage what reasonable cause there can be which would prevent an appellant from enclosing the requisite documents which his notice given that he, by definition, had them. It must be said that the law normally assumes that people know the law and observe the same.*
>
> *19. Further, in an unusual event where, e.g. the requisite documents have been stolen from the appellant, he would have the right not to give an invalid notice but to obtain replacement of the requisite documents and, if time has expired by then, apply for an enlargement of time under s. 66(1A).'*

33. In August 2007, the Board, in a decision made in another case (D16/07), expressed disagreement with the conclusion in the three board decisions mentioned above, including the decision in D2/07. According to the Board in D2/07:

> (a) the reference to ' giving notice of appeal in accordance with subsection (1)(a)' in section 66(1A), on its fair construction, does not mean ' within the time under subsection (1)(a)' . Giving notice of appeal ' in accordance with subsection (1)(a)' requires more than just giving notice within the one month time limit, as the appellant is required to serve on the Clerk the specified documents under subsection (1)(a) of section 66. Accordingly, under section 66(1A), the power of the Board to extend time applies to all cases of non-compliance with the requirement under section 66)(1)(a), including the cases where the appellant has given notice of appeal within the one month period, but has failed to serve on the Clerk the requisite documents ' in accordance with subsection(1)(a)' ;

(b) it is possible and certainly well conceivable that an appellant may be able to give notice of appeal but is unable to access or furnish the requisite documents within the period allowed by subsection (1)(a). ' He may be bedridden or may be imprisoned. He may have lost one or more of the specified accompanying documents through no fault on his part' ;

(c) ' There is no reason why on principle a taxpayer who has failed to give any notice at all should be treated differently from a taxpayer who gives a notice but without the specified accompanying documents. Both have failed to comply with the requirements to give a valid notice' . It is ' illogical that someone who has not given any notice at all within time may be better off than someone who has given notice within time but without one or more of the specified accompanying documents' ;

(d) citing the Explanatory Memorandum to the Inland Revenue (Amendment) Bill 1970 (by which section 66(1A) was first introduced to the statute book), the Board noted that the adding of subsection (1A) to section 66 was stated therein to give the Board ' discretion to extend the time for appealing against a determination of the Commissioner' ;

(e) the Board does have jurisdiction to extend time for compliance with the requirements of giving notice of appeal in accordance with section 66(1A), including cases where the non-compliance consists in the failure to serve the requisite documents. Whether or not the Board will do so in the circumstances of a case is a different issue.

34. We have considered the conflicting decisions of the Board on this particular point and are convinced that the approach adopted in D16/07 is correct. In our view, there can be no rational reason why the legislature would prefer an appellant who has failed to give any notice of appeal at all within the appeal period to an appellant who has given such notice within the time allowed but failed to comply with the requirement regarding the service of the requisite documents on the Clerk. The effect of D2/07 is that in the former case, the Board has jurisdiction to extend time to the appellant, but it would have no such power in the latter case. We do not think that such patently unfair result could have been intended by the legislature.

35. Adopting a purposive approach to the construction of section 66(1A), we are in agreement with D16/07, and are of the view that the Board does have jurisdiction to extend time in all cases of non-compliance with the requirement under section 66(1)(a).

36. Indeed we understand Ms Tsui' s submission to be that the Commissioner also agrees that D16/07 was correctly decided and that this Board does have jurisdiction to extend time in a case such as the present.

37. The next question to consider is whether there is a reasonable cause for the Appellant's failure to serve the Appendices on the Clerk.

38. The Appellant has given sworn evidence to the effect that when he received the Determination from the Revenue, the Appendices came as a separate set of documents and were not physically attached to the Determination. He told us that he did not appreciate that the separate set of documents are to be considered as part of the Determination and that was the reason why he did not include the same when he served his notice of appeal together with a copy of the Determination. After he had received the letter from the Clerk requesting for the Appendices, he personally attended the office of the Board on 11 December 2007 to hand over the Appendices as requested by the Clerk. The Revenue has not queried this aspect of the Appellant's evidence upon cross-examination.

39. Ms Tsui, however, has rightly pointed out to us that the present case is not the first time the Appellant filed an appeal (D29/06, (2006-07) IRBRD, vol 21, 554) to the Board. It was pointed out that in December 2005, the Appellant had lodged an appeal against the Commissioner's determination relating to the salaries tax assessments for the years of assessment 2002/03 and 2003/04. On that occasion, when the Appellant gave his notice of appeal (by letter dated 28 December 2005), he served on the Clerk the determination of the Commissioner ('**the 2005 Determination**') together with all the appendices. The Appellant frankly admitted this upon cross-examination. He explained to us that on that occasion he received from the Commissioner the 2005 Determination with the appendices attached as one single set of documents. That set of documents was very small and he filed the whole set with the Board when he gave notice of appeal. The present case is different as the Appendices were voluminous and came to him as a set of documents separate from the Determination, and he had not realised that this separate set of documents, which was large and consisting of many pages, was to be treated as part of the Determination. We have looked at the 2005 Determination and note that the appendices thereto were indeed much less voluminous than the present case, consisting of about 15 pages only. This contrasts significantly with the Appendices in the present case which runs up to almost 180 pages. We accept the evidence of the Appellant that the 2005 Determination and the appendices thereto were received by him as a single set of documents, and the situation in the present case is different. We also accept his evidence that because the Appendices in the present case were received by him as a separate set of documents, he did not realise that the same was to be considered as part of the Determination.

