Case No. D62/08

Extension of time - time to lodge appeal - appeal out of time - whether time to lodge appeal should be extended - salaries tax - source of income - whether at least some salaries were derived from a Hong Kong source - whether the 60-day rule applies - whether appellant can claim relief on 'double taxation' - Inland Revenue Ordinance ('IRO') sections 8, 66 and 68(4).

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung Han Chu and Yeung Eirene.

Date of hearing: 20 February 2009.
Date of decision: 30 March 2009.

The appellant lodged an appeal against the determination of his salaries tax assessment dated 31 July 2008 ('the Determination') on 22 October 2008, more than one month after the Determination was issued. He claimed that he did not receive the Determination. He appealed against the Determination by claiming that his salaries were not chargeable to salaries tax in Hong Kong.

Held:

1. The appellant lodged his appeal against the Determination out of time as he actually received the Determination by registered post on 5 August 2008.

2. There was no reasonable cause for the appellant to lodge his appeal out of time as he was not prevented to do so by any illness or absence from Hong Kong. Thus the Board refused to extend time for the appellant to lodge his appeal. (Chow Kwong Fai (Edward) v Commissioner of Inland Revenue [2005] 4 HKLRD 687 applied)

3. On the merits of the appeal, the source of the appellant's salaries was Hong Kong by his own admission. He admitted that the location of his employment was in Hong Kong. He also rendered some services in Hong Kong. Thus those salaries were chargeable to salaries tax. (Commissioner of Inland Revenue v Geopfert [1987] HKLR 888 applied)

4. The appellant could not apply for relief against salaries tax because he was in Hong Kong for more than 60 days during the period caught by the Determination. He also provided no evidence to show that he paid tax in places outside Hong Kong.

(Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174 applied)

Application refused.

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai (Edward) v Commissioner of Inland Revenue [2005] 4 HKLRD 687
Commissioner of Inland Revenue v Geopfert [1987] HKLR 888
Commissioner of Inland Revenue v So Chak Kwong Jack 2 HKTC 174

Taxpayer in person.
Chan Wai Lin and Chan Man On for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The appellant wishes to appeal against the Determination ('the Determination') of the Acting Deputy Commissioner of Inland Revenue ('the Acting Deputy Commissioner') dated 31 July 2008 whereby the salaries tax assessment for the year of assessment 2000/01 under charge number x-xxxxxxx-xx-x, dated 5 November 2001, showing net chargeable income of $1,003,451 with tax payable thereon of $160,086 was reduced to net chargeable income of $943,451 with tax payable thereon of $149,886.

2. He contends that his employment income from his former employer should not be subject to salaries tax.

3. The issues in this case are:

(1) Whether his appeal was out of time;

(2) If his appeal was out of time, whether the Board of Review ('the Board') should exercise its discretion to extend time in this case;

(3) (a) If his appeal was not out of time; or

(b) if his appeal was out of time and the Board should extend time for him to appeal;

whether his employment income was chargeable to salaries tax.

Whether the appeal is out of time

4. Section 66 of the Inland Revenue Ordinance, Chapter 112, provides that:

> *'(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –*
>
> *(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts; or*
>
> *(b) such further period as the Board may allow under subsection (1A),*
>
> *either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal. (Replaced 2 of 1971 s. 42)*
>
> *(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971 (Added 2 of 1971 s. 42. Amended 7 of 1986 s. 12)*
>
> *(2) The appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.*
>
> *(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).*

(Replaced 35 of 1965 s. 32)'

5. The Determination is dated 31 July 2008. It was sent on 31 July 2008 by registered post to the appellant's business address. Information from the post office showed that this item was delivered on 5 August 2008.

6. The appellant felt able to allege that he had not received the Determination. We reject it for the following reasons:

(a) His allegation, made for the first time at the hearing, is contradicted by what he alleged in his notice of appeal dated 22 October 2008 that (emphasis added but otherwise written exactly as it stands in the original):

'Personally, I have recently (August 2008) resigned from my own company in Hong Kong ... and all my files were packed and moved into storage (together with my HK IRS file and *this attached document*). It was not until last week (13th Oct), I was able to retrieve this document from searching over boxes of files from my years of work, causing a major delay.'

