

Case No. D17/22

Salaries Tax – appeal out of time – whether the appeal is out of time; whether the reasons given by the appellant fall within ‘other reason cause’ category contained in sections 82B(1) and 82B(1A) of the Inland Revenue Ordinance – section 82B(1) and 82B(1A) of the Inland Revenue Ordinance

Panel: Anita H K Yip SC (chairman), Chung Wai Yin Christine and Lo Chi Yip.

Date of hearing: 10 December 2021.

Date of decision: 15 November 2022.

The Appellant worked as a PE teacher at International School A from 1 April 2018, to 31 July 2018, and then changed employment to International School B. However, when filing the tax return for the year of assessment 2018/19, the Appellant mistakenly reported only the income from School B and omitted the portion from School A.

Both schools provided the necessary forms to the Inland Revenue Department (IRD) with the correct remuneration figures. On 29 January 2020, the IRD calculated the correct salaries tax liability based on information from both schools.

On 5 February 2021, the IRD issued a notice of intention to assess additional tax, notifying the appellant of the intention to penalize her for the omission of income. The Appellant apologized for the oversight on 20 February 2021.

On 25 March 2021, the IRD issued a Notice of Assessment and Demand for Additional Tax, demanding payment of approximately 7% of the omitted amount as a penalty. The Penalty Notice was successfully delivered to the appellant on 29 March 2021. The Appellant contacted the IRD on 31 March 2021, to inquire about the Penalty Notice and was informed about the appeal mechanism.

The Appellant requested a reconsideration of the penalty on 20 April 2021, but was advised by the IRD on 4 May 2021, to address the appeal to the Board of Review (BoR). On 20 July 2021, the BoR received the Appellant’s undated notice of appeal, and on 6 August 2021, the IRD expressed its intention to contest the validity of the appeal due to the late submission.

During the hearing, the Appellant provided live testimony and mentioned various letters exchanged. The appellant called the Inland Revenue Department (IRD) to seek clarification but was unsuccessful. Mistakenly, the Appellant sent a letter to the IRD instead of the Board of Review (BoR), thinking they were the same entity. After realizing the mistake, the Appellant wrote to the BoR, but the letter was deemed incorrect. The Appellant also mentioned her work schedule as a contributing factor to the delay.

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

Held:

1. Sections 82B(1) and 82B(1A) of the IRO require the notice of appeal to be submitted to the BoR within one month, along with necessary documents, after the assessment is delivered. The Appellant can seek an extension if he/she can demonstrate inability due to illness, absence from Hong Kong, or other reasonable cause (D16/07 22 IRBRD 454).
2. The Board held that the appeal is out of time: the Appellant's letter, received on 20 April 2021, did not meet the statutory requirements for a valid notice of appeal within the one-month period ending on 29 April 2021. The Appellant's undated notice of appeal was received 82 days late, on 20 July 2021.
3. After careful consideration, the Board concluded that the grounds put forth by the Appellant did not meet the legal requirements of 'reasonable causes' under section 82B(1A) IRO.
4. The Board emphasized that the Appellant, as a teacher at an International School, is presumed to possess a certain degree of literacy and should have been aware of the appeal mechanism. The Board pointed out that clear instructions on the appeal mechanism were provided in the Penalty Notice and reiterated during the phone call with the IRD.
5. The Appellant's duty to accurately report taxes and follow the stipulated procedure was emphasized. The Board did not consider the Appellant's work schedule a valid excuse for the 82-day delay, especially when the Appellant had been in contact with IRD staff and a representative from the BoR throughout the process. Therefore, the Board concluded that the Appellant was not prevented by any reasonable cause for the late appeal, leading to the dismissal of the appeal as it was out of time.

Appeal dismissed.

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D2/04, IRBRD, vol 19, 76
D24/16, (2017-18) IRBRD, vol 32, 319
D98/98, IRBRD, vol 13, 482
D41/05, (2005-06) IRBRD, vol 20, 590
D139/00, IRBRD, vol 16, 24
D4/19, (2020-21) IRBRD, vol 35, 65
D9/79, IRBRD, vol 1, 354
D146/01, IRBRD, vol 17, 88

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

D2/03, IRBRD vol 18, 301
D7/09, (2009-10) IRBRD, vol 24, 391
D13/09, (2009-10) IRBRD, vol 24, 426
D17/11, IRBRD, vol 26, 274
D1/15, IRBRD, vol 30, 272

Appellant in person.
Chan Pik Wan and Tang Kim Kam, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant appealed (**‘Appeal’**) against the Assessment of Additional Tax under section 82A of the Inland Revenue Ordinance (**‘IRO’**). As part of the appeal procedure, the Board is first asked to determine whether the Appeal is out of time; and if so, whether the Board should exercise its discretion in favour of the Appellant to extend time in this Appeal (**‘Preliminary Issue’**).

