

Case No. D10/21

Salaries tax – appeal against determination – appellant lodging appeal more than 3 years out of time – whether prevented by illness – whether other reasonable grounds for extension of time – sections 64(4) and 66 of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Chui Pak Ming Norman (chairman), Kwan Wai Yi Janet and Seto Sing Tak.

Date of hearing: 26 August 2021.

Date of decision: 27 September 2021.

The Appellant objected to the Salaries Tax Assessment raised on him that a sum received from his employer was not taxable. On 30 October 2017, the Deputy Commissioner rejected the Appellant's objection and confirmed the Salaries Tax Assessment ('Determination'). The Determination was delivered to the Appellant on 11 November 2017. In the covering letter the Appellant was advised of his right to appeal, with the procedure and time limit of lodging an appeal set out in details.

On 7 May 2021, the Appellant lodged an appeal to the Board of Review ('Board') against the Determination by way of an e-mail enclosing the notice of appeal ('NOA'). By another e-mail sent to the Board on 10 May 2021, the Appellant explained that the delay in lodging the appeal was due to his medical conditions including bilateral knee pain, hypertension, high blood sugar, hyperlipidemia, early atherosclerotic coronary and sudden onset of Right cubital tunnel syndrome which he received an operation 8 December 2017 ('Operation').

At the hearing, the Appellant confirmed that he would neither give evidence nor call any witness. The Appellant did not dispute that he was in Hong Kong between 30 October 2017 and 11 December 2017, but claimed that his case was similar to Honorable Leung Ka-lau v The Commissioner of Inland Revenue [2021] HKCFI 1177 ('Leung's Case') which was favourable to him. Movement records also showed that: (a) the Appellant was in Hong Kong during 30 October 2017 and 5 March 2018; (b) the Appellant left Hong Kong on 5 March 2018 and returned to Hong Kong on 8 March 2018.

Held:

1. The appeal was *prima facie* invalid as the NOA was given outside the 1-month period stipulated under section 66(1) of IRO. The grounds relied on by the Appellant for extension of time fell only on: (a) his illness; or (b) other reasonable grounds.

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2. The Appellant chose not to give evidence at the hearing and the Board could not know whether the Operation would prevent him from filing the NOA. However, even assuming that the Appellant was prevented by the Operation from filing the NOA on or before 11 December 2017, it was clear that the Appellant was not prevented from filing the NOA within the 1-month period from the end of February 2018: (a) there should be a point of time that the Appellant was no longer affected by the Operation and could file the NOA; (b) the Appellant was able to travel in March 2018; (c) the Appellant acknowledged during the hearing that he was not prevented from filing the NOA in March 2018, but that he forgot to do so until the release of the judgement on the Leung's Case on 27 April 2021.
3. It was unknown whether the Leung's Case would assist the Appellant in its appeal proper. Even assuming that the decision might assist the Appellant: (a) that case was not finalized as an appeal was underway; (b) it remained the Appellant's duty to show any exceptional circumstances to justify an extension of time, which the Appellant failed to do (Chau Cheuk Yiu v Poon Kit Sang (2012) 15 HKCFAR 460 and Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA 1049 considered).

Appeal dismissed.

Cases referred to:

Honorable Leung Ka-lau v The Commissioner of Inland Revenue HKCFI 1177
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
HKSAR v Hung Chan Wa & Another (2006) 9 HKCFAR 614
Chau Cheuk Yiu v Poon Kit Sang (2012) 15 HKCFAR 460
Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA
1049
D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5, 537
D19/01, IRBRD, vol 16, 183
D13/11, (2011-12) IRBRD, vol 26, 232
D31/12, (2012-13) IRBRD, vol 27, 667
D36/12, (2012-13) IRBRD, vol 27, 791

Appellant in person.

Ching Wa Kong, Fung Chi Keung and Yau Yuen Chun, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant objected to the Salaries Tax Assessment for the year of assessment 2012/13 raised on him on the ground that a sum received from his employer in relation to settlement of his claim on lost rest days and holidays was not taxable.
2. By the determination dated 30 October 2017 ('Determination'), the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') rejected the Appellant's objection and confirmed the Salaries Tax Assessment for the assessment year 2012/13 under Charge Number X-XXXXXXXX-XX-X, dated 24 July 2013, showing Net Chargeable Income of HK\$2,517,827.00 with Tax Payable thereon of HK\$406,030.00.
3. The Appellant was not satisfied with the Determination and lodged this appeal against the Determination to the Board of Review ('Board') pursuant to the provisions of section 66 of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance') on 7 May 2021.

