

CACV 41/2017
[2021] HKCA 1049

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 41 OF 2017
(ON APPEAL FROM HCAL NO 166 OF 2016)**

IN THE MATTER of Order 53, Rule 3 of the
Rules of the High Court

and

IN THE MATTER of an application by
Excelter Investment Limited for leave to apply
for judicial review

BETWEEN

Excelter Investment Limited

Applicant

and

Inland Revenue Board of Review

Putative
Respondent

and

The Commissioner of Inland Revenue

1st Putative
Interested Party

Department of Justice

2nd Putative
Interested Party

Before: Hon Lam VP, Barma JA and Lisa Wong J in Court

Date of Hearing: 30 July 2019

Date of Judgment: 30 July 2019

Date of Reasons for Judgment: 22 July 2021

REASONS FOR JUDGMENT

Hon Barma JA (giving the Reasons for Judgment of the Court):

1. This was an appeal by Excelter Investment Limited (“the Applicant”) against the decision of Au J (as he then was) (“the Judge”) dated 7 February 2017 refusing to grant

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the Applicant leave to apply for judicial review of a decision of the Inland Revenue Board of Review dated 20 June 2016 (“the Board Decision”), by which the Board of Review determined that the Applicant’s intended appeal against a determination of the Deputy Commissioner of Inland Revenue dated 30 December 2014 (“the Determination”) was out of time, that no extension of time should be granted as the Applicant had not established any of the bases on which an extension of time could be granted by the Board of Review under section 66(1A) of the Inland Revenue Ordinance (Cap 112) (“the IRO”), and that the intended appeal should not be entertained.

2. In the proceedings below and on this appeal, the Board of Review was named as Putative Respondent, and the Commissioner of Inland Revenue (“CIR”) and the Department of Justice were named as 1st and 2nd Putative Interested Party respectively. Of the putative parties, only the CIR appeared and made submissions on this appeal.

3. At the conclusion of the hearing, we dismissed the appeal with costs (to be taxed on a party and party basis if not agreed) to the CIR, and indicated that we would hand down our reasons for doing so in due course. We now do so, with apologies for the delay.

4. The underlying dispute between the Applicant and the CIR related to certain Profits Tax assessments and additional Profits Tax assessments for eight years of assessment between 2001/02 and 2009/10. The dispute related to the proper treatment for Profits Tax purposes of gains made by the Applicant from the acquisition and subsequent disposal of three shop premises. The Assessor considered that the gains were income in nature and hence assessable to Profits Tax. The Applicant disagreed, contending that the gains were capital in nature and thus not taxable, and raised an objection to the assessments. By the Determination, the Deputy Commissioner rejected the Applicant’s objections and confirmed two of the assessments and revised the other six.

5. Dissatisfied with the Determination, the Applicant decided to appeal to the Board of Review.

6. The procedure and time limit for appealing to the Board of Review are set out in section 66 of the IRO. For present purposes, sections 66(1) and 66(1A) are relevant. These provide as follows:

“66. Right of appeal to the Board of Review

- (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 of Review may allow under subsection (1A),

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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.

(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)."

7. As the Determination was sent to the Applicant and its tax representatives, Messrs Sum, Arthur & Co, on 30 December 2014, a notice of appeal, accompanied by the grounds of appeal and other required documents specified in section 66 should have been given to the Board of Review by 30 January 2015. Instead of doing so, the Applicant sent a letter dated 23 January 2015 by hand to the Board of Review, which was received by the Board of Review on 27 January 2015. The letter stated that the Applicant had decided to appeal against the Determination, and purported to apply for an extension of time for the submission of grounds of appeal until 28 February 2015, on the ground that Mr Lai Wing To ("Mr Lai"), who was said to be the director and major shareholder of the Applicant would be out of Hong Kong from 25 January until 1 February 2015. Apart from containing no grounds of appeal, it appears that the letter did not enclose the Determination, reasons for it or statement of facts.

8. The Clerk to the Board of Review responded by letter dated 28 January 2015, drawing attention to sections 66(1) and (1A), emphasising the need for a notice of appeal to be accompanied by a statement of grounds of appeal and the Determination to be appealed from within one month from the Determination. The letter also stated that if an appeal was filed late, the Board of Review would, at the hearing, consider whether or not an extension of time should be granted. If an extension were granted, the Board of Review would go on to hear the appeal, either immediately or at a later date. The Applicant was urged to comply forthwith with the requirements of section 66(1), and was invited to contact a named person in the event of any enquiries. It was (or should have been) clear from this letter that the Board of Review did not regard the Applicant's letter of 23 January 2015 as a compliant and effective notice of appeal.

