

**Case No. D4/22**

**Salaries tax** – appeal out of time – sections 58(2), 66(1) and 66(1A) of the Inland Revenue Ordinance

Panel: Loh Lai Ping Phillis (chairman), Lai Ka Ho Alan and Wong Man Kong Raymond.

Date of hearing: 3 March 2022.

Date of decision: 27 April 2022.

The Appellant contends that the two ex-gratia payments from her ex-employer should be excluded from the Assessment for the year of assessment 2018/2019.

The Commissioner's Determination was delivered to the Appellant's address on 8 October 2021.

The notice of appeal dated 5 November 2021, was received by the Board of Review on 22 November 2021.

The Commissioner contests the validity of the Appeal in that the notice of appeal was out of the statutory 1-month time limit.

The preliminary issue is whether the Board could and should exercise its discretion under section 66(1A) of the IRO.

**Held:**

1. This Appeal is out of time, there was a delay of 14 days.
2. Section 66(1A) of the IRO stipulates that the burden of proof is on the Appellant that she was prevented to lodge an appeal in time because of illness, absence from Hong Kong or other reasonable cause.
3. Upon her own evidence, the Appellant had read the Determination sometime in mid-October 2021.
4. Mr B, the Appellant's husband, in preparing the notice of appeal, set the target deadline date of 5 November 2021, shows that the Appellant was aware of the 1-month deadline.
5. There is no evidence that the Appellant was prevented from filing or was unable to file the notice of appeal by the deadline date of 8 November 2021

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

6. The Board has no power to extend the time for the Appellant's appeal as the Appellant has not demonstrated that the provisions of section 66(1A) are met.

**Appeal dismissed.**

Cases referred to:

D24/16, (2017-18) IRBRD, vol 32, 319  
D98/98, IRBRD, vol 13, 482  
D2/04, IRBRD, vol 19, 76  
Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379  
D41/05, (2005-06) IRBRD, vol 20, 590  
D16/07, (2007-08) IRBRD, vol 22, 454  
D3/91, IRBRD, vol 5, 537  
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687  
D31/12, (2012-13) IRBRD, vol 27, 667  
D10/15, (2016-17) IRBRD, vol 31, 1

Appellant in person, accompanied by Appellant's husband.  
Ms Yun Rita and Chan Wai Lin, for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. This is the appeal ('Appeal') of the Appellant/Taxpayer against the Determination of the Commissioner of Inland Revenue ('Commissioner') dated 6 October 2021 ('Determination') regarding the Appellant's objection to the Salaries Tax Assessment for the year of assessment 2018/2019 ('Assessment') raised on her.
2. As part of the appeal procedure, this Board is first required to determine whether the Appeal is out of time; and if so, whether there is any discretion to be exercised in favour of the Appellant for extension of time ('Preliminary Issue').
3. Therefore, this decision deals solely with the Preliminary Issue. This Board will only proceed to hear and determine merits of the Appeal, at another hearing to be scheduled, if the Preliminary Issue is decided in favour of the Appellant.
4. This Board held the hearing of the Preliminary Issue on 3 March 2022.
5. The Appellant was present and represented by her husband Mr B.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

6. The Commissioner was represented by Ms Rita Yun.
7. The Appellant and Mr B gave oral evidence. The Commissioner did not call any oral evidence. Both referred to documents submitted and exchanged before this Board.

**Facts**

8. Given the simplicity, the only facts need to be briefly stated are those relevant to the Preliminary Issue in the following terms:

- (1) Pursuant to the termination of her employment in October 2018, the Appellant declared income for the year of assessment 2018/2019 by filing a Tax Return. In doing so, she had excluded from the reported income two ex-gratia payments that she had received from her ex-employer;
- (2) The Assessor raised on her Assessment by a notice dated 13 March 2020 including in the assessable income the two ex-gratia payments;
- (3) The Appellant objected to the Assessment in that the ex-gratia payments should be excluded from the Assessment;
- (4) Pursuant to further enquiries with the Appellant and her ex-employer, the Commissioner made the Determination dated 6 October 2021 confirming the Assessment;
- (5) The Commissioner sent the Determination (together with Appendices A-E) on 6 October 2021 by registered post (as evidenced by a relevant Certificate of Bulk Posting for Registered Packets) to the Appellant's address. It was delivered to the Appellant's address on 8 October 2021 (as evidenced by a Memo dated 26 November 2021 from Hongkong Post);
- (6) By a notice of appeal enclosing the grounds of appeal both dated 5 November 2021, received by this Board on 22 November 2021, the Appellant appealed against the Determination; and
- (7) By a letter dated 7 December 2021, the Commissioner raised an objection to the Appeal in that the notice of appeal received by this Board on 22 November 2021 fell outside the statutory prescribed 1-month time limit from the date of delivery of the Determination on 8 October 2021 to the Appellant. Accordingly the Commissioner expressed the intention to contest the validity of the Appeal.

