

**Case No. D14/22**

**Appeal** – appeal out of time – application to extend time limit for filing notice of appeal – whether applicant was prevented by absence from Hong Kong or other reasonable cause from giving notice of appeal within time limit – sections 2, 51, 58, 64, 66 and 80 of Inland Revenue Ordinance (Cap.112) (**‘IRO’**)

Panel: Wu Pui Ching (chairman), Chan Kwok Tung and Melwani Vishal Prakash.

Date of hearing: 25 May 2022.

Date of decision: 2 September 2022.

The applicant was a company incorporated in Hong Kong. According to the applicant, during the years of assessment 2006/07 to 2012/13 (**‘Relevant Period’**), it did not have any substantive business, employees or physical office facilities in Hong Kong, but operated through a representative office in a city outside Hong Kong. The director of the applicant was one Mr C, who was not resident or ordinarily resident in Hong Kong. In 2014, the applicant closed the representative office. After that, the applicant did not conduct any commercial operations or employ any staff, whether in Hong Kong or elsewhere.

Regarding the Relevant Period, the applicant took the position in its tax returns that it was not taxable in Hong Kong, and further alleged that the Commissioner of Inland Revenue (**‘Commissioner’**) had acquiesced such position until the first assessment to profits tax for the year 2006/07 was issued on 26 March 2013. The Commissioner subsequently issued 6 other assessments to profits tax in respect of the Relevant Period, which were objected to by the applicant on the ground that they were excessive. On 26 November 2020, the Commissioner made a determination in respect of the Profits Tax Assessments for the Relevant Period (**‘Determination’**), which was delivered by registered post to the applicant’s registered address (**‘Address B’**) on 30 November 2020 (**‘Time Issue’**). On 29 July 2021, the applicant filed a notice of appeal against the Determination, about 6 months after the statutory deadline for filing notice of appeal had lapsed.

The applicant applied for extension of time to file its notice of appeal. According to the applicant, Address B was the address of another company (**‘Company F’**) which shared the office premises with the applicant’s auditors, which then had an affiliated firm assisting the applicant in corresponding with the Commissioner, with Mr C being the primary point of contact. The applicant complained that: (a) the Commissioner did not transmit the Determination to Mr C (who was absent from Hong Kong) or bring it to his attention; (b) Company F had misdirected the Determination to another person (**‘Ms F’**) who failed to bring it to Mr C’s attention. As a result, the applicant only found out the Determination being issued upon enquiries being made by its solicitors on 27 July 2021.

**Held:**

1. As a statutory body, the Board had no power to enlarge time other than as provided for in section 66(1A) of IRO, under which an extension of time could only be granted if the Board was satisfied that the appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving a notice of appeal within the time period. Furthermore, even if the above criteria were satisfied, the Board still retained a residual discretion as to whether or not to grant the extension. (Excelter Investment Ltd v Inland Revenue Board of Review & Others [2021] HKCA 1049, Wong Wing Biu v Commissioner of Inland Revenue [1985] 1 HKC 433 and Re Wan Wah Shing [2005] 4 HKLRD 674 considered)
2. Adopting a purposive interpretation and balancing the different statutory aims and objectives, the Board was not satisfied that, for the reasons put forth by the applicant, it should be able to rely on Mr C's absence from Hong Kong to seek extension of time. In any event, the applicant failed to show that Mr C's absence from Hong Kong had prevented the applicant from giving the notice of appeal within statutory time limit. (HKSAR v Cheung Kwun Yin (2009) 12 HKCFAR 568, Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 911 & (2014) 17 HKCFAR 218, Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 and Koo Ming Kown & Another v The Commissioner of Inland Revenue [2022] HKCFA 18 considered)
3. Further, the Board was unable to accept that the misdirection by Company F of the Determination and the subsequent failure by Ms J to bring the Determination to the attention of Mr C would singly or jointly constitute a 'reasonable cause', since any unilateral mistakes of an appellant could not be properly described as a reasonable cause preventing him from giving the notice of appeal within time. The provision should contemplate 'some temporary impediment of an external and physical nature', rather than 'something internal and psychological'. It was also accepted by the applicant that the specified reasonable causes described a class of causes that arose from contingencies 'beyond the immediate control of the taxpayer' and were 'not directly due to his negligence, inadvertence, or carelessness'. The acts and omissions of Company F and Ms J should also not be imputed onto the applicant, or that the applicant should not be faulted for not having a more substantive presence of agents and/or professional advisors in Hong Kong, as there were obviously steps or measures which could have been undertaken by the applicant to procure the Determination to be properly and timely brought to his attention. (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 and Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218 considered)
4. In any event, the applicant was not 'prevented' from giving the notice of