40. In these circumstances, we consider that the Appellant did have a reasonable cause for his failure to serve on the Clerk the Appendices at the time when he gave notice of appeal. In taking that view, we are not unmindful of the provision in section 66(1A), which requires us to be satisfied that the Appellant had been 'prevented by…. reasonable cause' from lodging his appeal in time. We note that in Chow Kwong Fai v The Commissioner of Inland Revenue [2005] 4 HKLRD 687, the Court of Appeal, after reviewing both the Chinese and English versions of section 66(1A),

came to the conclusion that the word 'prevented' used in section 66(1A) meant 'unable to' and, although providing a less stringent test than the word 'prevent', imposed a higher threshold than a mere excuse. We also note that in the same case Cheung JA, in commenting on the effect of the word 'prevent' in section 66(1A), observed as follows (at 701G-I):

> '*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 of s.66(1A). 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.*'

Barma J expressly agreed (at 701I) with this observation of Cheung JA.

41. In the present case, unlike the case of Chow Kwong Fai, the Appellant did serve the Determination (together with the Statement of Facts and the reasons therefor contained therein) on the Clerk when he filed his appeal. He had not submitted the Appendices at the same time because the same were not physically attached to the Determination when transmitted to him, which caused him to think that the Appendices were documents separate from the Determination and were not documents that needed to be filed together with his appeal. Although the documents were referred to in the Statement of Facts as appendices, we think that in the circumstances, particularly when section 66(1)(a) does not expressly provide for the submission of supporting documents referred to in the determination or statement of facts, the Appellant has a reasonable cause for not apprehending the need to submit the Appendices to the Clerk when he filed his appeal. It may be said that it was a mistake on the Appellant's part, but we are of the view that in the special circumstances of the case, that mistake was the result of a reasonable cause. And if the Appellant had failed to satisfy the requirement under section 66(1)(a) because of such a reasonable cause, he has – to adopt the words of Cheung JA – 'satisfied the requirement' for the exercise of discretion under section 66(1A).

42. In considering whether to exercise our discretion to extend time, we also bear in mind the fact that the delay is small in the present case (even on the case of the Commissioner, the appeal was only four days late). We also bear in mind the total absence of prejudice to the Commissioner. The Appendices are documents in the possession of the Commissioner and there is no question of the Commissioner suffering any prejudice at all as a result of the delay by the Appellant in serving the same on the Clerk. As noted by the Board in BR 19/71, IRBRD, vol 1, 58 (although the comment was only made as an *obiter*):

> '*It would seem that in an appeal under s.66(1) of the Hong Kong Ordinance, the omission by the taxpayer to forward copies of the Commissioner's written determination, the Commissioner's reasons and the statement of facts (which*

are usually comprised in one document), would not prejudice the other party being the Commissioner, who would have the omitted documents.'

The same sentiments were expressed by the Board in D91/06, (2007-08) IRBRD, vol 22, 206 which is also a case where a notice of appeal was filed without the attachments referred to in the written determination. We were however told by Ms Tsui (who also represented the Commissioner in that case) that that case was different from the present case because in D91/06 there was evidence (which the Commissioner apparently accepted) that the appellant in that case had not received from the Commissioner the attachments to the written determination at all. This fact, however, is not readily apparent from the report of the decision. Be that as it may, the Board's comment in that case to the effect that because the Commissioner would have the omitted documents, he would not have suffered any prejudice, must clearly be right.

43. For reasons mentioned above, we would (on the assumption that we were wrong in holding that the appeal was not out of time) exercise our discretion in favour of the Appellant by extending time to appeal.

The substantive issues

44. We now turn to the substantive issues raised in the Appeal.

45. The major issue ('**the Expense Issue**') raised in this Appeal is whether the Appellant should be allowed deductions of the following expenses for the years of assessment 2004/05 and 2005/06:

	2004/05	**2005/06**
Previous investment	$829,252	-
Engineering fee	-	$60,403.98
Professional fee	$25,489.23	$37,752
Telephone expenses	$4,192	$2,973.19
Transportation fee	$8,266.27	$21,018.17
Sponsorship expense	-	$43,709

46. Another issue was originally thought to be raised by this Appeal, namely, whether the sum of $66,000 received by the Appellant from his employer, one Company A, for the year of assessment 2004/05 is to be considered as rental payments or cash allowances, and whether the Appellant has been correctly assessed to tax in respect of the deemed rental value (in the amount of $71,400) of his place of residence. This issue has turned out to be a non-issue, as the Appellant told us at the hearing that in respect of the question of rental reimbursement from his employer, his objection only relates to the year of assessment 2005/06. He contended that his total income for the year of assessment 2005/06 should be $1,299,000 only and that he should not be assessed to

tax in respect of any rental reimbursement for that year. After it has been explained to him that by the Determination, the Commissioner has already accepted that his total income for that year was $1,299,000 and that he has not been assessed to tax for any rental reimbursement or deemed rental value for that year, the Appellant told us that he had no further objection or disagreement with the Commissioner on the question of rental reimbursement. Hence the issue of rental reimbursement that was originally thought to exist has turned out to be a non-issue.

