Case No. D10/15

Salaries tax – extension of time to lodge appeal – meaning of the word 'prevented' in Inland Revenue Ordinance section 66(1A) – whether or not being too busy and taxpayer's misjudgment can be a reasonable cause of extending time – whether or not the sum was reward for past service or relates to past service rendered by the taxpayer to the company

Panel: Liu Man Kin (chairman), Choi Kwan Wing Kum Janice and Li Ming Kwong.

Date of hearing: 7 May 2015.
Date of decision: 21 August 2015.

Upon the termination of the employment from the Company, the Company paid two sums of money to the Taxpayer. Sum I was a sum of payment in recognition of the Taxpayer's contribution during his entire career with the group in which the Company is a member. Sum IIB was the profit share of the previous year being held over. The Taxpayer lodged an appeal against the Salaries Tax Assessment raised on him. The issue in the appeal is whether the said two sum of money are taxable.

However the Taxpayer did not lodge the appeal within the time prescribed in Inland Revenue Ordinance section 66(1)(a). Accordingly, this is a late appeal. The delay in lodging a valid notice of appeal is more than 3 weeks. The Taxpayer explained that he was under work pressure at that time and he did not engage a lawyer or a tax representative to handle this appeal because he felt he was capable of handling the matter by himself.

The issue before this Board is the Taxpayer's application for an extension of time under Inland Revenue Ordinance section 66(1A) in order to pursue this appeal.

Held:

1. Unless the conditions in Inland Revenue Ordinance section 66(1A) are satisfied, this Board has no jurisdiction to extend time to allow an appellant to lodge an appeal. The word 'prevented' in Inland Revenue Ordinance section 66(1A) could best be understood to mean 'unable to' (D11/89, IRBRD, vol 4, 230 and Chow Kwong Fai Edward v CIR [2005] 4 HKLRD 687 followed).

2. Absence from Hong Kong does not confer an automatic right for extension of time, and the Taxpayer has to show that he was so prevented from giving the notice of appeal in time. There was no evidence before this Board showing

that the Taxpayer was prevented by absence from Hong Kong from giving the Notice of Appeal in time (D19/01, IRBRD, vol 16, 183 followed).

3. A 'reasonable cause' requires 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 is unlikely to receive sympathetic consideration from the Board. Being too busy to get on with the appeal cannot be a reasonable cause. In fact, the Taxpayer could engage a lawyer or a tax representative to handle this appeal. He did not do so because he felt he was capable of handling the matter by himself. This may well be a misjudgment of the Taxpayer. However the Taxpayer's misjudgment cannot be a reasonable cause of extending time. The Board found that no reason for extending time under Inland Revenue Ordinance section 66(1A) can be established. The Taxpayer's application for extending time to lodge the appeal was dismissed (D4/99, IRBRD, vol 14, 141 followed).

4. The Board also found that the Sum I is the payment in recognition of the Taxpayer's contribution during his entire career with the group in which the Company is a member. Clearly, it is a reward for past service and is taxable. Sum IIB is the profit share of the previous year being held over. It relates to past service rendered by the Taxpayer to the company. This sum is also taxable (Fuchs v CIR (2011) 14 HKCFAR 74 followed).

Appeal dismissed.

Cases referred to:

D2/04, IRBRD, vol 19, 76
D11/89, IRBRD, vol 4, 230
Chow Kwong Fai Edward v CIR [2005] 4 HKLRD 687
D19/01, IRBRD, vol 16, 183
D4/99, IRBRD, vol 14, 141
Fuchs v CIR (2011) 14 HKCFAR 74

Appellant in person.
Yau Yuen Chun, Chan Siu Ying Shirley and Lo Hok Leung Dickson for the Commissioner of Inland Revenue.

Decision:

Late Appeal

1. The Taxpayer lodged this appeal against the Salaries Tax Assessment for the year of assessment 2010/11 raised on him.

2. However, the Taxpayer did not lodge the appeal within the time prescribed in Inland Revenue Ordinance ('IRO') section 66(1)(a). Accordingly, this is a late appeal.

3. The issue before this Board is the Taxpayer's application for an extension of time under IRO section 66(1A) in order to pursue this appeal.

The Facts

4. The undisputed facts concerning the time issue are set out below.

5. Deputy Commissioner's determination dated 27 November 2014 ('the Determination') was posted to the Appellant under cover of a letter of the same date ('the Letter', and 'the Determination' and 'the Letter' collectively referred to as 'the Packet').

6. The full text of IRO section 66 has been enclosed in the Letter. Further, the procedures, the documents required and the time limit relating to lodging an appeal to this Board have also been set out in the Letter.

7. The Packet was sent to the Appellant at the residential address of the Taxpayer by registered post on 27 November 2014 and was delivered as addressed on 29 November 2014.

8. On 7 January 2015, the Taxpayer sent a facsimile dated 7 January 2015 to this Board, in which the Taxpayer claimed that he had sent his notice of appeal by facsimile on 26 December 2014.

9. On 8 January 2015, this Board wrote to the Taxpayer and stated that it did not receive the facsimile dated 26 December 2014 and the notice of appeal mentioned in the Taxpayer's facsimile dated 7 January 2015.