appeal within the statutory time limit. The word ‘prevented’ used in section 66(1A) of IRO should be best understood to bear the meaning of the term ‘unable to’, which imposed a higher threshold than a mere excuse and would appear to give proper effect to the rigour of the time limit imposed. In the present case, any ‘absence from Hong Kong’ or ‘other reasonable cause’ (assuming they could be established) would not have ‘prevented’ the applicant from giving notice of appeal on time, as in the sense of being rendered unable to do so. Once a document was properly served under section 58(2) of IRO, actual notice was treated to have been given to the taxpayer. It was then up to the taxpayer to ensure that the document (which he chose to be sent to a specified address) would be brought to his attention. (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 and Chan Chun Chuen v The Commissioner of Inland Revenue [2012] 2 HKLRD 379 considered)

**Appeal dismissed.**

Case referred to:

Excelter Investment Ltd v Inland Revenue Board of Review & Others, CACV 41/2017 (unreported, 22 July 2021)  
Wong Wing Bui v Commissioner of Inland Revenue [1985] 1 HKC 433  
Re Wan Wah Shing [2005] 4 HKLRD 674  
HKSAR v Cheung Kwun Yin (2009) 12 HKCFAR 568  
Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218  
Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 911 (CA)  
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687  
Koo Ming Kown & Another v The Commissioner of Inland Revenue, FACV 1/2022 (unreported, 5 August 2022)  
Chan Chun Chuen v The Commissioner of Inland Revenue [2012] 2 HKLRD 379

Stefano Mariani, Partner of Messrs Deacons, for the Appellant.  
Cassandra Fung and Camille Shek, Acting Senior Counsel, Department of Justice, for the Commissioner of Inland Revenue

**Decision:**

**A. Introduction**

1. This is the application ('the Time Application') of Company A ('the Taxpayer') for an extension of time to file its notice of appeal ('the Notice of Appeal') against the determination ('the Determination') of the Commissioner of Inland Revenue ('the Commissioner') dated 26 November 2020 in respect of the Profits Tax Assessments for the years of assessment 2006/07 to 2012/13 ('the Relevant Period'), which was delivered by registered post to the Taxpayer's registered address ('the Registered Address') at Address B on 30 November 2020 ('the Time Issue').

2. The Taxpayer filed the Notice of Appeal on 29 July 2021, when the statutory deadline for filing it pursuant to section 66(1)(a) of the Inland Revenue Ordinance ('the Ordinance') had already lapsed being 30 December 2020. The Time Application was heard by this Board ('the Board') as a preliminary issue on 25 May 2022 ('the Hearing'). By the parties' consent, leave was granted to Mr C, Position L of the Taxpayer, to give oral evidence at the Hearing via video link strictly on the Time Issue.

3. For the reasons detailed below, the Board is not satisfied that time should be extended for the Taxpayer to file the Notice of Appeal against the Determination pursuant to section 66(1A) of the Ordinance and the Time Application is accordingly dismissed.

**B. FACTUAL BACKGROUND**

4. In the Time Application, the Taxpayer relies on the following factual matters as set out in the Determination, focusing on the circumstances leading to the delay in the filing of the Notice of Appeal.