47. Before we turn to deal with the Expense Issue, we would point out that the question whether the Appellant was entitled to grant of dependent parent allowance for the year of assessment 2005/06 is also a non-issue. Ms Tsui for the Commissioner has made it clear that the Appellant is entitled to the grant of dependent parent allowance for the year of assessment 2005/06. However, given the amount of net assessable income of the Appellant for the year 2005/06, it would have been more favourable to the Appellant by applying the standard rate (16%) to his net assessable income (pursuant to section 13(2) of IRO) than to grant him the allowances (including the basic allowance and the dependent parent allowance) under Part V of the IRO and apply the progressive rates under Schedule 2 of IRO. The Revenue, in assessing the Appellant' s salaries tax for the relevant year of assessment, has applied the more favourable formula in favour of the Appellant. The tax payable by the Appellant by applying the standard rate is $205,152, whereas the tax payable by applying the progressive rates would have been $219,640. Hence applying the standard rate pursuant to section 13(2) would be more favourable to the Appellant. In this connection, it is to be noted that under section 13(2) of IRO, when applying the standard rate, the net assessable income is to be reduced only by such deductions as are under Part IVA allowable to the taxpayer. For the standard rate to be applicable, the net assessable income could not be further reduced by the allowances under Part V.

The facts relevant to the expense issue

48. The facts stated in the paragraphs below represent the finding of facts made by us. We have made such finding based on the documents put before us by the parties, and also the oral evidence of the Appellant given at the hearing. Generally speaking, we accept that the Appellant was an honest witness and we accept his evidence as true. Where there is any aspect of his evidence which we do not accept, we shall point out specifically in the paragraphs below. As will be clear from the discussions below, we are of the view that the documents submitted and the oral evidence given by the Appellant, even if they are accepted, cannot prove his alleged entitlement to deduct the various items of expenses mentioned in paragraph 45 above; and we are of the clear view that the Appellant has failed to discharge his onus (placed upon him by section 68(4) of IRO) of proving that the assessments appealed against are either excessive or incorrect.

49. The Appellant was employed by Company A as a Director of Sales and Marketing – New Products Development Division commencing from 18 March 2002. The terms of employment offered to the Appellant are evidenced by a letter dated 12 March 2002, which provided, inter alia, as follows:

'Probationary Period:	Six months from date of commencement of work
Notice Period:	Two weeks during probationary period. Two months after probationary period.
Starting Salary:	HK$40,000 per month.
Remuneration Package after Probationary Period:	First year: Monthly salary of HK$50,000 plus annual bonus payable at the discretion of the Company Chairman; After first year: Monthly Salary of $40,000 plus performance bonus which is five percent (5%) of the audited net profit of New Products Development Division. A separate Profit and Loss Account will be maintained for the New Products Development Division. Apart from all direct and identifiable costs and expenses, including fixed assets depreciation, a reasonable apportionment of the Company's engineering and administration overhead will also be charged to Divisional Account. Divisional losses will be carried forward to next year until fully set off by future profits. All new products (including modified existing products) developed by the New Products Development Division will normally have a life cycle of two financial years starting from the year of actual sales; however, a new product's life cycle may be extended by one or two more years if substantial improvements or changes are added to old model(s).
New Products Development Budget:	The initial amount is provisionally set at HK$5 million; but the amount may be increased if prior approval has been obtained from the Company Chairman.'

50. By a letter dated 3 March 2007 sent by Company A to the Inland Revenue Department, Company A stated the following:

'(1) The employment letter signed between the company and [Mr B] is still applicable to the years of assessments 2004/05 and 2005/06, except for the company has stopped to provide the rental reimbursement program to [Mr B] since 1st April 2005. Other terms and conditions of the employment remain unchanged.

(2) [Mr B] is responsible for the sales and marketing of our company's new products coffee maker, and fan heater which are launched since April 2003. In year 2004, one more new product, toaster oven (model no. XXXXXXX) was launched by [Mr B] to customer introduced by him. [Mr B] has to deal with customers, negotiate selling price and quantity of sales order and follow up the confirmed sales order.

(3) The products launched by [Mr B] are small electrical appliances, they are coffee maker, fan heater and toaster oven. Coffee maker and fan heater are launched since year 2003 and toaster oven was launched since year 2004. There are also new models of coffee maker launched during the period from 1.4.2004 to 31.3.2006.

(4) Expenses incurred in the invention of the products were paid by the company directly to external suppliers. There was no reimbursement of such kind of expenses to [Mr B] by the company.

(5) The company would not use the new products invented by [Mr B] personally. The company has not paid for the products used. After new products are launched, the company sells the products to customers introduced by [Mr B].

(6) [Mr B] may or may not use his car for travelling in discharging his duties, it is up to [Mr B's] own decision. In so far, there is no disbursement for car expenses to [Mr B] and the company has not made reimbursement for this.'

The 'Mr B' referred to in this letter is a reference to the Appellant.

51. Before the Appellant became an employee of Company A, he ran his own business with a business partner (a person known as Mr C). A company called Company D was formed in Hong Kong on 23 June 2000. The Appellant was a shareholder and director Company D. Shortly afterwards another company was formed by the name of Company E. The Appellant was also a shareholder and director of Company E. In his evidence given at the hearing of the Appeal, the Appellant told us that Company D was used to carry out transactions in Hong Kong and Company E was used to carry out transactions in mainland China.

