

Case No. D24/22

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 section 66(1A) of the Inland Revenue Ordinance – section 66(1A) of the Inland Revenue Ordinance.

Panel: Chui Pak Ming Norman (chairman), Chan Kin Pun and Chung Koon Ying Louis.

Date of hearing: 30 November 2022.

Date of decision: 19 December 2022.

The Appellant objected to the Additional Salaries Tax Assessment for the year 2016/17, claiming that a sum received from their ex-employer should not be subject to Salaries Tax. However, the Deputy Commissioner of Inland Revenue rejected the objection and confirmed the revised Assessment in a Determination sent to the Appellant on 29 April 2022.

Displeased with the Determination, the Appellant lodged an appeal to the Board of Review on 19 June 2022, invoking section 66 of the Inland Revenue Ordinance. Yet, the appeal seemed invalid as it exceeded the one-month statutory period specified in section 66(1) of the Ordinance.

The Clerk of the Board informed the Appellant of the potential invalidity of the appeal and presented three preliminary issues to address. These were: (a) whether the appeal was filed within the one-month statutory period, (b) if not, whether the Board had the authority to extend the time for appeal under section 66(1A) of the Ordinance, and (c) if the Board had jurisdiction, whether they should exercise their discretion to extend the time for appeal.

The Respondent contested the validity of the appeal, prompting the Appellant to seek leave to file the notice of appeal out of time under Section 66(1A) of the Ordinance.

Held:

1. The issue is whether the notice of appeal was filed within the one-month statutory period. The Appellant claims that he received the letter and determination in mid-May 2022, and therefore filed the notice of appeal on 19 June 2022, within the one-month period. However, the Board held that the letter and determination were sent to the Appellant’s address on 29 April 2022, and were delivered to his letterbox on 6 May 2022. According to the Board’s decision in a similar case, once the notice was properly served, it is deemed to have been given. Therefore, the notice of appeal should have

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been filed by 5 June 2022, within the one-month period.

2. The Appellant can apply for an extension of time under section 66(1A) of the Ordinance if he can prove that he was prevented by illness, absence from Hong Kong, or other reasonable cause from giving notice of appeal. However, there is no evidence of illness, and although the appellant was in Country A at the material time, he was able to communicate with the Board and the respondent via email. The fact that he sent an email requesting an extension of time and eventually filed the notice of appeal on 19 June 2022, indicates that his absence did not prevent him from giving notice of appeal.
3. The Appellant argues that he needed time to locate documents and refresh his memory, but even if he only became aware of the letter and determination in mid-May 2022, he still had sufficient time to draft and file the notice of appeal before the 5 June deadline. The Board finds these reasons to be insufficient as a reasonable cause for the delay.
4. Based on the analysis, the Board concludes that the Appellant could have filed the notice of appeal within the statutory period but chose not to do so. Therefore, the Board refuses to grant the Appellant's application for an extension of time to file the notice of appeal.

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD
Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD
Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA
1049
D9/79, IRBRD, vol 1, 354
D11/89, IRBRD, vol 4, 230
D3/91, IRBRD, vol 5, 537
D2/03, IRBRD, vol 18, 301
D2/04, IRBRD, vol 19, 76
D55/09, (2009-10) IRBRD, vol 24, 993

Appellant in person.

Ng Sui Ling Louise and Wong Hoi Ki, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant objected to the Additional Salaries Tax Assessment for the year of assessment 2016/17 raised on him on the ground that a sum made to him by his ex-employer should not be chargeable to Salaries Tax.

2. By the determination dated 29 April 2022 ('Determination'), the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') rejected the Appellant's objection and confirmed the revised Additional Salaries Tax Assessment for the assessment year 2016/17, being Additional Net Chargeable Income of \$1,233,309 with Additional Tax Payable thereon of \$189,663. The Determination was sent by the Respondent to the Appellant by registered post to the Appellant's address at Singapore on 29 April 2022.

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') by serving a notice of appeal with the Board dated 19 June 2022, which was sent by means of an email on 19 June 2022.