9. It was not until 2 April 2015 that the Board of Review received a letter of authorisation dated 17 March 2015 by which PricewaterhouseCoopers Ltd ("PwC") were appointed to be the Applicant's tax representatives. On 17 April 2015, PwC lodged a notice of appeal with a statement of grounds on behalf of the Applicant, accompanied by copies of the Determination, the reasons for it, and a statement of facts. The Board of Review wrote to PwC on 20 April 2015 to point out that Applicant's letter of 23 January 2015 was not accompanied by the grounds of appeal and other required documents, and that these were only received by the Board of Review on 17 April 2015, stating that the notice of appeal might be invalid if it were not accompanied by the required documents within the

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statutory one-month period. The letter indicated that three preliminary issues arose for determination: (1) whether the appeal was out of time; (2) if so, whether the Board of Review had jurisdiction to extend time pursuant to section 66(1A); and (3) if it did, whether the Board of Review should exercise its discretion to do so.

10. On 27 October 2015, in accordance with directions previously given, the Board of Review held a hearing to determine the three preliminary issues. At that hearing, the Applicant was represented by solicitors and counsel, and Mr Lai was in attendance. The Applicant had earlier filed affirmations by Mr Lai (“Mr Lai’s 1st Affirmation”) and his sister, Madam Lai Yuen Shan (“Madam Lai”) (also a director of the Applicant). The contents of these affirmations are set out at paragraphs 29 and 30 of the decision of the Board of Review. In essence, Mr Lai stated that as he had to leave Hong Kong on 25 January 2015, he made an application for an extension of time on behalf of the Applicant by the letter dated 23 January 2015, and that he considered that his absence from Hong Kong from 25 January meant that the provisions of section 66(1A) were satisfied. He also stated that Madam Lai was out of Hong Kong for long periods, and that he believed he had acted diligently in giving the notice of appeal when, and in the form that, he did. Madam Lai stated in her affirmation that although she was a director of the Applicant, she left its business in the hands of Mr Lai, and was herself away from Hong Kong from 6 February 2015 until 9 April 2015.

11. At the hearing, the Board of Review invited Mr Lai, who was present, to give evidence before it to assist it in determining the preliminary issues, but Mr Lai declined to do so.

12. The Board of Review considered the evidence, and the submissions of counsel for the Applicant and the Commissioner’s representative, and concluded by the Board Decision that the appeal was out of time as no compliant notice of appeal had been served within the one-month period stipulated in section 66(1) of the IRO, that the Applicant had failed to establish that it had been prevented from filing the notice of appeal within time by any of the grounds stated in section 66(1A) and that, accordingly, the Board of Review had no discretion to extend time and would not entertain the notice of appeal.

13. The Applicant then sought to apply for leave to judicially review the Board Decision. In its Form 86 dated 19 September 2016, the Applicant put forward three grounds for judicial review, namely:

- (1) the Board Decision was unlawful and/or irrational because the Board of Review had failed to have regard to the provisions of section 66(1A) of the IRO;
- (2) the Board of Review had erred in law by failing to apply the principles set out in *AW v Director of Immigration* (CACV 63/2015) and *Secretary for Justice v Hong Kong and Yaumati Ferry Co Ltd* (CACV 819/2000) by failing to have regard to the length of the delay, the explanation for the delay, the merits of the intended appeal, the prejudice (if any) that

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would have been suffered by the CIR, and the existence of questions of general public importance; and

- (3) the refusal to entertain the Applicant's appeal deprived it of its right to appeal and was a breach of natural justice.

14. The application for leave to bring judicial review proceedings was supported by the second affirmation of Mr Lai ("Mr Lai's 2nd Affirmation"), also dated 19 September 2016. In it, Mr Lai sought to place the responsibility for the delay in lodging grounds of appeal, and the other documents required to be lodged with the notice of appeal, on the Applicant's tax representatives. He said that the Applicant's original tax representatives, whom he approached after receiving the Determination, had declined to assist the Applicant in the preparation of its appeal, and that after sending the letter of 23 January 2015, it was not until the latter part of February 2015 that he was introduced to PwC, who eventually agreed in March 2015, to draft and lodge grounds of appeal on behalf of the Applicant, lodging such grounds (along with the other required documents) with the Board of Review on 17 April 2015.

15. It will be noted that none of these matters were mentioned in Mr Lai's 1st Affirmation, and were not raised before the Board of Review.