**B.1. *The Taxpayer's Business Model***

5. The Taxpayer was incorporated in Hong Kong in 2002. During the Relevant Period, the Taxpayer carried on the businesses of trading and acting as a commission agent in the years of assessment 2006/07 and 2007/08 and thereafter only the business of trading. According to the Taxpayer, its revenue was derived from, broadly speaking, trading income, commission or agency service fees (but not after the year of assessment 2007/08) and freight and sample and mould income.

6. The Taxpayer was affiliated with a group of companies in the multinational Company D group ('the D Group'). The Taxpayer held a licence to sell Company D branded products to customers outside Europe. The Taxpayer sourced personalised gifts, greeting cards and aromatic and ornamental candles etc. bearing the Company D brand and marketed them to overseas customers. The Taxpayer sourced manufacturers, handled orders and undertook product quality control functions for merchandise designed by the entities in the D Group but manufactured in China.

7. The Taxpayer's case is that it did not at the material time have any substantive business presence in Hong Kong and it conducted substantive commercial operations through a representative office ('the SRO') in City E. The Taxpayer alleges that it did not have any manufacturing facilities, substantive business facilities or trading stock in Hong Kong and its sole business asset in Hong Kong was a bank account, which was operated remotely. The Taxpayer also alleges that it did not have employees in Hong Kong, whereas the SRO had 40 to 50 employees in China, with 10 of them performing quality control and assurance functions and the rest the sourcing operations.

8. The Taxpayer summarises its business model as follows:

- (1) Throughout the Relevant Period, Mr C was and remains a director of the Taxpayer and took a leading role in procuring supply contracts.
- (2) Mr C was not at any time resident or ordinarily resident in Hong Kong and would negotiate and conclude supply contracts with customers overseas.
- (3) When the Taxpayer received a sales order from a customer, it would through a staff member in the SRO place a corresponding order with a Chinese manufacturer.
- (4) After the Taxpayer received the manufactured goods, it would again through the SRO ensure quality control, arrange for shipment to be made to the customer and manage payments from and to the customer and the manufacturer.

9. It is also part of the Taxpayer's case that it did not lease any physical office facilities in Hong Kong during the Relevant Period, and each address it maintained in Hong Kong for correspondence purposes was the address of its company secretary and/or corporate service provider. As described by the Taxpayer, these addresses were 'addresses of convenience' and were not the addresses of the operative office of the Taxpayer.

10. Throughout the Relevant Period, the Taxpayer took the position that it was not taxable in Hong Kong and filed its tax returns accordingly. The Taxpayer alleges that the Commissioner had acquiesced such position until 26 March 2013, when the Commissioner issued the Taxpayer the first assessment to profits tax for the year of assessment 2006/07. According to the Taxpayer, this assessment was issued around the same time that it ceased trading and in essence became dormant. The Taxpayer further closed the SRO in 2014, after which it did not conduct any commercial operations or employ any staff, whether in Hong Kong or elsewhere. The Commissioner thereafter issued the Taxpayer six other assessments to profits tax, one for each year of assessment over the Relevant Period. The Taxpayer objected to each of them on the ground that they were excessive.

**B.2. *The Taxpayer's Account for the Delay***

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11. Essentially, the explanation provided by the Taxpayer for the delay in filing the Notice of Appeal is as follows.

12. The Taxpayer alleges that the Commissioner was accustomed to sending hard copy correspondence to the Taxpayer at the Registered Address, ie Address B.

13. According to the Taxpayer, the Registered Address was actually the address of Company F, which was sharing the office premises with the Taxpayer's auditors, Company G. Company G had an affiliated firm of tax accountants, Company H ('H Tax'), which had assisted the Taxpayer in corresponding with the Commissioner on an *ad hoc* basis but with Mr C being the primary point of contact.

14. It is common ground that the parcel containing the Determination was sent to the Registered Address by the Commissioner. The Taxpayer's complaint is that the Commissioner did not however transmit the Determination to Mr C, who was at that time the Taxpayer's only director, or otherwise bring it to his attention. The Taxpayer alleges that as Mr C was unaware of the Determination, he only sought advice from Deacons ('Deacons') on 24 July 2021 on what he understood to be an 'ongoing tax dispute'. After Deacons made inquiries with the Commissioner on 27 July 2021, it was found out that the Commissioner had already issued the Determination. The Taxpayer then instructed Deacons to file the Notice of Appeal forthwith.