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 of Review 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. The Determination was sent on 29 April 2022 and the Notice of Appeal was filed on 19 June 2022. On the face of the documents, 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. On 21 June 2022, the Clerk of the Board ('Clerk') wrote to inform the Appellant of the potential invalidity of the notice of appeal and advise him of the 3

preliminary issues in his appeal; namely (a) whether his appeal is validity given within 1-month statutory period; (b) if his appeal is given out of time, whether the Board has jurisdiction to extend time for appeal under section 66(1A) of the Ordinance; and (c) if the Board has jurisdiction, whether the Board should exercise its discretion to extend time for appeal.

8. On the same date, the Clerk also wrote to the Respondent requesting the Respondent to indicate its position on whether it intends to contest the validity of the appeal. By its letter dated 11 July 2022 to the Clerk, the Respondent indicated that it intends to contest the validity of the appeal. Since the Respondent contests the validity of the appeal, it necessitates the Appellant to make an application for leave to file his notice of appeal out of time pursuant to Section 66(1A) of the Ordinance.

Preliminary Issues

9. The hearing today is for the Board to deal with the preliminary issues of this appeal, namely, (a) whether the notice of appeal was filed outside the statutory 1-month period and, if so (b) whether the Appellant's late appeal could and should be entertained by the Board.

Hearing

10. Save the preliminary issues, the Board will not deal with the main appeal today. The reason is obvious. If the Board decides in favor of the Appellant by giving an extension of time to the Appellant to lodge an appeal against the Determination, the Respondent has the right to bring a judicial review application to the High Court of Hong Kong Special Administrative Region ('High Court') to rectify the decision made by the Board. If the Board decides in favor of the Respondent by refusing to exercise its discretion to extend the period for the Appellant to file his notice of appeal, likewise the Appellant is free to lodge an application to the High Court to rectify the Board's decision on refusing to grant an extension of time to the Appellant to lodge a notice of appeal. It is therefore a futile exercise if the main appeal is proceeded with but the decision of the Board on the preliminary issues are rectified by the High Court subsequently.

11. It follows that a new date, if the circumstances are justified, will be fixed to hear the main appeal after the Board's decision on the preliminary issues becomes final.

Burden of Proof

12. Since it is the Appellant's application for an extension of time to file his notice of appeal, it is his burden to prove that leave should be given to him under section 66(1A) of the Ordinance. However, the Appellant is required to discharge his burden on the basis of balance of probability only. To discharge his burden of proof, the Appellant may call any witness (including himself) to testify for him and submit whatever relevant documents or other evidence to the Board for its consideration.

13. At the hearing, the Appellant elected to give evidence under oath as a witness. Apart from himself, he confirmed that he had no other witness to call. He also confirmed that he had no further documents or other evidence to submit but relied on the documents in the hearing bundles.

The Appellant's Testimony

14. The following is the summary of the Appellant's testimony before the Board:

- (a) The case has been dragged on for more than 3 years. He first objected to the assessment in July 2017. He only received the Determination in mid-May 2021.
- (b) Each time he responded to the enquiries made by the Respondent in time over the first two years after he lodged the objection. Such replies were made by post or by email.
- (c) Before he received the Determination in mid-May 2021, he had not heard anything from the Respondent for 15 months.
- (d) In Country A, the transactions were mostly done electronically. For example, he received the bank statements electronically from his bank. He also received bills electronically. As a result, he seldom opened the letterbox because he did not expect anything important to be sent by post and in the letterbox. Inside the letterbox were advertisements.
- (e) Upon cross-examination, the Appellant admitted that he received the Determination and the cover letter of the Respondent dated 29 April 2022 ('Letter') in mid-May 2022.
- (f) The Appellant agreed that he had sent an email to the Board and the Respondent on 23 May 2022, which was within one month from the date of receipt of the letter from the Respondent.
- (g) The Appellant also confirmed that he had read the Letter and the warning notice stated therein. He agreed that he was aware of the one-month period within which to file an appeal. He understood that there was a possibility that his appeal might be rejected for late filing.
- (h) He agreed that he only filed the notice of appeal on 19 June 2022, which was 13 days after the deadline to lodge an appeal.
- (i) However, he needed time to locate and understand the documents which he had submitted for more than 3 years. He could not file the

notice of appeal on time because he was unable to do that. He needed time to find papers and refresh his memory on the case.

