HCIA5/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO.5 OF 2004

BETWEEN

CHOW KWONG FAI, EDWARD Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

Before : Hon Tang J in Court
Date of Hearing : 15 November 2004
Date of Judgment : 1 December 2004

J U D G M E N T

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1. This appeal, by way of case stated, arose out of the assessment of certain share option benefit under salaries tax for the year of assessment 1996/97.

2. On 26 July 2002, the Commissioner of Inland Revenue ("the Commissioner") made his determination following the applicant's notice of objection on 12 October 1999. The

determination was transmitted to the applicant on 27 July 2002. Under section 66 of the Inland Revenue Ordinance, Cap.112 ("the Ordinance"), the applicant could within one month of the transmission of the determination give notice of appeal to the Inland Revenue Board of Review ("the Board"). No such notice was given within one month.

3. On 25 November 2002, the applicant lodged a notice of appeal which sought, *inter alia*, an extension of time under section 66(1A).

4. Section 66(1A) provides:

> "(1) 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."

5. On 11 February 2003, the application for extension of time was heard and dismissed by the Board.

6. On 28 March 2003, the Board gave its reasons.

7. The applicant applied for a case to be stated but was refused by the Board. The applicant then made an application for judicial review, as a result of which the Board was ordered to state the case. In his judgment, Hartmann J said that there were two questions of law:

> "…. First: 'Did the Board reach a decision which no reasonable decision-maker could reach?'. Second: 'Did the Board, in reaching its decision, fail to give due weight to the procedural unfairness (if found to be such) visited upon the applicant by a misrepresentation as to procedural requirements made to him by an officer of the Board?'"

(See Edward Chow Kwong Fai v. Inland Revenue Board of Review, HCAL No.47 of 2004.)

8. The questions in relation to which the Board eventually stated a case were:

> "(a) Whether or not the Board of Review has erred in law in refusing the application by the Taxpayer for extension of time to give notice of appeal under section 66(1A) of the Inland Revenue Ordinance against the Determination of the Acting Deputy Commissioner of Inland Revenue dated 26 July 2002 in respect of the Salaries Tax Assessment for the Year of Assessment 1996/97.

(b) Whether the Board erred in law in refusing the application having regard to the advice of Ms Pau as referred to in the transcript of evidence and quoted in paragraph 5 above.

(c) Whether the Board erred in law in refusing the application having regard to the alleged misunderstanding of the Appellant caused by the said advice of Ms Pau, namely, that the Board would not consider the application for extension of time for lodging the appeal unless the statement of facts and the statement of grounds of appeal had been lodged with the Board.

(d) Whether the Board' s decision was bad in law in view of the Appellant' s alleged misunderstanding that he needed to prepare a statement of facts for the purpose of section 66(1) and (1A) of the Inland Revenue Ordinance.

(e) Whether the Board' s decision was bad in law in that the Board failed to take into consideration or having taken into consideration failed to reach the correct conclusion, the evidence, which was unchallenged, as to the appellant' s alleged understanding that he must produce to the Board all supporting documents and detailed facts to be relied on by the appellant at the time when he lodged the notice of appeal, the statement of facts and the statement of grounds of appeal as required by section 66(1) and (1A) of the Inland Revenue Ordinance.

(f) Whether the Board' s decision was bad in law as being unreasonable in view of the fact that the Deputy Commissioner of Inland Revenue took more than two and half year from the lodgment of the notice of objection to issue the Determination."

9. The applicant no longer relied on (f).

10. Mr Ho Chi Ming who appeared for the applicant accepted that essentially there is one ground for consideration by me, namely, whether the applicant had been prevented by "other reasonable cause" from giving a notice of appeal. The reasonable cause relied on was the advice allegedly given by Miss Pau and relied on by the applicant. The burden was on the applicant to show that he satisfied the requirement of section 66(1A).

11. The applicant relied on two conversations which he said he had with one Miss Pau of the Board. This is what the applicant said as recorded in the transcript:

> "Mr Chairman, this sentence of the ordinance is one continuous sentence. I was reminded by Miss Pau of this office within the one month deadline that the statement of facts and the statement of grounds of appeal must be attached to the granting of the extension. Sir, I am mindful that, as the commissioner' s representative

mentioned, one only needs to give notice of appeal together with a copy of the commissioner's determination. Based on the wording of subsection 1A, I was not privy to take that short cut, if you like, that indeed the process could be split into two steps; first one gives notice for an extension within the one month with the statement of facts and statement of grounds of appeal plus whatever supporting documents to follow later. I was not advised of this route. Miss Pau of this office did warn me that when I did submit the appeal together with the reasons therefor and the statement of facts and the statement of grounds of appeal it would be up to the board to decide whether my explanation for the extension of time would be granted.