15. According to the Taxpayer, Mr C had launched investigations and discovered as follows:

- (1) Company F confirmed that it had received a parcel from the Commissioner. Company F however did not open it and was therefore not aware of the contents, as Company F was not authorized to have any access to the correspondence directed to the Taxpayer. A clerk of Company F had acknowledged physical receipt of the Determination but without knowing its nature. The Taxpayer stresses that Company F was 'a mere provider of forwarding address', and was not an association of professionals, nor the company secretary or designated tax representative or agent of the Taxpayer.
- (2) Afterwards, Company F had forwarded the parcel to Ms J in City E. As described by the Taxpayer, Ms J was an ex-employee of the SRO, but she agreed to assist Mr C and the Taxpayer with certain legacy issues arising from the operations of the D Group and its affiliates in the Greater China region after she left her employment. Ms J however failed to forward the Determination to Mr C or bring it to his attention. Instead, Ms J kept the parcel unopened in her City E office until she was alerted to the nature of the contents in August 2021. According to Ms J, when she received the Determination, the COVID-19 pandemic had reached its height and it was difficult for her to obtain physical access to her office. Ms J was also very busy with her own full-time employment and hence did not give the Taxpayer's

matters sufficient priority. For clarity, Ms J did not appear as a witness before the Board.

**C. APPLICABLE LEGAL PRINCIPLES**

16. In considering the Time Issue, the Board has thoroughly examined and taken into account all the cases and authorities diligently cited by the legal representatives of both sides. The Board however considers it desirable to concentrate only on the material ones and therefore does not refer to each and every case cited in the discussion and analysis below.

17. The Board of Review, as a statutory creature, has no power to enlarge time other than as provided for in the Ordinance. The only power of the Board of Review to extend time for bringing an appeal is that found in section 66(1A) of the Ordinance. An extension of time can only be granted if the appellant can bring itself within the purview of that section: see *Excelter Investment Ltd v Inland Revenue Board of Review & Others*, CACV 41/2017 (unreported, 22 July 2021) [2021] HKCA 1049 at §22 *per* Barma JA, citing *Wong Wing Biu v Commissioner of Inland Revenue* [1985] 1 HKC 433 *per* Mantell J.

18. Section 66 of the Ordinance provides:

*‘(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 may allow under subsection (1A),*

*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) (emphasis added).*

19. As can be seen, pursuant to section 66(1A) of the Ordinance, the Board of Review may exercise discretion to extend time for an appellant to file a notice of appeal if it is satisfied that the appellant was prevented by illness or absence from Hong Kong or

other reasonable cause from giving a notice of appeal within the time period stipulated by section 66(1)(a) of the Ordinance. The focus is on the reasons why the appellant was prevented from filing a notice of appeal on time.

20. Absent a qualifying reason, namely, the appellant's illness, the appellant's absence from Hong Kong or some other reasonable cause, which prevented the filing of a notice of the appeal, the Board of Review has no power to extend time. The grounds of appeal and its merits are not matters that relate to those reasons and as such are not relevant matters for consideration: see *Excelter (supra.)* at §23 *per* Barma JA.

21. Furthermore, it is also common ground that even if the above criteria are satisfied, the Board of Review still retains a residual discretion as to whether or not to grant the extension of time: see *Re Wan Wah Shing* [2005] 4 HKLRD 674 at §§16-17 *per* M Ng J<sup>1</sup>.

#### **D. 'ABSENCE FROM HONG KONG'**

22. In the present case, the Taxpayer alleges that Mr C absence from Hong Kong was the primary reason preventing the Taxpayer from filing the Notice of Appeal in accordance with section 66(1)(a) of the Ordinance.