52. Both Company D and Company E had their registered office at Premises F. However, the Premises F was leased by a company called Company G. The Appellant's evidence is that Company G was a company vehicle used by his business partner to invest in Company D and Company E. According to the Appellant, the Premises F was leased before Company D was formed and that was why the lease was signed by Company G. After Company D and Company E were formed, the Premises F were used by the companies as their offices.

53. In his evidence at the hearing, the Appellant claimed that he had paid for the rent and expenses of the Premises F, that is so despite the fact that it was Company G (and not himself) which was the tenant. We are however unable to accept this claim by the Appellant. If he had indeed paid for the rent out of his own pocket, one would expect him to be able to produce some direct evidence of payment (cheque copies, bank statement etc.). The demands for rent and other expenses were not addressed to him but to Company G, and such of the documents that the Appellant was able to produce (for example, the schedule of management fees and costs of decoration was a document described as the 'Purchasing General (sic) of July 2000' of Company D) in support of his claim do not in any way show payment by the Appellant personally. We therefore do not accept that the Appellant has proved, on the balance of probabilities, that he had paid for such rents and expenses. In any event, for reasons given below, even if the Appellant had indeed paid for the rental and other expenses of the Premises F, we do not think that he was entitled to claim deduction of such expenses against his assessable income.

54. The business of Company D and Company E failed. According to the Appellant, this was because his business partner had failed him and 'runaway'. In the bundle of documents submitted by the Commissioner, there is a letter dated 15 November 2004 written by the Appellant to the Revenue. That letter was part of the documents submitted by the Revenue in relation to the Appellant's appeal in D29/06 referred to above. In that letter, the Appellant explained the position as follows:

> 'I was [in] association with [Mr C] (Company G) to set up the Company in Hong Kong called [Company D] in 2000 and I owned 15% share. The company started the small Electric Appliance business and we had to invest according to % share. I brought my customers to company and incharge (sic.) of the Marketing function. [Mr C] does not invest according to the % share and he borrow money from myself in return his cheque and I paid some overdue payment. I kept chasing him for all debt and he runaway in 2002.
>
> In 2002, all my customers were place an orders (sic.) but we did not have enough capital to complete the orders. That why I were looking for company who could finished my orders. I entered into an agreement with [Company A] with 5% commission on P/L net profit……'

55. The Appellant also claimed to be the inventor of two products, namely, [editor note: product descriptions deleted] (hereinafter referred to as the 'Product H' and the 'Product I' respectively). He told us in evidence that he began work on the invention of the two products while he was in Company D and Company E, and brought over his inventions to Company A after he became employed by that company. He had continued his work on the development and improvement of his inventions while he was working as an employee of Company A, and had incurred engineering fees in the prosecution of such work. However, he emphasized that his work on the products had nothing to do with his duties as the Director of Sales and Marketing of Company A. He was at pains to point out that the two products were his personal inventions and he was therefore entitled to register himself as the inventor of the products. For that reason, he had paid for the engineering fees for the development of the products and he had also paid for the professional fees incurred for the purpose of registering the patents for these products. Although the registration of the patents was still pending, he emphasised in his evidence that it was he, and not Company A, who owns the intellectual property rights of these products. He told the Board that by registering himself as the patent-holder of the products, he would be entitled to licence his inventions for use by other third parties and receive royalties for the same. He is also free to use his own inventions and exploit the same in his own business for his own benefit.

56. The Appellant claimed that he had granted Company A the right to manufacture products invented by him. The products were sold by Company A to customers who were introduced by the Appellant to Company A. Commission was paid to him by Company A in respect of the sale of such products.

57. Although the Appellant has not produced any direct evidence to prove that he has paid the professional fees incurred in respect of the patent registration of the products, we are prepared to accept that he has indeed made payment for such professional fees. There is clear evidence of the patent applications in USA in which the Appellant was named as the inventor. The documents show that the patent applications were handled by the Law Offices of Company J. The patent attorneys of the Appellant had issued an invoice dated 1 July 2005 (in respect of the patent application for Product H) for the sum of USD3,267.85 (equivalent to HK$25,489). We note that the invoice was directed to the Appellant personally and therefore it was the Appellant who was demanded, and was liable, to pay (this contrasts the case of the rentals and expenses for the Premises F mentioned above, where the relevant demands, debit notes etc. were not directed against the Appellant, and it was Company G and not the Appellant who was legally liable to pay). The correspondence and the email exchanges between the patent attorneys and the Appellant also show that the attorneys were looking to the Appellant for payment of their services. By an email dated 14 June 2006, the patent attorney informed the Appellant that the costs for the patent application in respect of the Product I was USD4,840 (equivalent to HK$37,752). Again, that email was addressed to the Appellant and there is nothing to suggest that the Appellant has ever disputed his liability for the fees of his patent attorney. In these circumstances, although the Appellant has not put in any direct evidence of payment, we accept that he has paid the amounts mentioned above.