So, out of being ignorant on the one hand, having read section 1A on the other hand, and having taken advice from this office within the one month, I proceeded to prepare my statement of facts, statement of grounds, as well as to collect supporting documents, part of which now form the basis of this appeal. I wish to explain this to the board, that really what caused the delay was the preparation of the statement of facts and the preparation of the statement of ground, which form part of the continuous sentence under subsection 1A."

(Transcript pages 10-11.)

"MR CHOW: As I explained earlier on, Mr Lau, within the one month I did call this office, Miss Pau, to seek advice, to say that this is how I read subsection 1A. I did not have any illness, so it was pointless contemplating that. The preparation of the statement of facts and the statement of grounds would require evidence and a lot of thought to put them together. In other words, when the statement of facts and the statement of grounds are ready the appeal itself would be ready and there was no way that within the remaining one month that I would be able to prepare the statement of facts and the statement of grounds.

I appreciate, chairman and board members, that you are all volunteers and I did not labour on other points and give many, many other reasons. The fact also remains that 26 July is in the middle of the summer holidays. My family and I were not in Hong Kong, we were in England, and I did not return until some two weeks afterwards. I didn't want to make that as an explanation. Even then, a notice for extension together with a copy of the commissioner's determination, that would be easy enough, a one line letter requesting extension attaching a copy would be fine. But, to prepare the statement of facts and the statement of grounds is a totally different situation.

Mr Lau, I did take positive action within the one month with the office here. There was no other way and it was not suggested to me that I could give notice first, because it was explained to me by Miss Pau that the board would only sit when the

> statement of facts and the statement of grounds are ready, so you may as well do your own thing, take your own risk, and let the board decide when it sits to consider your lateness and also your appeal."

(Transcript pages 15-16.)

12. On the basis that this was indeed said by Miss Pau, the applicant had to satisfy the Board that it "prevented him from giving a notice of appeal within one month".

13. Mr Ho has put it in this way in his written submission:

> "4.2 The Appellant' s case is that he relied on a wrong advice of a staff of the clerk to the Board of Review. The advice was that the Board would not consider the application for extension unless the statement of facts and the statement of grounds of appeal have been submitted so that if he could not do that within the one month appeal period, he might as well take the risk and file his notice when he was able to do so. Then the Board would consider whether to allow late appeal. Relying on the advice, the Applicant failed to give the notice of appeal within the appeal period. Nor did he file an application for extension within that period. It would be unjust and/unfair for the Board not to grant extension in the circumstance. This constitutes ' reasonable cause' . Question of Law (b) to (e) all relate to this point.
>
> ….
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> 7.1 The advice of Ms Pau was wrong. There was no requirement in the IRO that the application of extension would not be considered without submitting the statement of facts and the statement of grounds of appeal first. Had Ms Pau gave the correct advice, the Appellant would not have waited until he had finished the statement of facts and statement of grounds of appeal before he lodged the notice of appeal. Alternatively, he would have submitted an application for extension of time for making the appeal within the 1 month. If he did so, and if the Board rejected his application for extension, he would still have time to lodge an appeal within the 1month period."

14. However, as I have said to Mr Ho during the hearing, I could find no evidence from the transcript that the applicant said that but for the advice he would have lodged the notice of appeal within one month. Mr Ho could not identify any such evidence either.

15. The passages which I have quoted above do not support the allegation that but for the advice the applicant would have lodged his notice of appeal within one month. What he said at page 16 of the transcript at line 6 was that:

> "…. Even then, a notice for extension together with a copy of the commissioner's determination, that would be easy enough, a one line letter requesting extension attaching a copy would be fine. …."

16. Mr Ho in his oral submission said that assuming that but for the wrongful advice the applicant would have submitted a one liner asking for an extension of time, then assuming that that was rejected by the Board and assuming that the applicant still had one or two weeks left, when he knew he must do it within that time he might then take professional advice to do whatever was necessary to submit a notice of appeal within one month.

17. But that was pure conjecture. There was no evidence when the telephone conversation with Miss Pau took place. I thought they did not take place until after the applicant return to Hong Kong some two weeks after 26 July. Mr Ho said that I should not assume that to be the case because the applicant might have called when he was in the UK. There was simply no evidence on the issue. On the evidence which I have quoted in paragraph 11 above, it seems to me that it was the applicant's case but for the advice he would have lodged "a notice for extension ….. a one line letter requesting extension attaching a copy would be fine".