Documents relevant to the Case

15. The documents in the Board of Review Bundle ('L1 Bundle') and the documents in the Revenue's Documents Bundle ('R1 Bundle') were not challenged by the Appellant. As such, the documents form the documentary evidence of the case, upon which the Board may find facts of the case. Apart from the aforesaid two bundles, the Respondent also submitted a bundle of authorities relied on by it which is referred to as 'R2 Bundle'.

Facts of the Case relevant to the Preliminary Issue of the Appeal

16. The Board has carefully considered the oral evidence presented by the Appellant and the documents in the aforesaid bundles. On the basis of the Appellant's oral testimony and the documents in the aforesaid bundles, the Board finds the following facts which are relevant to the preliminary issue of the case:

- (a) The Determination was sent under the cover of the Letter by registered post to the Appellant's address in Country A, namely, Address B on 29 April 2022.
- (b) According to the Country A Post, the Letter was delivered to the letterbox of the Appellant's aforesaid address on 6 May 2022 at 13:57.
- (c) On 23 May 2022 (at 14:45), the Appellant sent an email to the Respondent and the Board confirming receipt of the Determination and asking for an extension of deadline for raising the objection to the Determination with one month.
- (d) On 24 May 2022 (at 10:20), the Board sent the Appellant an email *inter alia* explaining the procedure of lodging an appeal against the Determination and reminding him that if he wished the Board to consider his appeal as 'on time' and hence a valid appeal, (ie lodged within the statutory one-month period,) he should comply with the requirements under section 66(1) or section 82B of the Ordinance without undue delay.
- (e) A full text of section 66 of the Ordinance was annexed in the Letter.
- (f) On 24 May 2022 (at 16:15), the Respondent sent an email to the Appellant advising *inter alia* that regarding the extension of time to lodge an appeal, there is no authority available under the Ordinance for the Respondent to extend the time limit of lodging an appeal to the Board. In the said email, the Respondent also drew the Appellant's attention to the content of section 66 of the Ordinance and he might contact the Board directly concerning the extension of time to lodge an appeal.

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- (g) On 19 June 2022, the Appellant filed his notice of appeal together with other documents via an email to the Clerk.
- (h) On 21 June 2022, the Clerk sent the Appellant a letter dated 21 June 2022 advising him that his notice of appeal was *prima facie* invalid because he had failed to submit all documents required by law within one-month statutory period. The Appellant was advised to provide justification and supporting documents if he wished to ask the Board to exercise its jurisdiction to grant an extension of time for giving the notice of appeal.
- (i) On 11 July 2022 (at 15:31), the Appellant sent an email to the Board and the Respondent advising that the Letter was not provided to him 'by hand'. The Letter was dropped in his mailbox without any prior notice. In this day and age, he hardly opened his mailbox as all bills and bank statements were provided electronically. He further advised that the Respondent had not given him any updates for the last three years and that all of a sudden, the case was revived without giving him any time to prepare an appeal.

Legal Authorities and Principal on Extension of Time under Section 66 of the Ordinance

17. The Respondent submitted the following legal authorities which is in the R2 Bundle for the Board's consideration:

- (a) Sections 58 and 66 of the Ordinance;
- (b) Section 8 of Interpretation and General Clauses Ordinance ('Chapter 1');
- (c) Tax Cases
 - (1) Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD;
 - (2) Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD;
 - (3) Excelter Investment Limited v Inland Revenue Board of Review [2021] HKCA 1049;
- (d) Board of Review Decisions
 - (1) D9/79, IRBRD, vol 1, 354;
 - (2) D11/89, IRBRD, vol 4, 230;
 - (3) D3/91, IRBRD, vol 5, 537;
 - (4) D2/03, IRBRD, vol 18, 301;
 - (5) D2/04, IRBRD, vol 19, 76; and
 - (6) D55/09, (2009-10) IRBRD, vol 24, 993.