16. As the Applicant did not request an oral hearing of its application for leave to bring judicial review proceedings, the Judge dealt with the application on paper. In the CALL-1 Form dated 7 February 2017 (amended, in respect of the address of the Board of Review, the next day), the Judge refused leave to apply for judicial review, observing that the proposed grounds were entirely without merits. In relation to the first ground, he pointed out that the Board of Review had carefully considered the arguments raised under section 66(1A) and that there was nothing *Wednesbury* unreasonable about its decision. In relation to the second ground, he held that the authorities cited were of no assistance to the Applicant, as they did not apply to an application for an extension of time for appealing to the Board of Review, whose power to extend time was governed exclusively by section 66(1A), which provided an exhaustive list of the circumstances in which an extension of time could be granted. Finally, in relation to the third ground, he held that as the IRO provided exhaustively for the procedures and time limit for an appeal to the Board of Review, and the Applicant had failed to comply with them, there was no question of any breach of natural justice.

17. In its Notice of Appeal dated 14 February 2017, the Applicant put forward five grounds of appeal, which can be summarised as follows:

- (1) Ground 1: The Judge erred in holding that the Board of Review had properly applied section 66(1A), as it had failed to take account of the Applicant's grounds of appeal, and the reasons for delay explained in Mr Lai's 2nd Affirmation. Had it done so, it should have found that there was reasonable cause to grant an extension of time.

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- (2) Ground 2: The Judge erred in failing to conclude that the Board of Review should have applied the approach in *AW* and *Hong Kong and Yaumati Ferry* to the question of granting an extension of time for appealing. Had the Board of Review done so, it should have granted an extension of time having regard to the merits of the Applicant's appeal and its explanation for delay contained in Mr Lai's 2nd Affirmation.
- (3) Ground 3: The Judge should have had regard to the merits of the intended appeal (set out at length in the particulars under this ground) and the explanation for delay in Mr Lai's 2nd Affirmation, and held that the Applicant had a reasonable prospect of success in its intended appeal against the Determination, so that the Board Decision not to entertain the appeal should be quashed.
- (4) Ground 4: The Judge should have held that the Board of Review had failed sufficiently to take account of the Applicant's grounds of appeal and explanation for delay in MrLai's 2nd Affirmation, rendering the Board Decision unlawful, in breach of its statutory duty, irrational and in breach of natural justice.
- (5) Ground 5: In consequence of Grounds 1 to 4, the Judge's Order was not one which an appellate tribunal acting judicially could have made.

18. Leaving aside Ground 5, which does not add anything of substance and suffers from the fundamental misconception that the court acts in an appellate capacity in judicial review application, it is clear from Grounds 1 to 4 that the Applicant's appeal is predicated on the following contentions (which it says that the Judge should have accepted and applied):

- (1) The Board of Review should have applied the principles stated in *AW* and *Hong Kong & Yaumati Ferry* to the question of whether or not to grant the Applicant an extension of time to appeal against the Determination.
- (2) In applying those principles, it should have had regard to the merits of the Applicant's proposed appeal, by reference to the grounds of appeal that had been lodged (this is presumably a reference to the grounds of appeal lodged by PwC on 17 April 2015).
- (3) In applying those principles, it should further have had regard to the explanation for the delay provided in Mr Lai's 2nd Affirmation of 19 September 2016, and concluded that reasonable cause had been shown for an extension of time.

19. At the hearing before us, Mr C T Lee (whose name appears on the Notice of Appeal), appearing for the Applicant made submissions along the lines summarised in the previous paragraphs. He also made one further point, in support of his argument that the judge should have held that the Board of Review should have had regard to the grounds of

appeal that the Applicant wished to raise before the Board in considering whether or not an extension should be granted – this was a suggestion that in tax appeals there was an initial burden on the CIR to show that the receipts in question fall within the sphere of taxation and are properly exigible to tax. It followed from this, Mr Lee submitted, that it was necessary for regard to be had to the Applicant’s intended grounds of appeal, which called into question the nature of the receipts, contending that they were capital and not income in nature. In support of this proposition, Mr Lee relied on *Wing Tai Development Co Ltd v Commissioner of Inland Revenue* (unreported, 13 December 1979, Civ App No. 36 of 1979), per Roberts CJ at page 4 of the judgment).

20. None of these submissions have any merit.

21. Before dealing with them, we think it necessary to reiterate certain propositions, which should by now be familiar, relating to the role of the court in judicial review proceedings, and of this court in an appeal in such proceedings. These propositions were first stated in *Nupur Mst v Director of Immigration* [2018] HKCA 524. Although the context (an immigration judicial review appeal by a non-refoulement claimant) is very different from the present case, the propositions stated are of general application, and must be borne in mind. As Lam VP stated at [14] in that case:

- (1) Judicial review is not a further avenue of appeal from the decision under review. Before the court can interfere, it is essential to demonstrate some public law error on the part of the primary decision maker – either procedural unfairness, irrationality or error of law.
- (2) On an appeal to the Court of Appeal, the court’s focus will be on the decision of the judge below. The appellant must identify some error on the part of the judge that justifies intervention by the Court of Appeal in his refusal to grant leave to bring judicial review proceedings.
- (3) Such errors must be identified in the Notice of Appeal, as the Court of Appeal will only have regard to the errors by the judge there identified, and will not examine the primary decision maker’s decision afresh, as if the appeal were simply a re-run of the application for leave in the court below.