58. As regards the engineering fees, the Appellant has produced copies of invoices issued by various companies (including in particular one Company K) which on their face evidence the purchase of various engineering parts and items of accessories from these companies. The Appellant has also produced copies of certain credit card payments made to one Company L. A lot of the purchases were made by cash, and it is not clear from the documents who paid the cash. Despite this, we are prepared to accept that it was the Appellant who had paid for these purchases. As pointed out above, the evidence of the Appellant is that these two products were his personal inventions. His conduct in seeking to register himself (in the patent applications mentioned above) as the inventor of the products is consistent with his evidence. As we have found above, he has incurred and paid for the professional or legal fees incurred for the patent applications. This being the case, there is no reason why he would not also pay for the engineering fees of his personal inventions.

59. The Appellant told us, and we accept, that there were other products which were developed by Company A's engineers. Obviously, the engineering expenses for those products would be paid by Company A. For the two products mentioned above, however, they were the Appellant's personal inventions, and he has frankly admitted to us that his work on these products have nothing to do with his duties as the employee of the Company A. The Appellant was not employed by Company A as an engineer and it was not his duties to work on the engineering or development of products. As confirmed by Company A in its letter dated 3 March 2007 mentioned above, the Appellant was responsible for sales and marketing. The letter also made clear that for 'products invented by [the Appellant] personally…the company has not paid for the products used. After new products are launched, the company sells the products to customers introduced by [the Appellant]'.

60. According to the employer's return filed by Company A, the Appellant has received the following income from his employment:

Income	**2004-05**	**2005-06 (as Amended)**
Salary	$414,000	$480,000
Bonus	$300,000	
Commission	-	$819,000
Total	$714,000	$1,299,000

61. By a letter dated 6 December 2006 sent by the Appellant to the Revenue, the Appellant claimed that he was entitled to deduct various items of alleged expenses from his assessable income. The items claimed to be deductible have been set out in paragraph 45 above.

62. From the Appellant's letter of 6 December 2006 and the documents attached to the letter in support of his claim, the alleged items of expenses consist of the following:

For the year of assessment 2004/05

(1) 'Previous investment' in the total sum of $859,252 ('**Sum A**'), breakdown as follows:

(a)	Rent for the Premises F from 20 July 2000 to 20 March 2001	$269,100
(b)	Rates and government rent for the Premises F from 1 July 2000 to 1 January 2001	$18,000
(c)	Management fees, phone, decoration, electricity and related outgoings of the Premises F from 22 June 2000 to 5 February 2001	$146,752
(d)	Three dishonoured cheques drawn by Company E, Company D and a Mr M	$395,400

(2) Professional fee for patent application of Product H machine per invoice dated 1 July 2005, in the sum of $25,489.23 ('**Sum B1**');

(3) Telephone expenses incurred during the period from 21 June 2002 to 29 January 2003, in the sum of $4,192 ('**Sum C1**');

(4) Transportation expenses (petrol expenses) incurred during the period from 10 April 2004 to 27 March 2005, in the sum of $8,266.27 ('**Sum D1**').

For the year of assessment 2005/06

(1) Professional fee for patent application of Product I (as referred to in an email dated 14 June 2006 from one Mr N to the Appellant), in the sum of $37,752 ('**Sum B2**');

(2) Engineering fees or expenses incurred during the period from 7 March 2005 to 29 March 2006, in the sum of $60,403.98 ('**Sum B3**');

(3) Telephone expenses incurred during the period from 21 March 2006 to 21 November 2006, in the sum of $2,973.19 ('**Sum C2**');

(4) Transportation expenses (petrol expenses, parking fees, car repairs expenses etc.) incurred during the period from 3 April 2005 to 30 March 2006, in the sum of $21,018.76 ('**Sum D2**');

(5) Sponsorship expense as evidenced by a remittance of EUR 4,360 to the Organising Committee of 2006 XXXXX on 15 May 2006, in the sum of $43,709 ('**Sum E**').

63. As pointed out in paragraph 39 above, in December 2005 the Appellant had lodged an appeal against the Commissioner's determination relating to the salaries tax assessments for the years of assessment 2002/03 and 2003/04. The appeal was heard by the Board and by a decision dated 16 June 2006, the Board dismissed the appeal of the Appellant. We have looked at the decision of the Board in that appeal (D29/06), and found that Sum A and Sum C1 in the present case were in fact amongst the items of expenses claimed by the Appellant to be deductible for the year of assessment 2002/03, and the Board had rejected the Appellant's claim in D29/06.

64. The Appellant has not appealed against the decision of the Board in D29/06.

The Law

65. The deduction of expenses for salaries tax purposes is governed by section 12(1)(a) of IRO. The subsection provides as follows:

'*(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person –*

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income.'

66. By section 68(4) of IRO, the Appellant bears the onus of proving that the assessments appealed against are excessive or incorrect. Accordingly, in order to succeed on the Expense Issue, the Appellant bears the onus of proving that relevant expenses in question:

(a) were incurred by him;

(b) were not expenses of a domestic or private nature, or capital expenditure;

(c) were incurred in the production of his assessable income; and

(d) were wholly, exclusively and necessarily so incurred.

' in the production of income'

67. In CIR v Humphrey 1 HKTC 451 at 466-467, after referring to the corresponding English provision (rule 7 of the Rules applicable to Schedule E of the Income Tax Act 1952), the Court noted that there was a difference in phraseology between the section 12(1) of IRO and the English provision. The English provision uses the phraseology ' wholly, exclusively and necessarily incurred in the performance of the said duties' (that is, the duties of the office or employment). However it was held by the Full court that this difference in phraseology is immaterial. Since the decision of the Full court in Humphrey, it has been generally accepted that the English principles and tests relating to the words ' wholly, exclusively and necessarily in the performance of the said duties' are equally applicable to claims for deductions under section 12(1)(a): see, for example, D25/87, IRBRD, vol 2, 400 and D36/90, IRBRD, vol 5, 295.

