

INLAND REVENUE BOARD OF REVIEW DECISIONS

IRA No. 6/98

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
INLAND REVENUE APPEAL NO. 6 OF 1998

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BETWEEN

CHAN MIN-CHING trading as  
CHAN SIU WAH HERBALIST CLINIC

Appellant

AND

COMMISSIONER OF INLAND REVENUE

Defendant

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Coram: The Honourable Madam Justice Yuen in Court

Date of Hearing: 22 January 1999

Date of Delivery of Judgment: 22 January 1999

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J U D G M E N T

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This is an appeal by way of case stated from the decision of the Board of Review of 20 January 1998 dismissing the Appellant Taxpayer's appeal against the assessments made by the Deputy Commissioner of Inland Revenue for additional taxes, which assessments were issued on 20 August 1996.

These assessments were made under s. 82A of the Inland Revenue Ordinance. Under s. 82B, the Taxpayer has 1 month within which to lodge an appeal to the Board of Review. The Taxpayer here did not return to Hong Kong until 26 September 1996 and lodged her Notice of Appeal on 6 October 1996, out of time.

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Before me today, there was a suggestion by the Taxpayer that the additional assessments may have been sent to the wrong address. But on checking the assessments in her possession and which she had in court today, she has acknowledged that the address stated on the assessments was correct and there is no evidence to support the suggestion that these assessments to additional tax might have been sent to the wrong address.

The Board of Review, having heard her appeal, has raised the following issues on case stated:

- Question (1) : Whether the Board of Review has power to extend the time for giving Notice of Appeal under s. 82B of the Inland Revenue Ordinance.
- Question (2) : If the answer to Question (1) is yes, whether the Board has erred in law in refusing an application for extension of time by the Taxpayer.
- Question (3) : Whether the Board's decision based on the reasons given for dismissing the appeal is bad in law.

On Question (1), it is, first, clear that the Board of Review is a creature of statute, so it has no inherent jurisdiction such as to extend time for appealing. Any powers that the Board of Review has must come from the statute, and so I look to the statute to see if there are any powers to extend time.

Looking first at s. 82A and s. 82B, I can see no powers in law to extend time. There is, however, a reference to sections 66(2) and 66(3), so I have looked at those subsections to see if they can be of any assistance to the Taxpayer.

It is true that s. 66(1A) gives power to the Board of Review to extend time for appealing. However, that is expressly confined to cases of a Notice of Appeal "in accordance with ss. (1)(a)" - i.e. appeals from assessments under s. 64. It does not apply to appeals from assessments under s. 82A.

Since s. 66(1A) only applies to assessments under s. 64, the reference in the following part of s. 66(1A) to "any assessment" must be read consistently with that, to mean only assessments under s. 64. The purpose of this part of s. 66(1A) is to apply this power of extension to appeals from assessments (under s. 64) where the Notice of Assessments are given after the date specified therein.

Further, it is to be noted that where an extension of time can be granted, that has been clearly stated in the Ordinance. Section 66(1) provides for the giving of a Notice of Appeal within:

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- “(a) 1 month after transmission to [the Commissioner] under s. 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 ss. (1A).”

There is no equivalent provision for s. 82B. Section 82B contains a clear reference to 1 month only. There is no allowance in the language for any extension. Such additional provision for an extension of time would have been easy enough for the legislature to add when they added s. 66(1A) and s. 66(1)(b) but that was not done for s. 82A or s. 82B.

I conclude from that, that on the true interpretation of the relevant provisions of this Ordinance, the intent of the legislature was that strict compliance with time was required for an appeal from an assessment to additional tax which is, of course, by way of a penalty on the Taxpayer. A similar decision had been reached by Mantell J. in 1985 in the case of Wong Wing Biu (t/a Tai Yip Glass Co.) v. the Commissioner of Inland Revenue [1985] 1 HKC 433.

In conclusion, I find the Board of Review has no power in law to extend time beyond the 1 month stipulated in s. 82B for an appeal from an assessment to additional tax. Therefore, the Board of Review was correct in law in relation to Question (1) and this appeal has to be dismissed.

For the sake of completeness and in case the Appellant decides to take the matter further, I would also set out my decision in relation to the other two questions on the case stated.

Question (2) was: If the Board had power in law to extend the time for giving Notice of Appeal, whether the Board had erred in law in refusing an application for extension of time by the Taxpayer.

If I am wrong and the Board of Review did in law have power to extend time, then I would say that the Board of Review had erred in refusing an extension in this case. I noted that the Board of Review itself had said at para. 16(a) that the Board had great sympathy for the Taxpayer and that she, the Taxpayer “rightly felt aggrieved”.

Now, if that was the Board of Review’s view, one would have expected it to exercise its discretion (if it had one) to extend time. After all, the Taxpayer had told the Inland Revenue Department that she would be out of Hong Kong and the Inland Revenue Department had never informed her when they would issue the assessments for additional tax. Further, she lodged her appeal within 10 days, a fairly short time of her return to Hong Kong.

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So if I am wrong on Question (1) and the Board of Review did in law have power to extend the time, I would have thought that the Board of Review, given its stated views and in the light of the above, should have exercised its discretion in her favour. It having given no reason why it did not, it would have erred in law in refusing her application.

Question (3) in the case stated was as follows: Whether the Board's decision based on the reasons given for dismissing the appeal is bad in law. These reasons are stated in para. 16(b)-(e) of the decision.

Section 82B(2)(c) provides that on an appeal against assessment to additional tax, it shall be open to the appellant to argue that (a) he is not liable to additional tax; (b) the amount of additional tax assessed on him exceeds the amount for which he is liable under s. 82A; (c) the amount of additional tax, although not in excess of that for which he is liable under s. 82A, is excessive having regard to the circumstances.

The reference to "having regard to the circumstances" gives a wide discretion to the Board of Review. In my view, the reason why the Taxpayer failed to keep accurate records (as referred to in para. 16(b) of the Decision) and her ability or lack of it to pay additional tax (as stated in para. 16(c) of the Decision) would appear to me to be matters which the Board of Review should have taken into account as part of the "relevant circumstances" as referred to in s. 82B(2)(c).

As for para. 16(d), the Board of Review expressed its decision thus: "Having reviewed other similar decisions by various other boards, the Board concluded that the Board in hearing an appeal under s. 82B did not have jurisdiction to re-open the decision of another board and make a different assessment." Of course, the Board of Review cannot re-open a previous assessment but what it can and should do is to examine the assessment for additional tax and to see if that is right. However, if what the Board of Review meant was that it must reject the Taxpayer's submissions that the determination of the former Board of Review was wrong and should be set aside, there having been no appeal from that determination, then the Board of Review was correct in law. However, I would express no view on this paragraph since this Court has not been provided with the previous decisions referred to by the Board of Review in arriving at its decision in para. 16(d).

As for para. 16(e) which reads:- "Having considered the long investigation undertaken by the Revenue and having made reference to similar cases in the past, the Board concluded that the penalty equivalent to 100% of the tax undercharged was not unreasonable and excessive," likewise, I would express no view on this since this Court has not been provided with the cases referred to there.

In conclusion, therefore, in relation to Question (3) of the case stated, my view is that in relation to para. 16(b) and (c), the failure on the part of the Board to consider those factors may have been bad in law.

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In conclusion on this appeal, however, given my decision on Question (1), this appeal must be dismissed.

(Maria Yuen)  
Judge of the Court of First Instance

Chan Min Ching, B394019(0) t/a the Company for Appellant in person.

Ho Chi Sum, SGC from Department of Justice for Defendant.