23. In this connection, the Taxpayer submits that Mr C was the sole director of the Taxpayer and the principal point of contact in the Taxpayer's communications with the Commissioner. Mr C was ordinarily resident in the Country K and was physically absent from Hong Kong in 2020 and 2021. The Commissioner however did not bring the Determination to Mr C attention, whether by way of email, fax or phone.

24. The Taxpayer argues that the reason of 'absence from Hong Kong' in section 66(1A) of the Ordinance refers to absence in general, and does not necessarily need to be referring to the absence of an appellant. According to the Taxpayer, the omission by the legislative draftsman of the word 'his' before the reasons of 'illness or absence from Hong Kong' in section 66(1A) of the Ordinance provides support for this argument. The Taxpayer also relies on the fact that a company cannot act but through an agent; following from this is that if an individual taxpayer may be excused for a delay by virtue of being himself physically absent from Hong Kong, then by parity of reasoning, a body corporate may likewise be excused if its sole function agent is absent from Hong Kong.

25. It is plain that time may be extended in favour of an appellant who was prevented by, *inter alia*, '...absence from Hong Kong...' from giving notice of appeal in accordance with section 66(1)(a) of the Ordinance. As an appellant is defined under section 2 of the Ordinance to include a corporation, it becomes relevant to ask whether or not a corporate appellant can equally rely on the reason of 'absence from Hong Kong' in section 66(1A) of the Ordinance to seek extension of time in the same way as an appellant who is a natural person, and if so, whose absence and how such absence should be counted

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<sup>1</sup> A case on *inter alia* section 14(5B) of the Stamp Duty Ordinance (Cap 117), which has almost the same wording as section 66(1A) of the Ordinance.



etc. for that purpose.

26. These are all matters requiring proper statutory interpretation of section 66(1A) of the Ordinance to be answered.

27. The Taxpayer's current submissions would not provide a full and complete answer as they do not contain comprehensive examination of the statutory language of section 66(1A) of the Ordinance taking into account the legislative purposes and history and other relevant provisions as a whole etc. On this point, the Commissioner contends that 'a narrow and restrictive interpretation' ought to be adopted and the reason of 'absence from Hong Kong' in that section should be construed 'literally'.

28. The principles for statutory interpretation are well-established. The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their ordinary and natural meaning, unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise: see *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at §12 *per Li CJ*.

29. The Ordinance provides for an exclusive code for the determination of tax liabilities. The long title of the Ordinance is 'to impose a tax on property, earnings and profits'. Section 66 falls under Part 11 of the Ordinance on objections and appeals. In *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, the scheme and policy of the Ordinance were set out as follows:

*'119. For any government, faced with ever-increasing financial responsibilities and obligations, it is of the highest importance to have a fair and efficient tax system which can be expected, year on year, to produce public revenue to a more or less predictable level. **Annual taxes should be levied so as to ensure prompt payment and so as to achieve finality within a reasonably short time.** As Arden LJ observed in *Monro v Revenue and Customs Commissioners* [2009] Ch 69, [32], "**The state has a legitimate interest in ensuring finality in fiscal transactions**"; see also the citation from *Chow Kwong Fai v Commissioner of Inland Revenue* in [55] above. **Those are the policy aims of Parts 9 (Returns, etc.), 10 (Assessments), 11 (Objections and Appeals), 12 (Payment and Recovery of Tax), 13 (Repayment) and 14 (Penalties and Offences) of the IRO. They apply for the purposes of property tax, salaries tax and profits tax, all annual taxes.**'*

30. Section 64 is the first section in Part 11 of the Ordinance relating to objections and appeals. A notice of objection is in effect the first step in the appeal process. It leads to a re-consideration by the Commissioner. If there is no agreement, the taxpayer will appeal to the Board of Review under section 66 of the Ordinance.