(b) A copy of the Determination and the Acting Deputy Commissioner's covering letter[1] were lodged with the Board together with his notice of appeal. He was unable to explain how he could have sent a copy of the Determination to the Board if he had never received it.

7. The 1-month time limit for appeal commenced on 6 August 2008 and expired on 5 September 2008.

8. His notice of appeal was received by the Board on 22 October 2008. This was out of time.

9. Further, the notice of appeal was not accompanied by a statement of the grounds of appeal. The grounds of appeal were required before the notice of appeal could take effect, see D16/07, (2007-08) IRBRD, vol 22, 454 at paragraphs 4 – 12. It was not until 25 October 2008 that the appellant sent an email to the Board stating his grounds of appeal.

10. For these reasons, we conclude that the appellant was out of time and could only appeal if we should extend time under section 66(1A).

Whether to extend time for appeal

[1] The covering letter informed the appellant of his right of appeal under section66 and gave the appellant a copy of section 66 and the contact details of the Board.

11. The Board has jurisdiction[2] to extend time under section 66(1A) if it is satisfied that the 'appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a)'.

12. In Chow Kwong Fai (Edward) v Commissioner of Inland Revenue [2005] 4 HKLRD 687, at paragraph 20, Woo VP (with whose judgment Cheung JA and Barma J agreed) said:

> *'20. In my opinion, while a liberal interpretation must be given to the word "prevented" used in s 66(1A), it should best be understood to bear the meaning of the term "未能" in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means "unable to". The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:*
>
> *"It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have[3] considered[4] to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community." '*

13. At paragraph 46, Cheung JA (with whose observation Barma J agreed) added the following observation:

> *'46. 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 section 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.'*

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[2] See D16/07 at paragraph 55.
[3] Written exactly as it stands in the law report.
[4] Written exactly as it stands in the law report.

14. There is no allegation of any prevention by sickness.

15. On absence from Hong Kong, information from the Immigration Department showed the following absence from Hong Kong:

Departure		Arrival		Absence
Date	Time	Date	Time	No. of days[5]
06-08-2008	13:16:28	06-08-2008	20:29:40	1
07-08-2008	18:03:10	08-08-2008	15:55:27	2
14-08-2008	13:03:25	14-08-2008	19:45:45	1
16-08-2008	15:13:40	17-08-2008	07:06:16	2
19-08-2008	18:21:22	20-08-2008	09:24:59	2
03-09-2008	10:52:20	05-09-2008[6]	11:34:40	3
06-09-2008	18:28:10	07-09-2008	11:19:02	2
10-09-2008	17:54:28	11-09-2008	17:19:33	2
16-09-2008	17:26:15	17-09-2008	10:51:17	2
23-09-2008	18:12:50	27-09-2008	17:28:44	5
07-10-2008	08:58:28	08-10-2008	17:57:47	2
13-10-2008	21:04:09	15-10-2008	19:58:07	3
17-10-2008	17:35:32	18-10-2008	07:59:01	2
22-10-2008	19:34:01	22-10-2008	23:35:36	1
23-10-2008	07:17:35	28-10-2008	17:12:02	6

16. The appellant was absent from Hong Kong for 11 days during the 1-month time limit. The notice of appeal was delivered by hand to the Board on 22 October 2008. On that day, he left Hong Kong in the evening. His grounds of appeal were stated in an email sent on 25 October 2008 at a time when he was away from Hong Kong.

17. In our decision, the appellant was not prevented by absence from Hong Kong to give notice of appeal in accordance with section 66(1) within the 1-month time limit. He was, in our view, able to, but did not, do so.

18. All that section 66(1) required was to give written notice of appeal and send it together with all the requisite accompanying documents to the Board within the 1-month limit. There is no requirement to be ready for an immediate appeal hearing. Misconstruing, if he did, the section 66(1) requirement is not a reasonable cause, see Chow Kwong Fai where the Court of Appeal held at paragraph 34 that:

[5] Part of a day counted as one day. This approach is in favour of the appellant.
[6] The 1-month time limit expired on 5 September 2008.