Contention of the Validity of the Appeal

4. Section 66(1) of the Ordinance provides *inter alia* that '*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...*'
5. Section 66(1A) of the Ordinance provides *inter alia* that '*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 such period as it thinks fit the time within which notice of appeal may be given under subsection (1).*'
6. From the date of the Determination and the date upon which the notice of appeal was filed with the Board, it appears that the appeal is *prima facie* invalid as the notice of appeal was given outside the 1-month statutory period stipulated under section 66(1) of the Ordinance.
7. By the letter dated 28 May 2021 to the Board, the Respondent indicated that it intended to contest the validity of the appeal.

The Preliminary Issue for the Board

8. The preliminary issue for this appeal is, therefore, whether the Appellants' late appeal could and should be entertained. This depends on whether the statutory period for lodging an appeal against the Determination should be extended. If the Board decides that the statutory period for lodging an appeal against the Determination in favor of the Appellant, the Board will proceed with the appeal further. If at the end of the day the Board decides that no extension is granted for lodging an appeal in favor of the Appellant, it will be the end of the case.

The Hearing

9. At the hearing, the Appellant confirmed that he had no witness to call. The Appellant also confirmed that he would not give evidence under oath. He had no further documents or other evidence to submit but relied on the documents in the hearing bundles.

Facts of the Case

10. On the documents in the hearing bundles, we find the following facts relevant to the preliminary issue of the case:

- (a) The Determination was sent under cover of a letter dated 30 October 2017 from the Deputy Commissioner to the Appellant by registered post. According to Hongkong Post, the Determination was delivered to the Appellant on 11 November 2017. In the said letter the Appellant was advised of his right to appeal against the Determination under section 66 of the Ordinance.
- (b) The said letter set out in details the procedure and time limit of lodging an appeal to the Board. A full text of section 66 of the Ordinance was annexed with the letter.

11. By a notice dated 7 May 2021 sent by way of an e-mail on 7 May 2021, the Appellant sent its notice of appeal to the Board.

12. By an e-mail sent to the Board on 10 May 2021, the Appellant explained that the delay in lodging the appeal was due to the following reasons:

- (i) Suffering from bilateral knee pain due to severe degenerative osteoarthritis of both knees and surgery of both knees done before 2017, now regular follow up at Hospital A Orthopaedics Department.
- (ii) Suffering from medical problems of hypertension, high blood sugar, hyperlipidemia and early atherosclerotic coronary, and regular follow up at Hospital B Medical Department.

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- (iii) Suffering from sudden onset of Right cubital tunnel syndrome, surgery done by Hospital B Orthopaedics Department on 8 December 2017. Please refer to the attached medication record.

13. The movement record of the Appellant issued by the Immigration Department ('Movement Record') showed that the Appellant was in Hong Kong, *inter alia*, for the period from 30 October 2017 to 5 March 2018. The Appellant left Hong Kong on 5 March 2018 and returned to Hong Kong on 8 March 2018.

14. The Hospital B's Operation Record shows that the Appellant had an operation on 8 December 2017 commencing at 8:59 hour and ending at 10:10 hour. The duration of the operation was 1 hour 11 minutes.

15. By its letter dated 28 May 2021 to the Board, the Respondent indicated that it intended to contest the validity of the appeal.

16. As shown in the Appellant's Tax Return – Individual filed for the years of assessment of 2017/18, 2018/19, 2019/20 and 2020/21 with the Respondent, the Appellant was in full time employment for the aforesaid financial years.

Appellant's Submission

17. The Appellant did not dispute the contents of the Movement Record and the fact that he was in Hong Kong for the period from 30 October 2017 to 11 December 2017. The Appellant submitted that he did not file the notice of appeal within the statutory period because of his sickness. He relied on the operation he had on 8 December 2017 at Hospital B to support his application for an extension of time to file the notice of appeal.

18. Further he relied on the favorable judgment rendered by the Court of First Instance on the case of Honorable Leung Ka-lau v The Commissioner of Inland Revenue handed down on 27 April 2021. The Appellant claimed that his case was the same as Leung Ka-lau's case.

19. The Appellant did not submit any authority to support his application.

The Respondent's Submission

20. On this preliminary issue, the Respondent submitted that the Appellant's failure to file its appeal in time was not prevented by absence from Hong Kong, illness or other reasonable cause. It follows that no extension of time should be granted to the Appellant.