18. On the evidence, it is quite clear that the applicant was not in a position to do more than a one liner by the time he had his conversation with Miss Pau. In any event, there was no evidence from the applicant to any other effect.

19. In the Board's reasons, the Board described the applicant's grounds as follows:

> "The Appellant's grounds of appeal can be summarized as follows:
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> 'The Commissioner took more than 2½ years to issue the Determination on the Appellant's objection to the original assessment. The Appellant thought that his objection had been allowed. As a result, he disposed of or otherwise misplaced many of the relevant documents needed for the Appeal.
>
> Due to 2 successive changes in the controlling shareholders, board, management, company name, nature and place of business of the Hwa Kay Thai Group which employed him, the Appellant could not gain access to relevant documents or obtain any assistance from personnel having knowledge of the case.

> Consequently, the Appellant had great difficulty in preparing his appeal within the period of one month as he could only rely on published annual reports and his former colleagues who were not easy to contact.' "

20. The Board made no reference to the conversation with Miss Pau. As Mr Simon Lee, Deputy Law Officer (Civil Law) who appeared for the Commissioner, put it, the conversation with Miss Pau was not mentioned by the applicant until his reply. Mr Lee said that might be why the Board did not feel it necessary to refer to the conversation expressly in its decision. He drew my attention to the fact that in the last paragraph of the Board's decision, it said:

> "We have carefully considered all the facts and matters put before us by the Appellant and by the Commissioner's representative and the previous decisions of the Board above referred to. In all of the circumstances, we are not satisfied that the Appellant has shown any ground upon which we can justifiably exercise our discretion to grant any extension of time to the Appellant. Accordingly, we dismiss appeal."

21. I think it would have been preferable if the Board had dealt with Miss Pau's conversation expressly.

22. But I do not believe that it mattered because, as I have said, there was no evidence from the applicant that he was prevented by the conversation with Miss Pau from lodging a notice of appeal.

23. Mr Ho referred me to Australian authorities where it appeared that extensions of time were more readily granted. But the Australian legislations are very different from section 66(1A). So I do not find those authorities to be of any direct relevance. It may be useful to refer to one of these authorities. *Case U175* [87 Australian Tax Cases 1007], a decision of the Administrative Appeals Tribunal on 15 September 1987, the senior member Mr P.M. Roach at 1007 had this to say:

> "11. However, until recent times, the principle that procedural rules should be made and administered to promote the just determination of disputes was not followed in the procedural rules set by statute for the determination of income tax disputes. It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have been considered to be such that disputes 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. Under the Tax Act the quantum of liability to pay is determined by the unilateral action of the Commissioner in issuing an assessment at a time chosen by the Commissioner (sec. 166 and 174). Upon the issue of the assessment the tax becomes due and payable on the date specified (sec. 204), which will ordinarily be 30 days after service (sec. 204),

but may be earlier (sec. 205). As soon as the tax becomes due and payable, it is a debt due to the Commonwealth (sec. 208) and may be sued for and recovered immediately (sec. 209). Without recourse to legal process, the Commissioner may recover the tax by collecting from third parties moneys owing to the taxpayer (sec. 218) and the fact that an appeal or reference is pending is not of itself sufficient reason to delay the payment of tax (sec. 201). The provisions of Div. 1A (Collection by Instalments of Tax on Companies); Div. 2 (Collection by Instalments of Tax on Persons other than Companies); Div. 3 (Provisional Tax); and Div. 3A (Collection of Tax in respect of certain instalments for Work) of Pt. VI (Collection and Recovery of Tax) are such that in many instances the Commissioner already holds the disputed tax at the time he issues the assessment.

12. One result of the operation of those provisions is that the process of tax litigation between the Commissioner (as creditor) and the taxpayer (as debtor) is quite unlike the ordinary civil process of the law. There is no time limit restricting the period in which the Commissioner may issue an original assessment (cf. sec. 170), although there are limits on his power to issue amended assessments (ibid.). On the other hand, until 1 July 1986 the taxpayer had only 60 days (as defined) within which to mount a challenge by lodging an objection to the assessment (sec. 185). The Commissioner might take as long as he pleased in the making of a decision on the objection (c.f. sec. 186), although he would be in breach of his statutory duty if he failed to determine an objection within ' a reasonable time' (*Re O'Reilly: Ex parte Australena Investments Pty. Ltd. & Ors* 83 ATC 4807). However, a taxpayer dissatisfied with the decision had only 60 days (as defined) within which to further protest the assessment by either requesting a review or instituting an appeal (sec. 187).