31. On the one hand, it is of importance to ensure finality in fiscal transactions,

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and hence a time limit is imposed in Part 11 of the Ordinance on objections and appeals. If late applications for objections and revision of assessments are to be permitted, this would undermine the statutory regime, expose the government to claims and increase the risk of disruption to public finances and the burden of taxation on other groups. The courts have recognized the need for taxation revenue to flow in predictable amounts according to projections as to cash flow, such that disputes as to the claims made by the tax authority upon taxpayers have been treated differently from other classes of disputes within the community: see *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2012] 2 HKLRD 911 (CA) at §54 *per* Kwan JA (as her Ladyship then was), citing *Chow Kwong Fai v Commissioner of Inland Revenue* [2005] 4 HKLRD 687 at §20 *per* Woo VP.

32. On the other hand, to avoid hardship, a taxpayer should be given time and opportunities to object and appeal. Hence a balance has to be struck between these different statutory aims and objectives: see *Moulin Global Eyecare (CA)* (*supra.*) at §53.

33. In the recent decision of the Court of Final Appeal in *Koo Ming Kown & Another v The Commissioner of Inland Revenue*, FACV 1/2022 (unreported, 5 August 2022) [2022] HKCFA 18, Gleeson NPJ observed as follows:

‘63. In considering the above arguments, it is convenient to commence with that concerning legislative purpose. At one level of abstraction, it can be said that the purpose of the IRO is to raise revenue. No one would seriously suggest that it follows that the solution to any question about the meaning of a doubtful provision in the IRO is to construe it in the manner which will raise the most revenue. Taxing acts do not set out to raise revenue at all costs; typically they involve a complex interplay of considerations of fiscal policy, administrative efficiency and fairness to, and as between, taxpayers. Identifying the purpose of one element of a scheme of taxation is likely to require attention to detail (emphasis added).’

34. The Taxpayer bearing the burden of proof has not shown as to why after balancing the different statutory aims and objectives, section 66(1A) of the Ordinance should be construed in its favour. In these circumstances, the Board is not satisfied that for the reasons put forth by the Taxpayer, it should be able to rely on Mr C’s absence from Hong Kong to seek extension of time for filing of the Notice of Appeal late under that section.

35. It must however be made explicit, out of abundance of caution, that the Board should not be seen as making any definitive ruling on the statutory interpretation of the reason of ‘absence from Hong Kong’ in section 66(1A) of the Ordinance in an appeal involving a corporate appellant.

36. For the sake of argument, even assuming that the Board errs on this and the Taxpayer should be entitled to rely on Mr C’s absence from Hong Kong to seek an extension of time, the Taxpayer has in any event failed to show that it was such absence which prevented the Taxpayer from giving the Notice of Appeal in accordance with section

66(1)(a) of the Ordinance to be discussed further below.

**E. ‘OTHER REASONABLE CAUSE’**

37. In view of the above, the next question for consideration is whether or not, as submitted by the Taxpayer, (1) the misdirection by Company F of the Determination to Ms J; and (2) the subsequent failure by Ms J to bring the Determination to the attention of Mr C, would singly or jointly constitute a ‘reasonable cause’ for the Taxpayer’s purpose of seeking an extension of time pursuant to section 66(1A) of the Ordinance.

38. The Board is unable to accept these submissions of the Taxpayer for the following reasons.

39. First of all, the question of whether a cause was reasonable would undoubtedly depend on the facts on an individual case. However, there is no doubt that any unilateral mistakes of an appellant cannot be properly described as a reasonable cause preventing him from giving the notice of appeal within time: see Chow Kwong Fai (*supra.*) at §§41, 45 *per* Cheung JA.

40. In addition, in the context of the consideration of the proviso to section 64(1) of the Ordinance containing ‘absence from Hong Kong, sickness or other reasonable cause’, which are substantially the same reasons as in the case of section 66(1A) of the Ordinance, it was held that considering the language used, coupled with the context of a short time limit for a step to be taken to commence the appeal process, the proviso should contemplate ‘some temporary impediment of an external and physical nature’, rather than “something internal and psychological”: see Moulin Global Eyecare (CFA) (*supra.*) at §§123-124 *per* Lord Walker.