2. Therefore, this decision (**‘Decision’**) deals solely with the Preliminary Issue. The Board will only proceed to determine the merits of the Appeal, at another hearing, if the Preliminary Issue is decided in favour of the Appellant.

Facts

3. Given the simplicity, the facts only need to be briefly stated in the following terms.

- a. From 01-04-2018 to 31-07-2018, the Appellant was a PE teacher at International School A. From 01-08-2018, the Appellant changed her employment to International School B.
- b. Therefore, as far as salaries tax reporting for the Appellant is concerned, year of assessment 2018/19 which begins from 01-04-2018 to 31-03-2019 consists of two distinct sources of income from two successive employments.
- c. In respect of Appellant’s (commencement and cessation of) employments, both International Schools A and B filed the necessary forms with the Inland Revenue Department (**‘IRD’**) containing the relevant remuneration figures.
- d. In the 2018/19 Tax Return issued (on 02-05-2019) by the IRD to and declared (on 18-05-2019) by the Appellant, the Appellant had, erroneously, only reported the portion of income from International

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

School B (though the portion was also said to be incorrect and understated) and omitted the other portion from International School A.

- e. On 29-01-2020, IRD computed the correct salaries tax liability of the Appellant based on the composite information provided by International Schools A and B.
- f. On 05-02-2021, IRD issued a letter which is a notice of intention to assess additional tax under section 82A(4) of the IRO. Such notice is, by nature, to notify the Appellant the IRD's intention to penalize the Appellant for the omission of income.
- g. On 20-02-2021, the Appellant wrote in reply to the IRD letter dated 05-02-2021 apologizing and explaining that the omission was an unintentional error and was an oversight on her part.
- h. On 25-03-2021, after consideration, the IRD issued a Notice of Assessment and Demand for Additional Tax under section 82A IRO ('**Penalty Notice**') demanding the Appellant to pay roughly 7% of the omitted amount as penalty. In it, the appeal mechanism is stated in its usual terms.
- i. According to documentary evidence from the Hong Kong Post, the Penalty Notice was successfully delivered to the Appellant on 29-03-2021.
- j. On 31-03-2021, the Appellant telephoned the IRD to inquire about the Penalty Notice. During the telephone call, the IRD told the Appellant the appeal mechanism.
- k. On 20-04-2021, IRD received a letter from the Appellant dated 09-04-2021 in respect of the Penalty Notice, asking for a 'reconsideration' of the penalty.
- l. By a letter dated 04-05-2021, IRD informed the Appellant that, *inter alia*, any notice of appeal against the Penalty Notice should be addressed to the Board of Review ('**BoR**') instead, along with the other requirements. From the documentary evidence available, this IRD letter was delivered to the Appellant on 11-05-2021.
- m. On 20-07-2021, the BoR received the Appellant's notice of appeal in the form of an undated letter.
- n. By a letter dated 21-07-2021, *inter alia*, the Clerk to BoR set out the step forward for the Appellant, namely, by asking the Appellant to

provide justification and supporting documents to the Board for the grant of time extension.

- o. Subsequently, by a letter dated 06-08-2021, the IRD expressed its intention to contest the validity of the Appeal which was given outside the statutory prescribed limit (ie 1 month).

Legal Principles

4. The law on out of time appeals (whether against the penalty assessment under section 82B or against tax assessment under section 66) is trite and can be succinctly put as follows:

- a. Section 82A IRO provides the jurisdiction to impose penalty on incorrect tax reporting such as understatement or omission.
- b. Sections 82B(1) and 82B(1A) IRO mandate that the notice of appeal must be lodged with the BoR within one month along with the documentary requirements (see also D16/07 22 IRBRD 454) after the notice of assessment is delivered, unless the appellant can show that he was unable to do so either by reason of illness or absence from Hong Kong or any other reasonable cause, then the BoR may extend the statutory 1 month limit.
- c. Delivery of the assessment by IRD can be by way of personal service or post to the last known address: Section 58(2) IRO.
- d. Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 is the leading authority on the interpretation of section 66 IRO which clearly applies to section 82B. At [20], the Court of Appeal emphasized that:

“unable to” imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute.’