13. From 1915, when the Commonwealth first legislated to impose an income tax, until 30 June 1986, the procedural rules controlling tax litigation were abnormal by comparison with the rules for determination of other disputes. I refer not only to the shortness of the limitation period for objecting (60 days); to the shortness of the period within which to request reference for review or by way of appeal (60 days); and to the absence of any power to extend those periods under any circumstances whatsoever; but also to the absence of any power to permit a taxpayer to amend his grounds of objection so as to procure the determination of the substantive issue between the taxpayer and the community. Together those rules worked to deny to many taxpayers a fair adjudication on matters in dispute, and all too often resulted in the payment of more in tax than was payable under the substantive provisions of the Tax Act. (If the last day for objecting or for requesting review fell before 1 July 1986,

the old rules can still work injustice as the recent decision of this Tribunal (Decision No. 3156, January 1987) illustrates. In that case, assessments were upheld in one year because the evidence established that the claims were only allowable in another, later year. By then it was too late for the taxpayer to initiate an objection in relation to the later year and, three years having passed, it was beyond the Commissioner's power to amend in the exercise of his discretion pursuant to sec. 170(4).)

14. As of 1 July 1986, the harshness of those provisions has been eased in that, at the discretion of the court or Tribunal (as appropriate), a taxpayer is no longer necessarily bound to the grounds of his objection; and furthermore, provided that the last day for objecting or for requesting reference for review or upon appeal fell on or after 1 July 1986, the period within which objection may be made or the request for reference for review or upon appeal may be made may be extended.

The relevant sections provide as follows:

' 185(1) A taxpayer dissatisfied with any assessment under this Act may, within 60 days after service of the notice of assessment, lodge with the Commissioner an objection in writing against the assessment stating fully and in detail the grounds on which he relies:

…

186 The Commissioner shall consider the objection, and may either disallow it, or allow it either wholly or in part, and shall serve the taxpayer by post or otherwise with written notice of his decision.

187 A taxpayer who is dissatisfied with a decision under section 186 on an objection by the taxpayer may, within 60 days after service on the taxpayer of notice of the decision, lodge with the Commissioner, in writing, either—

(a) a request to refer the decision to the Tribunal; or

(b) a request to refer the decision to a specified Supreme Court.

188(1) Where the period for the lodgment by a taxpayer of an objection against an assessment has ended, the taxpayer may, notwithstanding that the period has ended, send the objection to the Commissioner together with

an application in writing requesting the Commissioner to treat the objection as having been duly lodged.

(2) Where the period for the lodgment by the taxpayer of a request under section 187 has ended, the taxpayer may, notwithstanding that the period has ended, send the request to the Commissioner together with an application in writing asking that the request be treated as having been duly lodged.

(3) An application under sub-section (1) or (2) shall state fully and in detail the circumstances concerning, and the reasons for, the failure by the taxpayer to lodge the objection or request as required by this Act.

188A(1) The Commissioner shall consider each application made under sub-section 188(1) and may grant or refuse the application.

(2) The Commissioner shall give to the taxpayer who made the application notice in writing of the decision on the application."

24. It will be seen from the passages quoted from that decision that the Australian legislations were very different from section 66(1). In Hong Kong, unlike Australia, the legislature has not seen fit to modify the rigour of the time limit in the lodging of tax appeals.

25. I return to the questions raised in the case stated.

26. I will deal with (b) first. The answer is "No".

27. For (c), the answer is "No" because the applicant could not show that he was prevented from filing his notice of appeal as a result of this misunderstanding.

28. For (d), the answer is also "No". As I have said, the result of the misunderstanding is that he did not lodge a one line application for an extension.

29. For (e), I do not believe this to be a relevant consideration because it was not the applicant's evidence that but for the misunderstanding he would have lodged a notice of appeal.

30. It follows that the answer to (a) is also "No."

31. For the above reasons, the appeal is dismissed.

32. I make an order *nisi* that the Commissioner is to have the costs of this appeal, to be taxed if not agreed. This order is to be made absolute unless within the next 14 days there is submission to the contrary.

(Robert Tang)
Judge of the Court of First Instance
High Court

Mr Simon Lee, Deputy Law Officer (Civil Law) and Mr Enzo Chow, GC of the Department of Justice, for the Respondent.

Mr Ho Chi Ming, instructed by Messrs Cheng, Chan & Co., for the Appellant.