41. It is also relevant to note that the Taxpayer accepts that the specified reasonable causes in section 66(1A) of the Ordinance describe a class of causes that arise from contingencies ‘beyond the immediate control of the taxpayer’ and are ‘not directly due to his negligence, inadvertence, or carelessness’.

42. Bearing these legal principles in mind, the Board rejects the Taxpayer’s argument that the acts and omissions of Company F and Ms J cannot be imputed onto the Taxpayer, or that the Taxpayer should not be faulted for not having a more substantive presence of agents and/or professional advisors in Hong Kong. Contrary to the Taxpayer’s submissions, there were obviously steps or measures that could have been undertaken by the Taxpayer in the circumstances of the present case to procure the Determination to be properly and timely brought to its attention.

43. These few broad matters are highlighted as follows.

44. *First*, the Taxpayer has the duty to understand its tax obligations under the Ordinance in Hong Kong, including the following provisions and requirements.

45. Pursuant to section 58(2) of the Ordinance, every notice given by virtue of

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the Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which is chargeable to tax under Part 2 of the Ordinance.

46. Unless the contrary is shown, any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post under section 58(3) of the Ordinance.

47. It is further provided by section 58(4) of the Ordinance that in proving service by post, it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.

48. Pursuant to section 8 of the Interpretation and General Clauses Ordinance (Cap 1):

*'Where any Ordinance authorizes or requires any documents to be served or any notice to be given by post or by registered post, whether the expression "serve" or "give" or "send" or any other expression is used, the service or notice shall be deemed to be effected by properly addressing, pre-paying the postage thereon and dispatching it by post or by registered post, as the case may be, to the last known postal address of the person to be served or given notice, and unless the contrary is proved, such service or notice shall be deemed to have been effected at the time at which the document or notice would be delivered in the ordinary course of post (emphasis added).'*

49. According to section 51(8) of the Ordinance, any person chargeable to tax under Part 2 (profits tax) among other parts who changes his address shall within one month inform the Commissioner in writing of the particulars of the change. The statutory duty is reinforced with criminal sanction under section 80(1)(c) of the Ordinance.

50. Second, it was the Taxpayer's own choice to adopt the address of Company F, sharing with Company G being the Taxpayer's auditors, as the Registered Address. Taking the Taxpayer's case to the highest, it well knew at all material times that Company F was not an association of professionals, a company secretary or a tax representative but merely a provider of forwarding address.

51. Third, as accepted by the Taxpayer, the parcel containing the Determination was indeed sent by the Commissioner to the Registered Address. Under section 58(2) of the Ordinance, it is sufficient for notice given by virtue of the Ordinance to be served by post to the last known place of business. The Commissioner had no duty in the present case to transmit the Determination to Mr C or otherwise bring it to his actual attention as contended by the Taxpayer.

52. Fourth, again putting the Taxpayer's case to the highest, it could have given Company F authorization to access to its incoming correspondence and documents

including the Determination but it did not do so. It is part of the Taxpayer's own case that Mr C was at the material times well aware that there was an ongoing tax dispute with the Commissioner.

53. Fifth, the Taxpayer could also have given instructions to Company F or Company G to forward all incoming correspondence and documents to Mr C direct in the first place. The Taxpayer however chose to rely on the voluntary service of Ms J, who was neither an employee nor officer but had her own full-time job. On the Taxpayer's case, Ms J failed the function or role entrusted upon her.

54. Clearly, as to what were the most appropriate administrative measures to be adopted in the circumstances was entirely an internal matter for the Taxpayer to decide. However, it should have been borne in mind by the Taxpayer that even though it had become dormant in practice and further closed the SRO in 2014, the tax dispute with the Commissioner was still ongoing. The Taxpayer should have ensured proper arrangements were in place both for the Taxpayer to discharge its duties under the Ordinance and to safeguard its position, and even more so when Mr C, the director of the Taxpayer, was not ordinarily resident in Hong Kong. The Board is not satisfied that appropriate administrative measures were adopted. The Taxpayer must bear full responsibilities for each and every step it took, and conversely what it did not appropriately take, as discussed above.