**Relevant Statutory Provisions**

9. Section 66(1) of the Inland Revenue Ordinance ('IRO') provides that:

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

*‘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; 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.’*

10. Section 66(1A) of the IRO provides 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).’*

11. Section 58(2) of the IRO provides 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...’*

### **Legal Principles**

12. The law on out of time appeals against tax assessment under section 66 of the IRO is trite. Section 66 (1) of the IRO mandates that the notice of appeal must be lodged with this Board within 1 month along with the specified documents after the written determination is delivered, unless the appellant can show that he was prevented from doing so either by reason of illness or absence from Hong Kong or other reasonable cause, then this Board may extend the statutory 1 month time limit.

13. Pursuant to Section 58(2) of the IRO, every notice given by virtue of IRO, including the written determination, by the Commissioner may be served on a person by way of personal service or post to his last known postal address.

14. This Board has considered relevant authorities and decisions, including

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

those submitted by the Commissioner, on the interpretation of the sections under IRO.

***Statutory one month time limit***

15. In D24/16, (2017-18) IRBRD, vol 32, 319 and D98/98, IRBRD, vol 13, 482, it was held that the statutory prescribed time limit should be interpreted to mean 1 calendar month from the date of successful delivery to the appellant's address. As set out in D2/04, IRBRD, vol 19, 76, the 1 month time limit was found to commence to run after the process of transmission had been completed and that the process of transmission would normally end when the determination reached the address that it was sent to. (page 80 paragraph 7)

16. In Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379, the Court of Appeal held that giving of notice under section 58(2) of the IRO does not imply that the taxpayer must have actual knowledge of the notice. The service would be completed when the requirements stipulated for service under section 58(2) of the IRO have been fulfilled, i.e. upon successful delivery at the address that it was sent to. Hon Cheung JA at page 388 paragraph 27(2) said:

*'I am unable to accept the taxpayer's argument...that the "giving" of notice implies "receipt" by the taxpayer, in the sense that he must have actual knowledge of the notice. Section 58(2) is the governing provision for giving notice by way of postal service. Once it is invoked the Commissioner does not need to show further that the notice had "actually" come to the knowledge of the taxpayer. This is because, first, the very 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. ... In my view, once the document was properly served under s.58(2), actual notice was treated to have been given to the taxpayer. It is then up to the taxpayer to ensure that the document which he had chosen to be sent to a specified address would be brought to his attention.'*

(emphasis added)

17. In D41/05, (2005-06) IRBRD, vol 20, 590 and D16/07, (2007-08) IRBRD, vol 22, 454, this Board held that in the context of section 66 of the IRO, giving notice of appeal to the Board means actual service of notice to the Clerk of the Board. Service is deemed complete when the notice of appeal, along with other specified documents, are physically delivered. This phrase excludes oral notice. It also excludes notice which has not been received, and cannot be entertained. Therefore, whether the notice of appeal was filed within time depends on the time when the Clerk of the Board received it (page 590 paragraph 2).

18. In D3/91, IRBRD, vol 5, 537, this Board held that strict adherence to the statutory time limits imposed must be observed, and refused to extend time without good reasons in favour of the taxpayer even though the delay in filing the notice of appeal was only one day (page 541).

***‘Prevented’ from giving a notice of appeal under section 66(1A) of the IRO***

19. Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 is the leading authority on the interpretation of section 66(1A) of the IRO, in which Woo VP of the Court of Appeal held that the word ‘prevented’ in section 66(1A) of the IRO should best be understood to mean ‘unable to’, and further explained the standard of the threshold (page 696 paragraph 20) as follows:

*‘In my opinion, while a liberal interpretation must be given to the word “prevented” used in section 66(1A), it should best be understood to bear the meaning of the term “未能” in the Chinese language version of the subsection... The term means “unable to”. The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word “prevent”. On the other hand, “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.’*

20. In D31/12, (2012-13) IRBRD, vol 27, 667, this Board held that the provisions of section 66(1A) of the IRO are unambiguous, very clear and restrictive, and the word ‘prevented’ is opposite to a situation where an appellant is able to give notice but failed to do so (page 667).

***Other reasonable cause***

21. In D10/15, (2016-17) IRBRD, vol 31, 1, the taxpayer, in applying for an extension of time under section 66(1A) of the IRO in order to pursue his appeal, explained that he was under work pressure at that time and he did not engage a lawyer or a tax representative to handle the appeal because he felt he was capable of handling the matter by himself. This Board held that unless the conditions in section 66(1A) of the IRO are satisfied, it has no jurisdiction to extend time to allow an appellant to lodge an appeal. A ‘reasonable cause’ required more than a mere statement that the taxpayer forgot about it, or was too busy to get on with it. An omission caused by neglect was unlikely to receive sympathetic consideration from the Board. The taxpayer’s application for extension of time to launch the appeal was dismissed.