10. On 20 January 2015, this Board received the Taxpayer's notice of appeal by facsimile.

11. On 21 January 2015, this Board wrote to the Taxpayer and advised him that that his appeal was invalid as he did not enclose the Determination.

12. On 22 January 2015, the Taxpayer sent his notice of appeal with the Determination and this Board received the same on the same day.

The Delay

13. IRO, section 66(1) provides:

> ' *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 –*
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> *(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*
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> *(b) such further period as the Board may allow under subsection (1A),*
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> *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.*'

14. The 1-month period in IRO section 66(1) commences immediately after the completion of the transmission process, and the transmission process would normally end when the determination reaches the address that it was sent to. See D2/04, IRBRD, vol 19, 76.

15. In this case, the Packet reached the Taxpayer's residential address on 29 November 2014, and hence the 1-month period began to run on 29 November 2014.

16. In accordance with IRO section 66(1), plainly a notice of appeal would not be valid unless it is accompanied by the documents prescribed in that section. In this case, the valid notice of appeal was only given to the Board on 22 January 2015.

17. Accordingly, the delay in lodging a valid notice of appeal is more than 3 weeks.

The Taxpayer's case

18. The Taxpayer gave evidence before us. His evidence in gist is as follows:

(a) The Taxpayer returned to Hong Kong from Country A on 26 November 2014. He acknowledged that he received the Packet on 29 November 2014.

(b) He was extremely busy at work at the time. Although he tried to prepare the notice of appeal in the evening, for a long period he could not concentrate on it and often put it aside.

(c) On 26 December 2014, which was Boxing Day, the Taxpayer went back to his office in the morning to send the notice of appeal to this Board by facsimile. He left his wife and children in the car. As he was taking the family to see a movie, he had some pressure on time in order to get to the cinema. He only stayed in the office for a short period of time. He believed that he had input the correct facsimile number, but did not print out a transmission report after sending out the facsimile.

(d) According to the Taxpayer, he only sent a notice of appeal of 3 pages to this Board by facsimile on 26 December 2014. The said notice of appeal was not accompanied by the Determination. He did not fully appreciate the requirements in IRO section 66(1) at that time.

19. According to the Taxpayer's movement records bearing his HKID No., the Taxpayer had no movement record from 27 November 2014 to 22 January 2015. These movement records were issued by the Immigration Department upon the applications of CIR, and were given to the Taxpayer before the hearing of this application for extension of time. During cross-examination, Ms Yau for CIR put these movement records to the Taxpayer and pointed out that the Taxpayer was in Hong Kong from 27 November 2014 to 22 January 2015. The Taxpayer did not dispute this in the hearing.

20. Ms Yau also put to the Taxpayer that he did not have a reasonable cause for extension of time for filing the notice of appeal. The Taxpayer replied that he was under work pressure at that time.

21. This Board asked the Taxpayer since he was busy at that time, why he did not engage a lawyer or a tax representative to handle his appeal. The Taxpayer answered that he felt he was capable of handling the matter by himself.

22. After the conclusion of the hearing before us, on 8 May 2015 the Taxpayer sent an email to this Board, in which he produced a copy of his Country A Passport ('the Passport'). In that email, based upon the record in the Passport, the Taxpayer said that he was not in Hong Kong from 29 December 2014 to 3 January 2015.

CIR's case

23. CIR submitted that the Taxpayer had failed to show any valid ground for extension of time under IRO section 66(1A), and the Taxpayer's application for extension of time should be dismissed.

24. CIR objected to the admissibility of the Passport, for the Taxpayer should not be allowed to adduce further evidence after the conclusion of the hearing. Further, CIR submitted that the Passport would not assist the Taxpayer's application for extension of time at all.

Discussion on extension of time

25. IRO section 66(1A) provides:

> ' *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).*'

26. Unless the conditions in IRO section 66(1A) are satisfied, this Board has no jurisdiction to extend time to allow an appellant to lodge an appeal. See D11/89, IRBRD, vol 4, 230.

27. The word 'prevented' in IRO section 66(1A) could best be understood to mean 'unable to'. See Chow Kwong Fai Edward v CIR [2005] 4 HKLRD 687 (CA).

28. The Taxpayer has never argued, and there is no evidence showing, that the Taxpayer was 'prevented by illness' from giving the notice of appeal in time.

29. As to 'prevented by absence from Hong Kong':

(a) In our view, the Passport should not be part of the evidence before this Board. The Taxpayer did not explain why he had not produced the Passport before the hearing. Since the Passport did not appear in the hearing, CIR had no opportunity to cross-examine the Taxpayer on the Passport during the hearing. In these circumstances, to admit the Passport into evidence would be unfair to CIR.

(b) In any event, the Passport at most can only show that the Taxpayer was not in Hong Kong from 29 December 2014 to 3 January 2015. As held in D19/01, IRBRD, vol 16, 183, absence from Hong Kong does not confer an automatic right for extension of time, the taxpayer has to show that *he was so prevented* from giving the notice of appeal in time. In this case, there is no evidence showing that the Taxpayer was prevented by his absence in Hong Kong from 29 December 2014 to 3 January 2015 from giving the notice of appeal within the 1-month period, bearing in mind that the 1-month period started to run from 29 November 2014.

