

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D86/03

Salaries tax – late appeal – whether being prevented from filing a timely notice of appeal –section 66(1A) of the Inland Revenue Ordinance ('IRO').

Panel: Andrew J Halkyard (chairman), Robin M Bridge and Peter R Griffiths.

Date of hearing: 4 November 2003.

Date of decision: 17 December 2003.

The determination of the Commissioner rejecting the appellant's objection to the assessments in dispute was dated 28 May 2003.

On 27 June 2003, the appellant's husband, on the appellant's behalf, attended the office of the assessor and stated that the appellant was dissatisfied with the determination.

By a notice dated 10 July 2003 but was received only on 13 August 2003, the appellant appealed against the determination.

By letter dated 21 August 2003, the appellant explained her reasons for lodging a late appeal. In particular, she had left Hong Kong and she encountered difficulty in securing the services of the representative to continue representing her.

Held:

1. The Board accepted that the appellant acted responsibly by appointing a tax agent and was not frivolous in her attitude towards compliance (D57/99 distinguished).
2. However, from at least 27 June 2003 when the appellant had received the determination, there was a further unexplained delay that the notice of appeal dated 10 July 2003 was delivered to the Board on 13 August 2003.
3. In the circumstances, the Board found the appellant was not prevented from filing a timely notice of appeal (D9/79 and D146/01 considered).

Appeal dismissed.

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Cases referred to:

D57/99, IRBRD, vol 14, 506

D9/79, IRBRD, vol 1, 354

D146/01, IRBRD, vol 17, 88

Ng Yuk Chun for the Commissioner of Inland Revenue.

Taxpayer represented by her representative.

Decision:

1. This is an appeal against the determination by the Commissioner of salaries tax and additional salaries tax assessments raised on the Appellant for the years of assessment 1997/98 to 2002/03 inclusive. The Appellant claims that she should be entitled to time basis assessment in accordance with the provisions of section 8(1A) of the IRO.

Preliminary issue: late appeal

2. On the basis of the documents produced before us, and the explanations of both Mr A (the Appellant's representative at the hearing) and Ms Ng Yuk-Chun (the Commissioner's representative), we find the following facts.

- (a) The determination of the Commissioner rejecting the Appellant's objection to the assessments in dispute was dated 28 May 2003.
- (b) The determination was addressed to the Appellant at the latest correspondence address given on her behalf to the Inland Revenue Department ('IRD'). This was care of Company B ('the Hong Kong subsidiary'), a Hong Kong company with whom she had signed a contract of employment on 10 March 1994 (determination, Facts 2(a) and 4). A copy of the determination was also sent to her then tax representative ('the Representative').
- (c) On 27 June 2003 the Appellant's husband, being properly authorised by the Appellant to act on her behalf, attended the office of the assessor at the IRD and stated that the Appellant was dissatisfied with the determination. After exchanging views regarding the contractual relationship between the Appellant and her true employer, it became clear that the parties would have to agree to

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disagree. Towards the conclusion of the meeting, the assessor advised the Appellant's husband regarding the Appellant's right to appeal to the Board of Review against the determination. The Appellant's husband replied that he was going to leave Hong Kong within a few days and neither he nor his wife would return for the appeal procedures.

- (d) In a written notice dated 10 July 2003 addressed to the Clerk to the Board of Review, the Appellant indicated her intention to appeal against the determination. She prefaced this notice with the statement: 'Firstly I would like to apologies for late response to your determination in my case. As for your decision, I would like to commends as follows...' The notice was received by the Clerk to the Board of Review on 13 August 2003, and was delivered by hand to the Clerk on that date.
- (e) In response to a letter dated 13 August 2003 from the Clerk to the Board of Review, in a letter dated 21 August 2003 the Appellant explained her reasons for lodging a late appeal as follows:

'The account firm we have been working [with] to represent my case [the Representative] returned the letter to me and it caused a big delay until I sent it to you again.

Since I left HK in July 2002 I live in [Country C]. You are sending the letters to HK office of the company branch [namely, the Hong Kong subsidiary] and they send it to [Company D] [namely, the Company C parent] – it takes some time for the correspondence to get through.

In addition, please note my address in [Country C] so your letters can get faster to me [address of Country C parent company given].'

3. In arguing that we should admit this late appeal, Mr A observed that at the time the Commissioner issued the determination the Appellant was living in Country C. When considered together with the explanations set out at Fact 5 above, Mr A argued that the Appellant was 'prevented' from lodging a timely appeal within IRO section 66(1) and that we should exercise our discretion under section 66(1A) to admit it. In short, Mr A contended that the combination of physical absence from Hong Kong and the reasons set out at Fact 5 should lead us to conclude that, being a lay person, the Appellant had insufficient knowledge or opportunity to lodge a timely appeal since she must find someone to represent her.

