Case No. D10/17

Salaries tax – personal assessment – sending of notice of appeal comprising the covering letter and determination – whether appellant prevented to lodge an appeal within a month – costs order - sections 16, 17, 42, 51(8), 58(2), 58(3), 64(4), 66(1A) and 68(9) of the Inland Revenue Ordinance (the 'Ordinance')

Panel: Chow Wai Shun (chairman), Ho Hoi Ki Daniel and Sara Tong.

Date of hearing: 20 June 2017.
Date of decision: 11 September 2017.

This was an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 30 April 2015 ('the Determination') which confirmed the Personal Assessment for the year of assessment 2009/10 raised on the Appellant. The notice of appeal of the Appellant was received by the Office of the Clerk to this Board on 21 February 2017. Correspondences continued to be exchanged between the parties after the notice of hearing was sent. The Appellant wrote to the Office of the Clerk to this Board the afternoon before the hearing applying for provision of certain documents and information, e.g. movement record, from the Inland Revenue Department (the 'IRD').

The Determination was sent from the Deputy Commissioner to the Appellant's address on record which was in Macau by registered post. The Appellant claimed he came back to Hong Kong in May 2015 but had not updated his postal address until December 2016. The Determination was redirected to the Appellant to his updated Shatin address on 24 January 2017.

In the substantive issue of the appeal, the appellant complained that the Inland Revenue Department (the 'IRD') had for a long time allowed his proposed apportionment of expense but had changed since the year of assessment 2009/10.

Held:

1. The hearing panel ('Panel') found that there had not been any information missing or not provided to the Panel as well as the Appellant which would have been prejudicial to the preparation of adjudicated of this appeal.

2. The IRD had duly served the notice comprising the covering letter and the Determination by, *inter alia*, sending the same to the Appellant's last known address. The Appellant had not been 'prevented' to lodge an appeal within a month from 30 April 2015 for any specific reasons under section

66(1A) of the Ordinance. The Panel found that the appeal was lodged late and no extension, if any, could have been so long to have saved the Appellant's appeal (Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379 followed, and D2/04, IRBRD, Vol 19, 76 distinguished).

3. The appeal was obviously unsustainable and the Appellant was patently frivolous and vexatious. The Appellant was ordered to pay as costs of the Board the amount of $25,000.

Obiter

4. Though the Panel concluded that the appeal was lodged late, it went on to consider the substantive issue of the appeal. Previous assessments did not constitute any form of representation binding on the IRD to future conduct. The burden was on the Appellant to show that the portion of expenses and outgoings allowed by the IRD was too little and too small. The Appellant chose not to go to the witness box to give evidence and stand up with any challenge from the representatives of the IRD in relation to these matters meant to the Panel that he had failed to satisfy the burden of proof under section 68(4) of the IRO. Even if the Panel extended the time for lodging the appeal, the assessment in paragraph 41(p)(ii) below would be confirmed (Interasia Bag Manufacturers Ltd v Commissioner of Inland Revenue [2004] 3 HKLRD 881, and Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718 followed).

Appeal dismissed and costs order in the amount of $25,000 imposed.

Cases referred to:

Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379
D2/04, IRBRD, vol 19, 76
Interasia Bag Manufacturers Ltd v Commissioner of Inland Revenue [2004] 3 HKLRD 881
Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718

Appellant in person.
Cheung Ka Yung and Chow Cheong Po, for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner

of Inland Revenue dated 30 April 2015 ('the Determination') which confirmed the Personal Assessment for the year of assessment 2009/10 raised on the Appellant. The notice of appeal of the Appellant was received by the Office of the Clerk to this Board on 21 February 2017. A copy of the Determination together with the Grounds of Appeal reached the Office of the Clerk on 22 February 2017.

2. Correspondences continued to be exchanged between the parties after the notice of hearing was sent. They would be referred to below so far as they appear relevant. The Appellant wrote to the Office of the Clerk to this Board the afternoon before the hearing asking this hearing panel to direct the Respondent to provide certain documents and information for the hearing. This panel invited submissions from both sides at the beginning of the hearing, with a couple of matters revisited at various stages of the hearing. In this decision, we shall deal with the Appellant's application first before turning to the preliminary issue and the substantive issue of this appeal.