22. The Court of Appeal in Chow Kwong Fai (Supra) also held that for the purpose of section 66(1A) of the IRO, self-caused or unilateral mistake made by the taxpayer cannot amount to a reasonable cause. Cheng JA at page 701 paragraph 45 said:

*‘Any misunderstanding on the part of the appellant that he had to prepare a statement of facts which took him beyond the one month limit must be unilateral mistake on his part. Such a mistake cannot be properly described as a reasonable cause which prevented him from lodging the notice of appeal within time.’*

### **Application of the Legal Principles**

23. In the present case, the statutory 1-month period started to run after delivery of the Determination on 8 October 2021 at the Appellant's address, and ended on 8 November 2021. The notice and grounds of appeal both dated 5 November 2021 were received by this Board on 22 November 2021.

24. Applying the above principles, it could not be regarded as a valid notice of appeal as it clearly did not meet the statutory requirements outlined above. There was a delay of 14 days.

25. This Board has, therefore, no difficulty in holding that this Appeal is out of time. In fact, this is not disputed by the Appellant.

26. This Board will proceed to consider the second limb, i.e. whether it should exercise a discretion in favour of the Appellant to extend the time allowed for the Appeal.

27. 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 only question is whether the Appellant has any reasonable excuse for the delay.

### **The Appellant's Evidence/ Reasons for Delay**

28. By a letter to this Board dated 27 November 2021, supplemented by her oral evidence given at the hearing, the Appellant explained the reasons for the delay. As it transpired that the letter was actually drafted by Mr B, he also gave evidence to explain the contents.

29. The Appellant claimed the following:

- (1) The Assessment, involving a large sum of tax money, is an important and serious matter to the Appellant. She had been vigilant and had made great efforts to deal with the enquiries of the Commissioner for 2 or 3 years since the time after her submission of the Tax Return and upon lodging the objection to the Assessment after its issue in March 2020. She had made numerous telephone calls to the Commissioner's office and had chased up for more than a year for a decision;
- (2) When the Determination was finally issued on 6 October 2021, and allegedly posted and delivered to her address on 8 October 2021, she was not notified of the dispatch, not even by a telephone call or email, despite that fact that she had provided her contact telephone and email address in all correspondence with the Commissioner's office. She complained that during the covid-19 period, posting was unreliable and delayed. The alleged delivery at her address on 8 October 2021 as reported by Hongkong Post, not supported by any signed receipt, cannot be verified and should not be relied upon by the Commissioner

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

as evidence of successful delivery;

- (3) The Appellant had a very busy schedule every day, not only on her full-time work but also on her master degree studies, especially when she was required to be on campus full-day for 2 full weekends every month. She relied on the evidence of her course calendar covering the period from May 2021 to June 2022, in particular on the months of October and November 2021 when she was busily engaged on campus on the following dates: 8-10, 15-17 October 2021 and 5-7, 12-14 November 2021;
- (4) She was definitely not the one who received or collected the registered mail containing the Determination, whether from the mailbox or from the security guard/management. She first saw and read the Determination (dated 6 October 2021) in around mid-October 2021 at home. There is no evidence as to who had received/collected the registered mail, whether Mr B or the helper, of which she could not recall nor was certain;
- (5) The Appellant noted the requirement of ‘...1 month after the transmission’ for lodging the appeal and therefore Mr B, when drafting the reply/notice of appeal, dated 5 November 2021 to set as a target date for the reply (as stated in the Appellant’s 27 November 2021 letter);
- (6) The notice of appeal/ reply was a matter of great importance to the Appellant given the great sum of tax money involved. She had to spend time to read the Determination and documents (which IRD spent probably 10 months to prepare since the Appellant wrote to the Commissioner’s office back in January 2021). More time was required for her to collect the necessary information and documents in preparing for the reply/notice of appeal, bearing in mind neither the Appellant nor Mr B was a tax expert;
- (7) Despite the lateness in her receipt and notice of the Determination (allegedly due to delayed posting during covid-19) in around mid-October 2021 and without knowledge as to the ‘real’ deadline, the Appellant had tried her best to reply within 1 month; she had made great efforts in preparing not only the notice of appeal but also a detailed explanation of her grounds of appeal with the supporting documents;
- (8) Mr B gave evidence that the notice of appeal together with the grounds of appeal both dated 5 November 2021 was posted to this Board in around mid-November 2021;
- (9) The Appellant submitted that it was wholly wrong and unreasonable



(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

for her to be deprived of the chance to appeal against the Determination when (i) the Commissioner had taken so long/more than 1.5 years to come up with the Determination upon her objection to the Assessment issued on 13 March 2020 and regular chasing by telephone calls (and actually for 2 to 3 years since her submission of the Tax Return); (ii) the Determination was suddenly sent to her address without notification e.g. by a telephone call or email and during covid-19 when posting was notoriously delayed and it could not be ascertained that she had received it when no signature of receipt was required for the registered post; and (iii) she did not know what the ‘real deadline’ was; and

- (10) Mr B submitted that the transmission of the Determination by registered post only, without follow up/ simultaneous telephone call or email notification, during the unprecedented covid-19 period, was unacceptable and unreasonable – the legislation, which provides transmission by post being valid service, does not cover such an extraordinary/exceptional pandemic situation. This Board should therefore exercise its discretion to extend the time for the Appellant to lodge the appeal.