68. In UK, it has been held that the words ' in the performance of the duties' mean ' in the course of the performance of the duties and not before or after the performance' (Rickets v Colquhoun [1926] AC 1, 4 and 6). Moreover, there is a distinction between expenses incurred in the course of producing income and those incurred for the purpose of producing income; while the former are deductible, the latter are not (CIR v Burns 1 HKTC 1181 at 1189).

69. It follows that where it is merely proved that an expense was incurred for the purpose of producing income, the expense is not deductible against the assessable income unless it can be shown that the same was incurred in the course of producing the income concerned.

' wholly, exclusively and necessarily'

70. Apart from the requirement that the expense must have been incurred in the production of the income, it must be shown that the expense which is sought to be deducted has been ' wholly, exclusively and necessarily' so incurred. As far as the words ' wholly' and 'exclusively' is concerned, it seems that where an expense is incurred partly in the course of producing the income, and partly not, apportionment is possible if it can be ascertained that a definite portion of it is attributable to the performance of the duties of the employee (that is, in the production of his income): see, Hillyer v Leek [1976] STC 490 at 492, Perrons v Spackman [1981] STC 739 at 762, and D36/90 where the point was dealt with in paragraph 7.4 of the decision.

71. On ' necessarily' , it has been held that the test is whether the duties of the employee cannot be performed without incurring the expense in question: per Donovan LJ in Brown v Bullock 40 TC 1 at 10. And in the words of Lord Blanesburgh in Ricketts v Colquhoun (supra) at 7-8:

> '*… the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties – to expenses imposed on each holder ex necessitate of his office and to such expenses only*.'

Stringency of the statutory requirement

72. The effect of the statutory requirement that in order to be deductible, the expenses have to be 'wholly, exclusively and necessarily incurred in the production income' (or in UK, 'wholly, exclusively and necessarily incurred in the performance of the duties') is thus extremely stringent. In the famous words of Vaisey J in Lomax v Newton 34 TC at 561-562:

> '*… the provisions of that rule are notoriously rigid narrow and restricted in their operation …. It must be shown that the expenditure incurred was not only necessarily but wholly and exclusively incurred in the performance of the relevant official duties …. The words are indeed stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that when examined they are found to come to nearly nothing at all*.'

73. The result of numerous cases amply demonstrates the highly restrictive effect of the statutory requirement in the context of the salaries tax regime. We would only need to cite the words of Deputy High Court Judge Carlson (as he then was) in CIR v Franco Tong Sui Lun [2006] 21 IRBRD 947 at 955 (paragraph 27), where the learned judge summarised the position as follows:

> '*The expenses contemplated by the section [i.e. s.12(1)] are strictly and only those referable to the activity of the employment itself as opposed to other personal contractual obligations which, although referable to the earning of his salary by the taxpayer and, as in this case, its very computation, are not expenses incurred in the performance of the taxpayers duty in doing the work required of that employment. It is this very narrow range of qualifying expenditure which, no doubt, prompted Vaisey J to make the remarks that he did in* ***Lomax v Newton*** *supra.…..*'

We have supplied our emphasis to the words underlined in the quote from Deputy Judge Carlson's judgment because the words so underlined, are particularly pertinent to our consideration of the present case.

Deductibility of the Expenses

Sum A: Previous Investments ($859,252)

74. Part of Sum A consists of the rentals and other expenses alleged to have been paid by the Appellant in respect of the Premises F. As pointed out above, the Premises F were used by Company D and Company E as their registered office but it was Company G which signed the lease (apparently because the lease was signed before Company D was formed). We have already found that there is insufficient proof that the Appellant had paid for these rentals and expenses.

75. The other part of Sum A consists of three cheques issued by Company D, Company E and Mr M. The name of the payee is not shown on the cheques issued by Company D and Company E. The cheque issued by Mr M was made payable to the Appellant. There is no evidence, and the Appellant has never explained, how and why the amounts of these cheques could become the Appellant's expenses. (We note that in the letter dated 15 November 2004 referred to in paragraph 54 above, the Appellant had suggested that Mr C had borrowed money from him 'in return of his cheque' and then ran away. That would not however make the cheque an 'expense' of the Appellant for salaries tax purposes). We find that there is insufficient proof that the Appellant had incurred expenses in the amounts of these three cheques.

76. In any event, even if Sum A had indeed been paid or incurred by the Appellant, we cannot see how the same could be deductible against his assessable income in the context of the salaries tax regime.

77. The Premises F were the office premises of Company D and Company E and Company G was the tenant of the premises. If the Appellant had paid for the rent and expenses for the Premises F, such payments were made by him for the benefit of these companies and would have nothing to do with his duties as an employee of Company A. Indeed at the time when Sum A was incurred, the Plaintiff was not even an employee of Company A. There can be no question of Sum A having been incurred in the course of the performance of the Appellant's duties with Company A.