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

The Statutory Provisions relating to service of documents

19. 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; 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.’

20. 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 for such period as it thinks fit the time within which notice of appeal may be given under subsection (1).’

21. Section 58(2) of the Ordinance provides *inter alia* that:

‘Every notice given by virtue of this 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,’

22. Section 58(3) of the Ordinance provides *inter alia* that:

‘Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.’

23. Section 58 (4) of the Ordinance provides *inter alia* that:

'In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.'

24. Section 8 of Chapter 1 provides *inter alia* that:

'Where any Ordinance authorizes or requires any documents to be served or any notice to be given 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.'

Discussion and Analysis

Was the notice of appeal given out of the 1-month statutory period?

25. It is not disputed that the Appellant gave the notice of appeal to the Board on 19 June 2022 by an email. If the Letter and Determination were served with the Appellant on or after 20 May 2022, then the notice of appeal was given within the 1-month statutory period. If the Letter and the Decision were served with the Appellant prior to 20 May 2022, then the notice of appeal was given outside the one-month statutory period.

26. The Appellant claimed that he opened his letterbox in mid-May 2022 and received the Letter and the Determination at that time. Hence it is his contention that the Letter and the Determination were served on him since then. He did not allege the specific date he received the Letter and the Determination. In our view, that does not matter. The Board finds that the Letter and the Determination were sent by registered post to the Appellant's address on 29 April 2022.

27. According to the provisions of section 58(2) and 58(4) and section 8 of Chapter 1, the service of the Letter and the Determination shall be deemed to be effected on 29 April 2022.

28. The Letter and the Determination were delivered by the Country A Post to the Appellant's letterbox at an address in Country A on 6 May 2022. According to the decision made by the Court of Appeal in Chan Chun Chuen v Commission of Inland Revenue, once the relevant notice was properly served under section 58(2) of the Ordinance, the giving of notice was effected. Once section 58(2) of the Ordinance is invoked, the Commissioner does not need to show further that the notice had 'actually' come to the knowledge of the taxpayer. As far as service of the Letter and the Determination are concerned, they were served by the Respondent on 29 April 2022. To the benefit of the Appellant, the Board would treat that the date of the service being 6 May 2022, the date on

which the Letter and the Determination were put into the letterbox by the Country A Post at his Country A address.

29. Under section 66(1)(a) of the Ordinance, any person who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefore and the statement of facts. Since the Letter and the Determination is deemed to have been served on the Appellant on 6 May 2022, it follows that the 1-month period of lodging the notice of appeal expires on 5 June 2022.

30. The Appellant lodged the notice of appeal on 19 June 2022. Apparently, the same was submitted outside the statutory period of one month.

31. Even though the Appellant gave his notice of appeal out of time, he might apply to the Board under section 66(1A) of the Ordinance for leave to file his notice of appeal out of time.

32. Under section 66(1A) of the Ordinance, 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).

Was the Appellant suffered any illness at the material time?

33. There is no evidence that the Appellant was suffered from illness at the material time. Neither did the Appellant make that claim while he gave oral testimony.

Was the Appellant outside Hong Kong at the material time?

34. It is not disputed that at the material time, the Appellant was in Country A. In fact, the Letter and the Determination were sent to the Appellant's address in Country A. The Appellant was therefore absent from Hong Kong at the material time.

Was his absence from Hong Kong preventing the Appellant from giving a notice of appeal?

35. Being absent from Hong Kong alone is not sufficient for the Board to exercise its discretion in favor of the Appellant. Under the provision of section 66(1A) of the Ordinance, the Appellant needs to prove that his absence from Hong Kong prevented him from giving a notice of appeal.