4. Having considered all the facts before us, we feel that the Appellant got somewhat enmeshed in the statutory procedures for pursuing her claim for time basis assessment. She tried to do the right thing and she was not frivolous in her attitude towards compliance. Specifically, we find

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that initially she acted responsibly by appointing a tax agent and we agree with Mr A that, unlike some of the authorities referred to by Ms Ng (such as D57/99, IRBRD, vol 14, 506) the Appellant did not blatantly and persistently ignore her obligations to observe the time limit for appeals laid down by the statute.

5. Notwithstanding the above conclusion however, the fact remains that from *at least* 27 June 2003 (the day her husband met with the assessor: see Fact 3) the Appellant was aware of the determination and its contents. We infer that by this time she had received the determination. Thereafter, nothing happened for *at least* two more weeks until 10 July 2003, the date appearing on her notice of appeal (see Fact 4). From that date there is a further unexplained delay of over one month until 13 August 2003 when the notice was finally delivered by hand to the Clerk to the Board of Review. We find that from 27 June 2003 onwards, there is no evidence – apart from the mere (unexplained) date appearing on the notice – as to why the matter was not pursued expeditiously.

6. Mr A asked us to assume that the Appellant's husband somehow got a copy of the determination, but that there was no evidence to show that the Appellant actually received it in a timely fashion. Similarly, Mr A noted there was no evidence to show when all relevant documents were returned to the Appellant when the Representative determined not to act further in this matter. We would respond by noting that it is the Appellant's task to prove these matters if she wishes to rely upon them as a 'reasonable cause' for failure to lodge a timely appeal. No proof was put to us, and our inference on this matter is recorded above. Moreover, there is proof that another letter sent to the Appellant by the Clerk to the Board (using the same address as that appearing in the determination) was replied to, and received by the Clerk, within nine days (see Fact 5).

7. In the event, we are prepared to accept Mr A's argument that initially the Appellant did her best to comply with the statutory procedures. We agree also that the Appellant obviously encountered difficulty in securing the services of the Representative to continue representing her. But these matters fall far short of explaining the virtual black hole of more than six weeks from 27 June 2003 to 13 August 2003, the date when the notice of appeal was finally given to the Clerk to the Board of Review. In all these circumstances, we are not able to conclude in terms of section 66(1A) that the Appellant was 'prevented' from filing a timely notice of appeal (see further, D9/79, IRBRD, vol 1, 354; and D146/01, IRBRD, vol 17, 88 as well as the authorities quoted therein as to the meaning of 'prevented'). We therefore refuse to admit this late appeal.

8. In passing, we also note that we are aware of, and understand, the Appellant's grievance that certain assessments were issued after some delay and reversed the assessor's previous practice of allowing time basis assessment. The fact remains however that, as a matter of law, the assessor clearly had the requisite power to raise the additional assessments (see IRO section 60).

Substantive issue

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9. In light of the above, strictly it is not necessary for us to consider the substantive issue of Hong Kong versus offshore employment. Suffice to say that, on first reading, the facts before us look even less promising for the Appellant than those found in D146/01. If we were to follow the thrust of that decision, the appeal would, in any event, be dismissed. We are inclined to conclude that the appeal on the substantive issue is unmeritorious.

10. To be fair to the valiant efforts of Mr A on behalf of the Appellant, we record that he tried to convince us that (1) the Commissioner only focused upon the ‘intervening contracts’ with the Hong Kong subsidiary while ignoring the original contract with the Country C parent (but this argument ignores the fact that contracts of employment with the subsidiary were entered into, operated according to their terms, and should be given due effect unless they constituted a sham: compare D146/01), and (2) the overseas services were performed pursuant to the contract with the parent (but this argument ignores the fact that the Appellant was not remunerated by the parent for those services, other than it continued to pay the employer’s contribution for social security benefits in Country C; indeed, we note that the evidence is to the contrary – she was remunerated by the Hong Kong subsidiary, a company whose activities were, as Mr A stressed, not restricted simply to operating in Hong Kong for its own customers: see determination, Fact 2(b)).

Order

11. On the basis of our findings above, we refuse to admit the late appeal. It follows that, even if we were so inclined (and we are not), we cannot disturb the determination of the Commissioner.

12. It is left for us to thank both Mr A and Ms Ng for the clear and concise way in which they advanced their respective arguments.