> *The appellant's 'alleged misunderstanding and understanding, together with his alleged ignorance, even if fully accepted to be the true reasons, in my judgment, cannot amount to a reasonable cause under s 66(1A) to make him unable to lodge his notice of appeal within time'.*

19. Thus points a), b) and d) in the appellant's notice of appeal dated 22 October 2008 do not constitute reasonable cause. More importantly, the assessor had since 2002 been pressing him to substantiate his case and he had had more than ample time for preparation.

20. Point c), even if accepted to be true, is against the appellant. To pack files and put them into storage in about August 2008 and not to retrieve them until about 2 months later cannot amount to, and is not, reasonable cause.

21. So far as point e) is concerned, there is no allegation of what, if anything happened in connection with the High Court matter during the period from August to October 2008. The factual basis for point e) has not been established and we reject it.

22. In our Decision, the appellant has no reasonable cause for not giving notice of appeal in accordance with section 66(1) within the 1-month time limit.

23. We decline to extend time.

24. Our decision declining to extend time disposes of this case. The Determination and the assessment appealed against as reduced by the Acting Deputy Commissioner stand.

Whether income chargeable to salaries tax

25. In view of our decision on the first and second issues[7], the third issue on whether the appellant's employment income was chargeable to salaries tax does not arise. Since we have heard both parties on the third issue, we shall deal with it briefly in case we are wrong on the first and the second issues.

26. Section 8, so far as relevant, provides that:

> *'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-*
>
> *(a) any office or employment of profit ...*

[7] See paragraph 3 above.

(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment-

(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services; (Amended 69 of 1987 s. 2)

(b) excludes income derived from services rendered by a person who-

(i) ...

(ii) renders outside Hong Kong all the services in connection with his employment; and (Added 2 of 1971 s. 5. Amended 69 of 1987 s. 2)

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where-

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income. (Added 69 of 1987 s. 2)

(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment. (Added 2 of 1971 s. 5)'

27. Section 68(4) provides that:

'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant. (Replaced 35 of 1965 s. 34)'

28. In Commissioner of Inland Revenue v Geopfert [1987] HKLR 888, Macdougall J held at pages 901 – 903 that:

'As a matter of statutory interpretation I am unable to escape the conclusion that, although s. 8(1) must be construed in the light of and in conjunction with s. 8(1A), s. 8(1A)(a) creates a liability to tax additional to that which arises under s. 8(1). It is an extension to the basic charge under s. 8(1). If it were otherwise s. 8(1A)(a) would be virtually otiose and s. 8(1A)(b) completely unnecessary.

It follows that the place where the services are rendered is not relevant to the enquiry under s. 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.

That being so, what is the correct approach to the enquiry? The approach that commends itself to me, and which I take to be correct, is that adopted by the English courts in the cases cited by Mr. Flesch.

In my view this is an approach that is entirely consistent with a correct interpretation of s. 8, for although at first sight it might seem somewhat illogical to ignore the place where the services are rendered, it seems to me that to do so is consistent with an acceptance that s. 8(1A)(a) is an extension of the basic charge imposed under s. 8(1).

...

Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.

...

Having stated what I consider to be the proper test to be applied in determining for the purpose of s. 8(1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarised as follows.

If during a year of assessment a person' s income falls within the basic charge to salaries tax under s. 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under s. 8(1A)(b) as read with s. 8(1B). Thus, once income is caught by s. 8(1) there is no provision for apportionment.

...

> *On the other hand, if a person, whose income does not fall within the basic charge to salaries tax under s. 8(1), derives income from employment in respect of which he rendered services in Hong Kong, only that income derived from the services he actually rendered in Hong Kong is chargeable to salaries tax. Again, this is subject to the "60 days rule".'*

29. In Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174, Mortimer J (as he then was) held at page 188 that:

> *'The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.'*

30. The law can be summarised thus:

(1) It is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located, see paragraph 28 above.

(2) If the source of the employment is located in Hong Kong, then subject to (3), (4) and (5) below, the whole income is chargeable to tax and there is no apportionment, see paragraph 28 above.

(3) If a taxpayer rendered **all** the services in connection with his employment outside Hong Kong, the whole income derived by the taxpayer is excluded, see section 8(1A)(b)(ii) quoted in paragraph 26 above.