Importantly, at [34], it was said that self-caused misunderstanding and ignorance cannot amount to a reasonable cause.

5. These legal principles are routinely applied by this Board, one only needs to cite a few examples to bring the point home:

- a. In D2/04, 19 IRBRD 76, D24/16, 32 IRBRD 319 and D98/98 13 IRBRD 482, the statutory prescribed time limit is interpreted to mean 1 calendar month from the date of successful delivery to the appellant’s address.

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

- b. In D41/05, 20 IRBRD 590 [11], and D16/07 22 IRBRD 454 [11], service is deemed complete when the notice of appeal, along with other specified documents, are physically delivered to the Clerk of the BoR. Oral or unreceived notice is unacceptable.
- c. In D139/00, 16 IRBRD 24 and D4/19 35 IRBRD 65, the Board there held that a unilateral mistake in sending the notice of appeal and other documents to IRD is not a reasonable cause within the meaning of section 82B(1A).

Analysis

6. Applying the above legal principles, the statutory 1-month period starts to count after the successful delivery of the Penalty Notice on 29-03-2021 and ends on 29-04-2021. The Appellant's letter dated 09-04-2021 was sent to and received by IRD on 20-04-2021 without other specified documents. Therefore, such letter could not be regarded as a valid notice of appeal as it clearly did not meet the statutory requirements outlined above.

7. In substance, clearly, the Appellant's undated notice of appeal (meeting the statutory requirement) was only received by the Clerk of BoR on 20-07-2021. This is roughly 82 days late after 29-04-2021.

8. The Board has, therefore, no difficulty in holding that this Appeal is out of time. In fact, this is not disputed by the Appellant. Since this Appeal is out of time, the Board will move on to the second limb to decide whether there are reasonable causes for the Board to exercise discretion in favour of the Appellant.

9. The Board should add that there is no dispute on both sides that the Appellant was neither sick nor absent from Hong Kong in the legal sense as described in Chow Kwong Fai (Supra). So the issue is whether the Appellant has any reasonable excuse.

Live evidence of the Appellant

10. Although the Appellant did not provide any additional documentary evidence as per the invitation of the Clerk's letter dated 21-07-2021, she chose to go into the witness box at the hearing. Her live evidence, although did not add much to her case, is summarized below for completeness:

- a. There were various letters (which were not produced by the Appellant) going back and forth. In particular, as far as possible, the sequence of event seems to be that:
 - i. Upon receiving the Penalty Notice, the Appellant called IRD on 31-03-2021 to clarify the matter, without success.

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

- ii. The Appellant mistakenly sent the letter dated 09-04-2021 to the wrong entity (ie IRD) instead of the BoR, thinking IRD and BoR are one and the same entity.
- iii. Upon discovering this mistake, the Appellant wrote to the BoR but was informed that the wording of such letter was ‘incorrect’ – as in it did not specify her intention to appeal, which then necessitated another round of phone call with a BoR representative named Mr C and another letter.

Besides the back-and-forth letters, the delay was further compounded by the work schedule of the Appellant requiring the Appellant to leave the house at 6:30 am and return only at around 5:30 pm.

- b. Importantly, the Appellant did not dispute that the Penalty Notice dated 25-03-2021 and the phone call with the IRD on 31-03-2021 contain specific instructions on the appeal mechanism. Her defence is only that she is not a tax expert and cannot be expected to be versed in this matter.

11. The live evidence largely corroborates with the letters previously written to the IRD and BoR in that, in gist, the Appellant was unclear as to the appeal mechanism and was confused as to how to go about it despite expending efforts to try to do it right.

12. Representatives of IRD did not seriously challenge Appellant’s testimony but emphasized that clear instructions on the appeal mechanism were provided, more than once, to Appellant, so that the Appellant should have known about it.