21. The Respondent, submitted, referred to and relied upon the following court cases and the Board's decisions:

- (a) Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687

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- (b) HKSAR v Hung Chan Wa & Another (2006) 9 HKCFAR 614
- (c) Chau Cheuk Yiu v Poon Kit Sang (2012) 15 HKCFAR 460
- (d) Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA 1049
- (e) D9/79, IRBRD, vol 1, 354
- (f) D3/91, IRBRD, vol 5, 537
- (g) D19/01, IRBRD, vol 16, 183
- (h) D13/11, (2011-12) IRBRD, vol 26, 232
- (i) D31/12, (2012-13) IRBRD, vol 27, 667
- (j) D36/12, (2012-13) IRBRD, vol 27, 791

Analysis and Discussion

22. It is common ground that the Appellant was in Hong Kong during the statutory period within which to file the notice of appeal. It follows that the grounds relied on by the Appellant in his application for extension of time fall only on (a) the ground of his illness; or (b) other reasonable grounds under section 66(1A) of the Ordinance. The ground of ‘not in Hong Kong’ is not available to the Appellant.

23. The Determination was delivered to the Appellant on 11 November 2017. It follows that the 1-month statutory period to file a notice of appeal ended on 11 December 2017. It is not disputed that the Appellant had an operation on 8 December 2017 (which was within the statutory period to file a notice of appeal).

24. The Appellant chose not to give evidence at the hearing. The Board could not know whether such operation would prevent him from filing a notice of appeal. For the purpose of discussion, the Board assumes that due to the operation the Appellant was prevented from filing a notice of appeal on or before 11 December 2017.

25. However, there should be a point of time that the Appellant was no longer affected by the operation and could file a notice of appeal thereafter if he wished to do so. We note from the Movement Record that the Appellant was able to travel in March 2018. For the purpose of discussion and to give the Appellant the benefit of doubt, we assumed that due to the operation the Appellant might be prevented from filing a notice of appeal until the end of February 2018.

26. As said, the Appellant was able to travel in March 2018. As shown in the Movement Record, the Appellant left Hong Kong on 5 March 2018 and returned on 8 March

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2018. He left Hong Kong again on 18 March 2018 and returned to Hong Kong on the same day.

27. In the course of the Appellant's submission, the Appellant was asked by the Board if it is fair to say that he was not prevented from filing a notice of appeal in March 2018, the Appellant replied in the positive. When asked the reason why he did not file a notice of appeal once he was not prevented, he said he forgot to do so until the release of the judgement on the case of Honorable Leung Ka-lau v The Commissioner of Inland Revenue handed down on 27 April 2021.

28. By reason of the Appellant's traveling activities taken in March 2018 and by reason of the Appellant's admission, it is clear to the Board that the Appellant was not prevented from filing and failed to file a notice of appeal within 1-month period from the end of February 2018. As confirmed by the Appellant, he failed to file a notice of appeal from by 31 March 2018. The Appellant only filed a notice of appeal about 3 years and two months thereafter.

29. The Board does not consider that forgetfulness on the Appellant's part in filing a notice of appeal within the statutory period is a reasonable cause for the Board to exercise its discretion under section 66(1A) of the Ordinance to extend the filing period for the Appellant.

30. We do not know whether the decision of Leung Ka Lau's case would assist the Appellant in its appeal proper (if there were a valid appeal proceeding in the Board). The Board for the time being is to consider the Appellant's application for an extension of time to file a notice of appeal and is not to consider the merit of the appeal proper.

31. For discussion purpose, even if we assume that the decision of Leung Ka Lau's case may assist the Appellant's appeal proper, the case is not yet finalized. As submitted by the Respondent, the Respondent has filed a notice of appeal to the Court of Appeal against the decision of the Court of First Instance. The appeal case is assigned the case number of CACV 278/2021.

32. In paragraph 55 of its decision in Chau Cheuk Yiu v Poon Kit Sang, the Court of Final Appeal said:

'It is acknowledged that in the majority of cases, this principle¹ may create a sense of grievance for the parties concerned. However, the finality principle is considered as of such critical importance to the overall administration of the justice system that this factor outweighs other factor save in exceptional circumstances in which case extension should be granted. Where such exceptional circumstances exist, one would expect that they would be plain and obvious and readily identifiable.'

¹ Referred to as 'there was a previous misunderstanding of the applicable law'

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33. In its decision in Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA 1049, Barma JA said in paragraph 23:

‘.... 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 merit 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 (our emphasis).’

34. By reason of the aforesaid, even if Leung Ka Lau’s case could, on current status, assist the Appellant, it is not finally decided. The Board should not take this case into consideration. Even if it were finally decided in favor of the Appellant, for finality principle, it remains the Appellant’s duty to show any exceptional circumstances to justify the Board to give an extension of time to him. In this connection, we agree with the Respondent’s submission that the Appellant did not show the existence of any exceptional circumstances.

35. Having said the above, it follows that there is only one option for the Board to make in the Appellant’s application for extension of time. The Board refuses to exercise its discretion under section 66(1A) of the Ordinance in favor of the Appellant to extend the time for the Appellant to file his notice of appeal under section 66(1) of the Ordinance.