78. It is argued by the Appellant that he had incurred Sum A in order to cultivate his business connections with his customers, which he has transferred to Company A. The reason why Company A would employ him was because of the product he had invented and the customers that he was able to introduce to Company A. Company A paid the Appellant commission for the profits made from selling the products to the customers introduced by him. In the Appellant's own words:

> 'My employment with [Company A] is to provide manufacture basic and continue to my business in [Company D] & [Company E]. All my income from [Company A] is because I transfer my customers and products design from [Company D] and [Company E]…..'

79. We do not think that this argument of the Appellant would assist him in any way. Merely because the commission of the Appellant is paid to him on account of customers or

business with customers introduced by him would not make Sum A a deductible expense against his assessable income. Ms Tsui submitted that on the case of the Appellant, Sum A was his business investment in Company D and Company E. As such, it was in the nature of a capital expenditure and was excluded from deduction under section 12(1) of IRO. In this connection, she cited the Board's decision in D6/06, (2006-07) IRBRD, vol 21, 1137 at 1147 on what constitutes 'capital expenditure':

> '*17. The difference between capital expenditure and revenue expenditure is that the former is for the acquiring of an asset, or for the receipt of future income or benefits, and would not be entirely expended within a specified period only; while the latter is for receipt of income within the same period when it was expended. Capital expenditure is not deductible under section 12(1)(a).*'

80. Ms Tsui may be right on her submission but it is not necessary for us to decide whether Sum A is in the nature of a capital expenditure or not. Suffice to say that it is clearly not an expense which 'was wholly, exclusively and necessarily incurred in the production of' the Appellant's income. As pointed out above, the House of Lords in Rickets v Colquhoun (supra) has held that in order for an expense to qualify as a deductible expense, the expenses must have been incurred in the course of the performance of the duties and not before or after the performance. Further, in order to satisfy the requirement of 'necessarily incurred', it must be proved that the duties of the employee could not have been performed without the payment of the expense. Clearly, Sum A cannot possibly satisfy these requirements as the Appellant was not even an employee of Company A when Sum A was allegedly incurred.

81. As pointed out above, Sum A was amongst the items of expenses claimed by the Appellant to be deductible for the year of assessment 2002/03, and the Board had rejected the Appellant's claim in D29/06**.** The Appellant has not appealed against the Board's decision in D29/06, and pursuant to section 70 of IRO, the assessment for the year 2002/03 has become final and conclusive. In rejecting the claim to deduct Sum A from his assessable income for 2002/03, the Board made the following observation (at page 10 of the decision):

> '*Adopting the Taxpayer's own words, Sum A was his investment in a business including customers, products and know-how, which business he brought to [Company A] and which investment he considered as his "business loss"…. But [Company A] was his employer, not his business partner. It is true that for profit tax purposes, past business loss could be carried forward to set-off against future business profit. But past business loss could not become expenses deductible from assessable income for salary tax purposes. The Taxpayer confused and mistook his employment income with [Company A] as his business profit, as a result, he wrongfully claimed deduction from his*

employment income under [Company A] as if it was his business profit deductible against his previous business loss from [Company D]'

82. We fully agree with this observation of the Board in D29/06, and the same applies equally to the assessments appealed against in the present case as it applied to the assessment for the year 2002/03, subject of the decision in D29/06. For this reason, and the reasons mentioned above, we are of the view that Sum A is not a deductible expense.

Sum B1: professional fee - $25,489 (2004-05)
Sum B2: professional fee - $37,752 (2005/06)
Sum B3: engineering fee - $60,403 (2005-06)

83. We have already found that the professional fees and engineering fees were incurred by the Appellant. The question is whether these expenses are deductible expenses.

84. In our view, they clearly are not. As already pointed out before, the two products in question were the personal inventions of the Appellant, and it is his own case that the work on the inventions and the development of these products have nothing to do with his duties as an employee of Company A. The Appellant was not employed by Company A as an engineer. His duties were in sales and marketing. It is true that he introduced customers to his employer and was paid commission on the sale of the products that he invented, but that would not make the expenses that he incurred in inventing, developing and patenting the products expenses deductible from his assessable income. These expenses were not incurred in the course of the performance of his duties as an employee of Company A, and it can hardly be said that he could not perform his duties without incurring these expenses.

85. The same applies to the professional fees incurred for the registration of the patents. The patent applications were made for the registration of the Appellant as the inventor and holder of the patents. The patent applications were not made for the benefit of Company A, and had absolutely nothing to do with the Appellant's duties as the employee of Company A. In this connection, we would again refer to the judgment of Deputy High Court Judge Carlson in CIR v Franco Tong Sui Lun mentioned in paragraph 73 above. The amount of commission payable to the Appellant may depend on, or be referable to, the sale of the products; but that does not mean that the expenses incurred for the invention and patent registration of the products, which are the personal inventions of the Appellant, were incurred by him in the course of the performance of his duties as the employee of Company A.

86. We hold that Sums B1, B2 and B3 are not deductible expenses.

Sum C1: telephone expenses - $4,192 (2004/05)
Sum C2: telephone expenses - $2,973 (2005/06)

87. The Appellant has produced copies of certain telephone bills in support of his claim for deduction of Sums C1 and C2 for the years of assessment 2004/05 and 2005/06 respectively. We have examined these telephone bills, and as rightly pointed out by Ms Tsui, all the telephone bills in support of Sum C1 show that the telephone expenses in question were not incurred in the year of assessment 2004/05. Rather they show telephone expenses incurred during the period from 21 June 2002 to 29 January 2003. Sum C1 cannot possibly be deducted against the Appellant's income for the year of assessment 2004/05.