Meaning of 'prevented' in section 66(1A)

36. As pointed out by another board of review in Case No. D9/79, the word ‘prevented’, is opposed to a situation where an appellant is able to give notice but has failed to do so. In the board’s view, neither laches nor ignorance of one’s right or of the steps to be taken is a ground upon which an extension may be granted. In Case No. D55/09, the board was of the view that the word ‘prevented’ cannot appropriately be used in a situation where a taxpayer is able to give notice, but has failed to do so.

37. In Chow Kwong Fai v Commissioner of Inland Revenue, the Court of Appeal was of the opinion that the word ‘prevented’ used in section 66(1A) should be best understood to bear the meaning of the term ‘unable to’ referred in the Chinese language of the subsection. ‘Unable to’ provides a less stringent than the word ‘prevent’. However, ‘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.

38. Despite the Appellant was in Country A in May and June 2022, the Appellant was able to communicate with the Board and the Respondent by way of email. The fact that the Appellant sent an email on 23 May 2022 to the Board and the Respondent asking for extension of time to raise the objection to the Determination as well as gave the notice of appeal on 19 June 2022 to the Board by an email negates any suggestion that the Appellant was prevented from giving a notice of appeal by reason of his absence from Hong Kong. If the Appellant did not wish to handle the appeal, he could engage a tax representative to handle the appeal on his behalf. However, he simply chose not to file the notice of appeal within the statutory time limit, either by himself or by a representative. We are of the view that his absence from Hong Kong during the material time had not prevented the Appellant from giving a notice of appeal with the Board. The Appellant in fact could file a notice of appeal within the time limit if he chose to do so.

39. The Appellant failed to persuade the Board to exercise its discretion in his favor on the grounds of ‘illness’ and ‘absence from Hong Kong’. It follows that the Appellant could only rely on the ground of ‘other reasonable cause’ from giving notice of appeal in his application for an extension of time under Section 66(1A) of the Ordinance.

Was there any ‘other reasonable cause’ prevented the Appellant from giving a notice of appeal?

40. Relying on ‘other reasonable cause’, the Appellant alleged that the Letter and the Determination were brought to his attention when he opened his letterbox in mid-May 2022. He alleged that he seldom opened his mailbox as all bills and bank statements were provided electronically. He did not expect anything important from mail. Further, the Respondent had not given him any updates for the last three years. All of a sudden, the case was revived, without giving him any time to prepare an appeal. He therefore needed time to locate documents to prepare the notice and needed time to refresh his memory.

41. Drafting a notice of appeal differs from preparing for an appeal. While it takes time to prepare for an appeal, drafting a notice of appeal is a relatively less time-

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consuming exercise. For discussion purpose, even if we assume that the Appellant only had knowledge of the Letter and the Determination in mid-May 2022, he still had about 20 days to draft and file a notice of appeal before the expiry date of 5 June 2022 for filing. The Board does not accept that the allegation of needing time to locate documents to prepare for a notice of appeal and time to refresh his memory is a reasonable cause which prevented him from giving a notice of appeal within the one-month statutory period.

42. The Board is of the view that it is only an excuse for the Appellant to allege that he seldom opened his mailbox (which implies that not much time was left for him to file a notice of appeal when he read the Letter and the Determination). If he seldom opened his letterbox, he could inform the Respondent of his email address beforehand and request the Respondent to send him the determination by email as well as by registered post when the same was issued. The Board does not find that it is a reasonable cause which prevented the Appellant from giving a notice of appeal within the one-month statutory period.

43. By reason of the aforesaid, the Board is of the view that the Appellant was able to file a notice of appeal on or before 5 June 2022 but he chose not to do so. From the above analysis, the Board takes the view that there is no factor mentioned in section 66(1A) of the Ordinance which prevented the Appellant from giving his notice of appeal to the Board on or before 5 June 2022. The Board therefore refuses to exercise its discretion in granting the Appellant's application for an extension of time to file his notice of appeal under section 66(1) of the Ordinance.