

Case No. D6/24

Profits tax – chargeability – profits derived from Hong Kong – appellant’s absence at hearing – failure to respond to notices – section 68(2), (2B) and (2D) of the Inland Revenue Ordinance – hearing in absence

Panel: Clark Douglas Stephen (chairman), Hung Stephanie Yu Jie and Keady Richard.

Date of hearing: 26 June 2024.

Date of decision: 9 August 2024.

The Appellant, a Hong Kong limited company, appealed against a Determination made by the Deputy Commissioner of Inland Revenue on 5 February 2024, which held that its profits for the year of assessment 2015/2016 were chargeable to Profits Tax as being derived from Hong Kong. The Appellant contended that its profits should not be taxed on the basis that they were derived from outside Hong Kong.

After lodging the appeal on 26 February 2024 under section 66 of the Inland Revenue Ordinance (Chapter 112) (**‘Ordinance’**), the Appellant failed to respond to repeated correspondence by the Board, including emails and letters requesting clarification concerning its attendance at the hearing and offering the option of remote communications. Despite reminders sent throughout March, April, and June 2024, no reply was received. The Board accordingly set a hearing on 26 June 2024.

On the day of hearing, the Appellant did not attend in person, by representative, or via remote means. The Board waited briefly and then proceeded in the absence of the Appellant.

Section 68(2), (2B) and (2D) of the Ordinance provides, in the event of the Appellant’s absence, that the Board may adjourn, hear in absence, or dismiss the appeal, subject to statutory requirements. No reasons for non-attendance or written requests to proceed in absence were received, nor was any remote appearance sought.

Held:

1. The Board found no basis to adjourn the hearing or to hear in the Appellant’s absence under section 68(2D) of the Ordinance, given that the Appellant was (and still is) a Hong Kong company but failed to follow procedural requirements.
2. In the circumstances, the Board had no other options but to dismiss the appeal formally.

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3. The Profits Tax Assessment was confirmed.
4. Given that no application for costs was made, no order was made as to costs.

Appeal dismissed.

Cases referred to: (Nil)

Appellant in absentia.

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

Decision:

Introduction

1. The Appellant objects to a Determination by the Deputy Commissioner of Inland Revenue ('the Commissioner') dated 5 February 2024 that its profits are chargeable to Profits Tax in the year of assessment 2015/2016. The Commissioner held the profits were chargeable to Profits Tax as being derived from Hong Kong. The Appellant objected on the basis the profits were derived from outside Hong Kong.
2. This is an appeal lodged by the Appellant on 26 February 2024 against the Determination pursuant to the provisions of section 66 of the Inland Revenue Ordinance (Chapter 112 of the Laws of Hong Kong) ('the Ordinance').
3. On 15 March 2024 at 9:56 am, the Appellant attached in his email to the Board a letter dated 6 March 2024 addressed to the Deputy Commissioner setting out further details of his appeal. The letter stated that the director of the Appellant would 'almost never go to [Hong Kong]'.
4. On the same day at 4:59 pm, the Clerk to the Board sent the Appellant an email stating that a hearing would be held to determine the appeal. The Board asked the Appellant's director whether he would attend the hearing in person, by an authorized representative, or by remote communication means, provided details for requesting that the hearing be conducted by video conference, and requested a reply by 20 March 2024.
5. The Clerk to the Board sent a chaser email on 21 March 2024 requesting a reply by 25 March 2024, and another chaser email on 5 April 2024 requesting a reply by 10 April 2024.
6. The Appellant did not respond. In the absence of a response, the Board set a hearing date of 26 June 2024.

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7. The parties were informed of the hearing date by letter from the Clerk to the Board of 15 April 2024. The Appellant was requested to inform the Board by Monday, 29 April 2024, if the Appellant would attend (a) in person, (b) by an authorized representative, or (c) by remote communications means.

8. On 3 June 2024, the first set of Hearing Papers were sent to the Appellant. The cover letter provided details of the place and date of hearing.

9. On 11 June 2024, the second set of papers including the Commissioner's Opening Submissions was sent to the Appellant. The cover letter also provided details of the place and date of hearing.

10. On 20 June 2024, the Clerk to the Board sent a further letter to the Appellant by email reminding it of the hearing on 26 June 2024 and setting out the provisions of sections 68(2), 68(2B) and 68(2D) of the Ordinance. These provide:

Section 68(2):

Subject to subsection (2B), an appellant shall attend at the meeting of the Board at which the appeal is heard in person or by an authorized representative.

Section 68(2B):

If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board may—

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal under subsection (2D); or

(c) dismiss the appeal.

Section 68(2D):

The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.

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11. The hearing of the appeal was due to commence on 26 June 2024 at 9:30 am. The Appellant was absent. The Board waited for 5 minutes before commencing the hearing to see if the Appellant (or an authorized representative) would attend.

12. The Commissioner appeared by Miss WONG Hoi-ki, Assessor, IRD and Ms NG Sui-ning, Senior Assessor, IRD.

Consideration by the Board

13. Section 68(2B) of the Ordinance provides for three options if the Appellant does not appear. First, if the Board is satisfied the failure to attend was due to sickness or other reasonable cause, it may postpone or adjourn the hearing. Second, the Board can proceed to hear the appeal under subsection (2D). Third, the Board can dismiss the appeal.

14. The Clerk to the Board had written to the Appellant setting the hearing date. No response was received and, in particular, there was no indication of sickness or any reason why a representative could not appear.

15. With regard subsection (2D), the wording provides that the Board can only proceed to hear the appeal if the ‘appellant will be or is outside Hong Kong’. This is not the case because the Appellant is a Hong Kong limited company. It is in Hong Kong, and therefore subsection (2D) should not apply. Even if the Board was satisfied that the Appellant was outside Hong Kong on the date of the hearing, which we are not, no notice was received in writing from the Appellant or its authorized representative requesting the Board to proceed in its absence. Further, the Appellant could have authorized another representative to attend, and in any event, the Appellant was given an opportunity to attend by video conference but did not respond.

16. The Respondent requested the Board to dismiss the appeal on the grounds that the Appellant had failed to attend the hearing of the appeal.

Conclusion and Determination

17. Given the failure of the Appellant to attend; the fact that the Appellant had not provided any reason why it could not attend; the fact that the Appellant had not requested in writing the appeal proceed in its absence; and, the fact the Appellant had not sought a remote hearing, it appeared to the Board that the Board had no other option than to dismiss the appeal.

18. The Board orally dismissed the appeal at the hearing, but now does so formally in writing in this decision.

19. The Board formally dismisses the appeal and confirms the Profits Tax Assessment.

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Costs

20. The Commissioner did not seek costs. There will be no order as to costs.