22. In relation to the suggestion that the Judge should have found that the Board of Review erred in failing to adopt the approach to extensions of time set out in the *AW* and *Hong Kong and Yaumati Ferry* cases, this contention is unarguable. Those cases relate to the principles to which a court should have regard in considering whether or not an extension of time should be granted for an application for judicial review, and have no application to extensions of time under the statutory framework laid down for appeals to the Board of Review. As a tribunal established by the IRO, the jurisdiction and powers of the Board of Review are to be found entirely within the confines of that legislation, see eg *Wong Wing Biu v Commissioner of Inland Revenue* [1985] 1 HKC 433, where Mantell J held that as a creature of the IRO, the Board of Review had no power to enlarge time other than as provided for in the IRO. It follows that the only power of the Board of Review to extend

time for bringing an appeal is that found in section 66(1A), and it can only grant an extension of time if the appellant taxpayer can bring itself within the purview of section 66(1A), and the Board and the Judge did not err in this respect.

23. As to the suggestion that applying the *AW* and *Hong Kong and Yaumati Ferry* principles, regard should have been had to the grounds of appeal put forward by the applicant, this contention too must be rejected. As noted above, the only source of the Board of Review's power to extend time is section 66(1A) of the IRO, to which these authorities do not apply. That provision permits the Board of Review to extend time only where it is satisfied that the appellant taxpayer has been prevented from giving notice of appeal within one month from the transmission of the Determination to it by illness, absence from Hong Kong or other reasonable cause. The focus is on the reasons why the appellant taxpayer was prevented from filing a compliant notice of appeal on time. Absent a qualifying reason (appellant's illness, appellant's absence from Hong Kong, or some other reasonable cause) which prevented the filing of such notice, the Board of Review has no power to extend time. The grounds of the taxpayer's appeal, and its merits are not matters that relate to the reasons for his being prevented from filing a timely notice, and as such are not a relevant matter for consideration.

24. As to the complaint that regard should have been had to the explanation for the delay mentioned in Mr Lai's 2nd Affirmation, this is plainly a bad point. As Mr Lee acknowledged, this explanation was not put forward until that affirmation was filed in support of the judicial review application on 19 September 2016. This was nearly 11 months after the hearing before the Board of Review, and just over 3 months after the Board Decision. As is apparent from the evidence before the Board of Review, none of the matters mentioned in Mr Lai's 2nd Affirmation relating to the alleged delay on the part of the Applicant's tax advisors as the cause of the failure to lodge a properly compliant notice of appeal on time were mentioned to the Board of Review. That being so, it is not open to the Applicant to rely on this material in the judicial review proceedings, as there can be no criticism of the Board of Review for failing to have regard to matters which were not raised before it. Like the Judge, we are entirely satisfied that the Board of Review was entitled to come to the decision that it did on the basis of the material put forward before the Board.

25. As to the additional point raised by Mr Lee, this takes matters no further. *Wing Tai* was concerned with the position in a tax appeal. Here, the Board of Review was concerned with the preliminary question of whether the proposed tax appeal should be entertained at all. In that enquiry, the only burden was on the Applicant to demonstrate that it had been prevented from lodging a properly compliant notice of appeal in time by one or more of the matters mentioned in section 66(1A). In the light of the Board Decision not to entertain the appeal, as the Applicant had not done this, there was no appeal in existence, in which the initial burden on the CIR could come into play.

26. For these reasons, none of Grounds 1 to 4 in the Applicant's Notice of Appeal have merit. As to Ground 5, it necessarily fails in the light of the failure of Grounds 1 to 4, on which it is premised. Moreover, Ground 5 clearly misapprehends the nature of the Court's role in judicial review proceedings. As made clear in *Nupur Mst*, when seised of an application for leave to bring judicial review proceedings, the court is not hearing an appeal

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from the primary decision maker – its role is far more restricted, and limited to that of review in the event that some public law error can be identified.

27. For all of the foregoing reasons, this appeal was dismissed with costs to the CIR.

(M H Lam)
Vice-President

(Aarif Barma)
Justice of Appeal

(Lisa Wong)
Judge of the Court of First
Instance

Mr C T Lee, instructed by Jal N Karbhari & Co, for the applicant
Ms Katherine Chan, Government Counsel of the Department of Justice, for the 1st & 2nd
putative interested parties
The putative respondent, attendance excused