88. We further note from the decision in D29/06 that the Appellant had in fact claimed deduction of C1 from his assessable income for the year of assessment 2002/03. This was rejected by the Board, for the following reasons, which in our view are clearly correct:

> '*The Taxpayer was an employee performing his employment duties. He should use the telephone of his office to communicate. If he used his own telephone and made calls for the purpose of his employer's business and incurred expenses, he should seek reimbursement over such telephone calls from his employer. He should not consider such telephone expense as his employment expense. The Taxpayer's claim for deduction of [this sum] fails.*'

89. For the year of assessment 2005/06, only $310 out of the total of $2,973 was for the year ended 31 March 2006. When this was pointed out during the appeal hearing, the Appellant agreed that the rest of the telephone expenses were not expenses for the relevant year of assessment. We note that the sum of $310 was charged under a bill addressed to one Ms O and the Appellant jointly, and in relation to a mobile phone numbered XXXXXXXX. It would appear that this mobile phone number was used by the Appellant and Ms O jointly, and there is no evidence to show that the sum of $310 was telephone expense incurred 'wholly, exclusively and necessarily in the performance of' the Appellant's duties as an employee of Company A.

90. Accordingly, neither Sum C1 nor C2 is a deductible expense.

Sum D1: transportation expenses - $8,266 (2004-05)
Sum D2: transportation expenses - $21,018 (2004/05)

91. For Sum D1, the Appellant has produced a schedule that purports to set out the dates, the amounts and the total petrol expenses for the period from 10 April 2004 to 27 March 2005. The Appellant has not furnished any invoices or other documentary proof of the items of petrol expenses set out in the Schedule. Clearly the Schedule is merely a self-serving document and cannot in itself prove that the amounts of petrol expenses had indeed been incurred for the year of assessment 2004/05. There is no other evidence to prove that Sum D1 has been incurred.

92. Even assuming that Sum D1 has been proved to have been incurred, for reasons mentioned below, we are of the view that it is not a deductible expense.

93. Sum D2 was made up of petrol expenses, parking fees and car repairs expenses etc. Unlike Sum D1, Sum D2 is supported by relevant receipts, invoices and other documents.

94. The Appellant alleged that some of its customers had office in Hong Kong and China, and for that reason he should be allowed to deduct his transportation expenses incurred, presumably, for travelling to his customers' office to see the customers.

95. Company A has pointed out in its letter to the Revenue dated 3 March 2007 that it was up to the Appellant whether to use his car for travelling in discharging his duties. In other words, it is not a case whereby the Appellant would not be able to discharge his duties without using his car. In our view, the letter of Company A, which we accept, shows quite clearly that the alleged transportation expenses subject of Sum D1 and D2 are not **'necessarily incurred'** in the production of the Appellant's income or in the performance of his duties. In the words of Company A, '[the Appellant] may or may not use his car for travelling in discharging his duties'.

96. As pointed out above, the statutory requirement under section 12(1) is a very stringent one. To be deductible, it must be shown that the Appellant could not have performed his duties without incurring the expenses in question. This has not been shown in the present case.

97. We accordingly hold that neither Sum D1 nor D2 is deductible.

Sum E: sponsorship expense/donation - $43,709 (2005/06)

98. The Appellant alleged that he and his teammates had represented Hong Kong in a sport event (a model helicopter competition) and has produced copy of a bank remittance showing payment of Euro 4,360 (equivalent to the amount of Sum E in HK$) to 'The Organizing Committee of 2006 XXXXX'. The amount of remittance was apparently required to defray the application or entrance fees, accommodation expenses and car rentals.

99. It can hardly be argued that Sum E, described as a 'sponsorship expense' in some of the documents before us, has anything to do with the Appellant's duties as an employee of Company A. Accordingly, unless Sum E falls within the definition of 'approved charitable donation' under section 2 of IRO, and qualifies for deduction under section 26C of that Ordinance, clearly the Appellant cannot deduct the same from his assessable income.

100. Section 2 defines an 'approved charitable donation' as a donation of money to any charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes.

101. In our view, Sum E is plainly not a donation in the first place. In its nature, a donation is a gift, and a gift is 'a transfer of property in a thing voluntarily and without any valuable

consideration' (see, the Shorter Oxford Dictionary cited by the Court of Appeal in Sanford Yung-tao yung v Commissioner of Inland Revenue [1979] 1 HKTC 1181. As pointed out above, Sum E was made in payment of application or entrance fees for the competition, car rentals and accommodation expenses. By no stretch of imagination can such payments be described as a gift or donation. Accordingly, the argument that Sum E is an ' approved charitable donation' falls on the first hurdle.

102. Even if Sum E was a donation, the Appellant has not shown that it was made to ' a charitable institution or trust of a public character which is exempt from tax under section 88' . Sum E was certainly not paid to the Government. Accordingly, the Appellant has failed to discharge his onus in showing that Sum E is an approved charitable donation.

103. Sum E is therefore not a deductible expense.

Decision

104. For reasons mentioned above, we hold that none of the items of expenses claimed by the Appellant is deductible against his assessable income.

105. We will accordingly dismiss the appeal.