### **Analysis**

30. As regards transmission to/service on the Appellant of the Determination, there is no evidence in challenge of the evidence of the Memo from Hongkong Post that successful delivery to the Appellant’s address was made on 8 October 2021.

31. Despite her arguments regarding the alleged delay in posting during covid-19 and no signed receipt of the registered post sent to her address, the Appellant does not argue that she had not received the registered post delivered to her address on 8 October 2021. She admitted that she came to have knowledge of and actually read the Determination sometime in mid-October 2021 (due to her own busy schedule).

32. There is no question that the service of the Determination by registered post to the Appellant’s postal address had complied with the statutory requirement provided under section 58(2) of the IRO. There is no substance in the Appellant’s argument that it should be followed/coupled by notification by telephone or email. There is no evidence in support of the delay in transmission due to covid-19 as alleged by the Appellant.

33. In the absence of evidence to the contrary, this Board finds that there was successful transmission of the Determination to the Appellant on 8 October 2021. The statutory appeal time limit period which was one month after transmission of the Determination ended on 8 November 2021 (Monday). The Appellant’s notice of appeal was received by the Board on 22 November 2021, therefore, the Appellant’s appeal was late by 14 days.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

34. In order to extend the time of appeal, this Board must be satisfied that the Appellant was ‘prevented’ from lodging, or ‘was unable’ to lodge an appeal by delivering the notice of appeal together with the specified documents to this Board within the statutory time limit.

35. There is no evidence showing, and indeed the Appellant has not argued, that she was prevented by illness or absence from Hong Kong from giving a notice of appeal within the statutory 1-month time limit.

36. The Appellant claimed that the delay was due to (i) the fact that she did not check her mailbox every day; (ii) her busy work and studies schedule and absence from home; (iii) lack of knowledge of the ‘real’ deadline for filing the appeal and (iv) more time required for her to read through the Determination and collect the necessary information and documents in preparing the notice of appeal.

37. Any delay in coming to have knowledge of the Determination was due to the Appellant’s own busy schedule or neglect in not checking the mail, but not proved to be due to any delay in posting. In any event, as held by the Court of Appeal in Chan Chun Chuen (*Supra*), once service under section 58(2) of the IRO was properly done, actual notice was treated to have been given to the taxpayer. It would then be up to the taxpayer to ensure that the document which he had chosen to be sent to a specified address would be brought to his attention. [paragraph 16 above]

38. The cover letter of the Determination dated 6 October 2021, enclosing a full text of section 66 of the IRO, sets out in detail the procedures and time limit for lodging an appeal to this Board. On the authority of D3/91 [paragraph 18 above], the time limit within which an appeal to be lodged under the statute is for all to observe. An omission due to ignorance of the law is not a good reason to extend the time for appeal.

39. In any event, the very fact that Mr B had, when preparing the notice of appeal, set the target deadline date of 5 November 2021, shows that the Appellant was aware of the 1-month deadline. The delivery of the notice and grounds of appeal and specified documents (albeit late in mid-November 2021 and received by this Board on 22 November 2021) shows that the Appellant had knowledge of the appeal mechanism.

40. Following the decision in D10/15 [paragraph 21 above], the Appellant being too busy or her choosing to give priority to work are also not reasonable causes or excuses for the delay in filing the notice of appeal under section 66(1A) of the IRO. There is no evidence that the Appellant was prevented from filing or was unable to file the notice of appeal by the deadline date of 8 November 2021 upon her own evidence that she had read the Determination sometime in mid-October 2021.

41. Having considered carefully all submissions and the oral and documentary evidence, even taking the Appellant’s case to its highest, this Board has come to the conclusion that no reasonable cause has been established to have prevented the Appellant from filing the notice of appeal within the prescribed 1-month time limit.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS  
(PUBLISHED IN MARCH 2023)

42. As the conditions set out in section 66(1A) of the IRO are not satisfied, this Board has no jurisdiction to extend time to allow the Appellant proceed with the Appeal lodged out of time.

**Conclusion**

43. The Appeal is out of time and is dismissed.

**Costs**

44. This Board considers it just and fair to make no order as to costs.