(4) Section 8(1B) extends section 8(1A)(b)(ii) to taxpayers who rendered some service in connection with his employment during brief visits to Hong Kong. Section 8(1B) is a relief, not a punishment for 'over-staying'. To come within this extension, the brief visits must not exceed a total of 60 days in a year of assessment. If his visits should exceed 60 days, section 8(1B)[8] does not apply, see paragraph 29 above.

(5) Section 8(1A)(c) is a double taxation relief provision. The taxpayer must prove that he has paid tax substantially the same nature as salaries tax in a territory outside Hong Kong before he could be eligible for such relief.

[8] Often referred to as the 60-day rule.

31. In his undated letter to the Revenue sent on about 5 September 2002, the appellant acknowledged that:

> 'Hong Kong was the place where the employment contract was negotiated and concluded'.

His employment contract provided that his year end bonus was to be (written exactly as it stands in the original):

> 'calculated according to Labour Ordinance of Hong Kong' and he was liable to summarily dismissed 'in accordance to common law would justify an instant dismissal'.

His monthly salary was in Hong Kong dollars. He was to be stationed outside Hong Kong, but this is irrelevant[9]. We conclude that the location and source of his income was in Hong Kong.

32. Thus, unless the appellant can make out a case under paragraph 30(3), (4) and (5) above, the whole of his income is chargeable to salaries tax and there is no apportionment.

33. During the 2000/01 year of assessment, the appellant was present in Hong Kong for 217 days[10]. Thus the 60-day relief under section 8(1B) does not apply.

34. On the question whether the appellant had rendered **all** the services in connection with his employment outside Hong Kong, he himself acknowledged that he had rendered **some** service in Hong Kong.

(1) In his letter to the Revenue dated 26 June 2002, the appellant wrote that (written exactly as it stands in the original):

> 'Per my previous working experience in [a place outside Hong Kong], I consider myself rendering 100% of my service to the operation in [a place outside Hong Kong], (even though there were occasional visits to HK offices)'.

(2) By letter dated 10 July 2002, the assessor enquired about his:

> 'travel schedule for the year ended 31.3.2001' and 'the purpose of [his] stay in Hong Kong.'

[9] See paragraph 28 above.
[10] 93 of which were on week days.

By his undated letter to the Revenue sent on about 5 September 2002, he replied that:

'I do not have a detailed travel schedule and cannot remember the dates of arrival and departure in Hong Kong. As a whole, the schedule is on a need basis, i.e. wherever the work needed me to do'.

(3) In his written communication to the assessor dated 19 December 2007, he stated that (written exactly as it stands in the original):

'My explanation to [IRD officials] was, some time during my employment term, I was assigned with another job as the Director of Supply which needed me to have meetings in HK office.'

(4) In his 4th ground of appeal sent by email on 25 October 2008, he stated that he was:

'given another job title as "Supply Chain Director" which required [him] to hold meetings in HK office'.

(5) At the hearing, he handed in a document in which he stated that (written exactly as it stands in the original):

'Being a responsible employee, it is logical for [the appellant] to continue to work to take up the 2nd job assignment to ensure continue materials supply to the 3 factories, even if he has to travel back and forth between HK and [a place outside Hong Kong]'.

(6) He also told us at the hearing that he had to be in Hong Kong.

35. Based on the appellant's own assertions and admissions, we find as a fact that he had rendered some service in connection with his employment in Hong Kong. In other words, he had **not** rendered **all** the services in connection with his employment outside Hong Kong and the section 8(1A)(b)(ii)[11] exclusion does not apply.

36. We turn now to double taxation relief. Not only is there no evidence of any payment of tax in any territory outside Hong Kong, the appellant asserted that there was in fact no payment. He did so by a document handed to us at the hearing stating that (written exactly as it stands in the original):

[11] See paragraph 26 above.

> 'Like other HK employees stationing in [a place outside Hong Kong] (during the past, and still so in present) income taxes were "supposedly" taken care by the company. Fact is: it wasn't!'

37. We conclude that the double taxation relief does not apply.

38. Had it been necessary to consider the appeal on the merits, we would have decided that his income was chargeable to salaries tax; his appeal should be dismissed and the assessment appealed against should be confirmed.

Disposition

39. As stated in paragraphs 23 and 24 above, we decline to extend time for appeal and the assessment appealed against as reduced by the Acting Deputy Commissioner stands.