55. Sixth, it might be true that the Covid-19 pandemic was an extraneous, unforeseeable event. The arrangements or measures that could be made in response were however within the control of the Taxpayer on the other hand. For this reason, the Board does not accept that the deficiency (or, more accurately, complete failure in the present case) in the operation of the communication or forwarding system that was devised by the Taxpayer would constitute a 'reasonable cause' for its delay in giving notice of appeal for the purposes of section 66(1A) of the Ordinance.

56. Seventh, whether or not there was any delay in the issue of the Determination by the Commissioner should not absolve the Taxpayer's duty under the Ordinance or justify its default for the purpose of seeking an extension of time under section 66(1A) of the Ordinance. In the premises, the Taxpayer has failed to establish that there was a reasonable cause which prevented it from giving the Notice of Appeal on time so as to enable the Board to consider whether or not to exercise the discretion to extend time under section 66(1A) of the Ordinance.

#### **F. WHETHER OR NOT BEING 'PREVENTED' FROM GIVING NOTICE OF APPEAL ON TIME**

57. As already briefly mentioned above, the Board is in any event not satisfied that in the present circumstances of the case, the Taxpayer could be considered to have been 'prevented' from giving the Notice of Appeal in accordance with section 66(1)(a) of the Ordinance.

58. The Taxpayer accepts that the word 'prevented' used in section 66(1A) of

the Ordinance should be best understood to bear the meaning of the term ‘unable to’ (未能) in the Chinese language version of the provision on the authority of Chow Kwong Fai (*supra.*) at §20 *per* Woo VP. The choice of that meaning not only has the advantage of reconciling the versions in the two languages if any reconciliation is needed, it also provides a less stringent test than the word ‘prevented’. On the other hand, the term ‘unable to’ imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of the time limit imposed by the Ordinance.

59. In the present case, even assuming for the sake of argument that the Taxpayer is able to establish that there was ‘absence from Hong Kong’ or ‘other reasonable cause’ as required under section 66(1A) of the Ordinance, such absence or cause still would not have ‘prevented’ it from giving the Notice of Appeal on time after receipt of the Determination, as in the sense of being rendered unable to do so. The Taxpayer’s argument seeking to rely upon Mr C’s lack of actual knowledge of the Determination until 27 July 2021 is untenable for the following reasons.

60. Section 58(2) of the Ordinance is the governing provision for giving notice by way of post. Under that section, the Commissioner does not need to show further that the notice had ‘actually’ come to the knowledge of a taxpayer.

61. The fact that a mode of service other than personal service is permitted is by itself an indication that service will be completed when the requirements stipulated for service have been fulfilled. There is nothing in section 58(2) of the Ordinance either alone or taken together with any other sections of the Ordinance which requires actual knowledge of the taxpayer before the time starts to run.

62. Once a document is properly served under section 58(2) of the Ordinance, actual notice is treated to have been given to the taxpayer. It is then up to the taxpayer to ensure that the document which he has chosen to be sent to a specified address would be brought to his attention: see *Chan Chun Chuen v The Commissioner of Inland Revenue* [2012] 2 HKLRD 379 at §27 *per* Cheung JA.

63. In the present case, the Taxpayer does not dispute that Company F received the parcel containing the Determination from the Commissioner. In fact, it is conceded further that the parcel was then forwarded by Company F to Ms J being the person intended by the Taxpayer to be dealing with the matters arising from the operations of the D Group and its affiliates in the Greater China region in City E.

## **G. CONCLUSION**

64. In view of the aforesaid, there are no grounds for the Board to begin considering whether or not to exercise the discretion to extend time for the Taxpayer to file the Notice of Appeal under section 66(1A) of the Ordinance.

65. For all these reasons, the Time Application is dismissed. In coming to this conclusion, it is not necessary and the Board indeed has not considered the one-page

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document titled 'Explanation of Codes for Assessor's Notes' intended to be adduced by the Commissioner but opposed by the Taxpayer.