(c) There is no evidence before this Board showing that the Taxpayer was prevented by absence from Hong Kong from giving the Notice of Appeal in time.

30. As to 'prevented by other reasonable cause':

(a) As held in D4/99, IRBRD, vol 14, 141, a 'reasonable cause' requires 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 is unlikely to receive sympathetic consideration from the Board.

(b) In the Taxpayer's evidence, the only explanation for the delay in giving the notice of appeal is that he was busy at the time. However, as said in the above, being too busy to get on with the appeal cannot be a reasonable cause.

(c) In fact, the Taxpayer could engage a lawyer or a tax representative to handle his appeal. He did not do so because he felt he was capable of handling the matter by himself. This may well be a misjudgement of the Taxpayer. However, the Taxpayer's misjudgement cannot be a reasonable cause for extending time.

31. Accordingly, we find that no reason for extending time under IRO section 66(1A) can be established. We dismiss the Taxpayer's application for extending time.

Discussion on the appeal proper

32. As the Taxpayer's appeal is a late appeal and the Taxpayer does not get an extension of time, we have no need to consider the Taxpayer's appeal. For the sake of completeness and in deference to the parties' submissions, we briefly set out our view on the appeal proper in the paragraphs below.

33. The essential facts concerning the appeal are as follows:

(a) The employment between a company ('the Company') as employer and the Taxpayer as employee started on 10 January 2000. The employment was terminated by a Deed of Release ('the Deed') dated 8 September 2010.

(b) Upon the termination of the employment, the Company paid HK$1,000,000 to the Taxpayer, amongst which HK$166,667 was payment in lieu of notice.

(c) The said HK$1,000,000 also included 2 sums:

Sum I – HK$575,368
Sum IIB – HK$48,065

(d) According to the Company, Sum I is the payment in recognition of the Taxpayer's contribution during his entire career with the group in which the Company is a member.

(e) As to Sum IIB, the Taxpayer said it was profit share of the previous year being held over.

34. The issue in the appeal is whether Sum I and Sum IIB are taxable or not. CIR's view is that those sums are taxable. The Taxpayer disagrees.

35. In Fuchs v CIR (2011) 14 HKCFAR 74, Ribeiro PJ said (all other members of the Court concurred):

> ' *17. In my view, the same approach should be adopted in the construction of section 8(1) of the Ordinance. Income chargeable under that section is likewise not confined to income earned in the course of employment but embraces payments made …… "in return for acting as or being an employee", or (in Lord Templeman's terms) "as a reward for past services or as an inducement to enter into employment and provide future services". If a payment, viewed as a matter of substance and not merely of form and without being "blinded by some formulae which the parties may have used", is found to be derived from the taxpayer's employment in the abovementioned sense, it is assessable. This approach properly gives effect to the language of section 8(1).*
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> *18. It is worth emphasising that a payment which one concludes is "for something else" and thus not assessable, must be a payment which does not come within the test. As Lord Templeman pointed out, it is only where "an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, [that] the emolument is not received 'from the employment'." Thus, where a payment falls within the test, it is assessable and the fact that, as a matter of language, it may also be possible to describe the purpose of that payment in some other terms, eg, as "compensation for loss of office", does not displace liability to tax. The applicable test gives effect to the statutory language and other possible characterisations of the payment are beside the point if, applying the test, the payment is "from employment*".
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> ……

> *22. In situations like those considered above, since the employment is brought to an end, it will often be plausible for an employee to assert that his employment rights have been 'abrogated' and for him to attribute the payment received to such "abrogation", arguing for an exemption from tax. It may sometimes not be easy to decide whether such a submission should be accepted. However, the operative test must always be the test identified above, reflecting the statutory language: In the light of the terms on which the taxpayer was employed and the circumstances of the termination, is the sum in substance "income from employment"? Was it paid in return for his acting as or being an employee? Was it an entitlement earned as a result of past services or an entitlement accorded to him as an inducement to enter into the employment? If the answer is "Yes", the sum is taxable and it matters not that it might linguistically be acceptable also to refer to it as "compensation for loss of office" or something similar. On the other hand, the amount is not taxable if on a proper analysis the answer is "No". As the "abrogation" examples referred to above show, such a conclusion may be reached where the payment is not made pursuant to any entitlement under the employment contract but is made in consideration of the employee agreeing to surrender or forgo his pre-existing contractual rights. In the present appeal, the principal dispute between the taxpayer and the Revenue involves rival contentions along the aforesaid lines.'*

36. In our view:

(a) Sum I is the payment in recognition of the Taxpayer's contribution during his entire career with the group in which the Company is a member. Clearly, it is a reward for past service and is taxable.

(b) Sum IIB is the profit share of the previous year being held over. It relates to past service rendered by the Taxpayer to the Company. This sum is also taxable.

Conclusion

37. For the reasons above, we dismiss the Taxpayer's application for extending time to lodge the appeal.