13. After deliberation, the Board is of the view that the grounds put forth by the Appellant do not meet the legal requirements of ‘reasonable causes’ under section 82B (1A).

14. **First**, the Appellant is a teacher at an International School and is presumed to possess a certain degree of literacy. As the appeal mechanism is stated in the Penalty Notice dated 25-03-2021 and also reiterated over the phone call between the IRD and the Appellant on 31-03-2021 (which is 2 days after the Penalty Notice was delivered to the Appellant on 29-03-2021), the Board can only take it that, by deciding to lodge an appeal herself, the Appellant must have known, to some degree at least, about the appeal mechanism.

15. The Board draws attention to the section 82A Assessment in the Penalty Notice, which, *inter alia*, states that ‘*If you wish to appeal against this assessment, you must give notice in writing to the Clerk to the Board of Review (PLEASE SEE CONTACT DETAILS OVERLEAF) within 1 month after this notice of assessment is given to you.*’ If the Appellant read the section 82A Assessment carefully, she would have no difficulty learning about to which entity it is that she had to lodge the appeal and the one-month statutory requirement.

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

16. **Second**, the duty to report tax accurately is a civic duty falling squarely on the Appellant. Likewise, if the Appellant wants to challenge the tax assessment made by the IRD, it is her rights under IRO but she has the duty to follow the stipulated procedure as stated in the statute. Nothing in the Appellant's case negates this positive duty in the Board's view.

17. **Third**, the Board is not prepared to accept that the Appellant's work schedule constitutes a reasonable excuse for the 82 days delay. This is especially so when the Appellant has been in touch with staff of IRD and Mr C of BoR and has been reminded of the appeal mechanism during this whole process.

18. Therefore, this Board concludes that the Appellant was not prevented by any reasonable cause for the late appeal that allows the Board to exercise discretion in favour of the Appellant.

19. Accordingly, as the Appeal is out of time, the Board dismisses the Appeal.

Cost

20. Despite invitation, both sides at the hearing did not make submission on costs.

21. The Board considers it just and fair order to make no order as to cost.

Passing Comments

22. As a passing remark, there are several aspects to improve the broader mechanics in relation to the appeal process that the Board feels compelled to raise:

23. **First**, the Board is not unsympathetic to the apparent mix up in entities (IRD and BoR) experienced by the Appellant regarding the lodging of the Appeal. Drawing from experience, it is not an uncommon theme in out of time appeal that the appellant wrongly addressed the notice of appeal to IRD in the first place – though without precise data, one only needs to look at a sample of the litany of cases on the BoR Decisions website to appreciate how persuasive this 'mistake' is over the years:

D9/79, IRBRD, vol 1, 354,
D146/01, IRBRD, vol 17, 88
D2/03, IRBRD vol 18, 301,
D7/09, IRBRD, vol 24,
D13/09, IRBRD, vol 24,
D17/11, IRBRD, vol 26, 274,
D1/15, IRBRD, vol 30, 272,
D139/00, IRBRD, vol 16, 24, and
D4/19, IRBRD, vol 35, 65

With this observation in mind, perhaps it would be helpful (and economical) to set up additional mechanism that would draw the prospective appellant's attention to this

(2022-23) VOLUME 37 INLAND REVENUE BOARD OF REVIEW DECISIONS

particular aspect so that a lot of these out of time appeal would have been prevented. For example, dedicated website, hotline, or leaflet could be included to ensure the prospective appellant not only has access to but also indeed accesses these resources to obtain clear understanding and guidance on the appeal mechanism. If one is more forward looking, e-channel of any sort (whether it be a dedicated web portal or email) facilitating the process of lodging the appeal should also be actively considered and encouraged.

24. **Second**, for efficiency, any written submissions prepared in advance by either party should be shared and exchanged with the other side (and the Board) in advance before the hearing to ensure the parties have the necessary time to prepare their own responses.

25. **Third**, at the hearing, the Appellant told the Board the only reason she was appealing was because she did not want any fraud charges to be laid against her. The Board explained to her that it has no jurisdiction to deal with fraud charges, if any, against her and the hearing was purely to determine the validity of her notice of appeal.

26. In any event, the Board would remind the Appellant of paragraph 14 in the Statement of Facts that, *'no prosecution under section 80(2) or section 82(1) of the Ordinance has been instituted against the Appellant in respect of the same facts.'*