The Appellant's application for provision of certain documents and information from the IRD

3. In his email to the Office of the Clerk to this Board the afternoon before the hearing, the Appellant referred to the hearing bundles submitted by the Respondent and asked for the following documents:

(a) The letter of the Assessor (Appeals) dated 12 May 2017 to the Appellant refers to certain appendices to her letter to the Clerk to this Board on the same date but those appendices were not included in the bundle.

(b) The movement record of the Appellant supplied by the Immigration Department does not contain any legend of codes.

(c) The earlier letter of the Assessor dated 13 May 2014 to the Appellant refers to duplicate letter and notices for the years of assessment 2009/10 and 2010/11 but those letter and notices were not included in the bundle.

(d) Sections 3A, 4, 5B, 11, 12, 16, 17, 18, 42, 59, 65, 68, 70, 81, 82 and 82A of the Inland Revenue Ordinance ('IRO').

He claimed that the absence of these documents and information had prevented him to defend his Statement of Appeal.

(a) Certain appendices

4. The said letter is addressed to the Appellant. It refers to another letter on the same date which is addressed to the Clerk to this Board with certain appendices. The other letter and those appendices were attached to the said letter to the Appellant. The said

letter was copied to the Clerk without further enclosures. The said letter, without enclosures, was included in the hearing bundle submitted by the Respondent. So, the concern of the Appellant was whether this hearing panel had been provided with that other letter and those appendices.

5. After much time spent for clarification and verification, it transpired that the other letter and those appendices had been forwarded to this hearing panel on the same date containing a covering page of sequence of events followed by a number of supporting documents relating to the preliminary issue. Indeed, apart from the covering sequence of events, those supporting documents have been included in the first part of the Respondent's hearing bundle. For the avoidance of doubt, both the Appellant and this hearing panel have had the same covering sequence of events.

(b) Movement record

6. The record covers the period from 1 April 2015 to 31 March 2017. Apart from the two columns showing the dates and times, there are two other columns marked with 'LOC' and 'MOVE TYPE'. Under 'LOC' there are references of 'CFT', 'MFT' and 'APS' whereas under 'MOVE TYPE' there are 'D's and 'A's without any legend of such codes. The Appellant argued that in the absence of any legend of such codes, he could not interpret and understand the record.

7. In response, the representatives of the Respondent explained that 'LOC' stands for 'location', 'CFT' for 'China Ferries Terminal', 'MFT' for 'Macau Ferries Terminal', 'APS' for 'Airport', 'D' for 'Departure' and 'A' for 'Arrival'.

8. These all make perfect sense to us and we find no ground to go any further than that at this juncture.

9. Subsequently, the Appellant challenged the authenticity and accuracy of the record and informed this panel that indeed he had applied for a Statement of Travel Records himself. However, it had not been made available to him before the hearing. He showed us a copy of the application which we note was signed on 22 May 2017 and according to the Appellant filed on 26 May 2017. We also note remarks on the application form that certain documents, as well as the application fee, were missing. According to the Appellant, he submitted all outstanding documents together with the payment of the application fee by 3 June and it would take 14 working days for the Immigration Department to produce the record. But for those missing documents, we might have had the record applied by the Appellant to compare. In the absence of any contesting evidence, we find no ground to challenge the movement record provided by the Respondent.

(c) Duplicate letter and notices for the years of assessment 2009/10 and 2010/11

10. The Appellant submitted that those notices formed the subject matter of his initial objection. In the absence of such notices in the hearing bundle, he claimed that he did not know what he had objected to.

11. The hearing panel referred the Appellant to the Determination which rejected his objection and confirmed those notices of assessment. It is the view of this hearing panel that the Determination should contain sufficient information on which the Appellant could formulate his arguments for this appeal. Furthermore, the Appellant should have a copy of that letter and notices but the Appellant said that he could no longer locate those documents.

12. In addressing this issue, the Respondent first referred us to a 'without prejudice' letter dated 22 April 2014 to the Appellant and hence, is included in the hearing bundle of this Board. In essence, the Assessor explained in the letter the relevant provisions of the IRO, proposed to disallow certain expenses claimed by the Appellant in full or in part, and invited the Appellant to supply further information or evidence to support his claims should he disagree.

13. The Respondent further clarified the circumstances upon which the subsequent letter enclosing the duplicate letter and notices was sent. That letter was first sent to an address in Shatin but was returned to the Respondent. Later, the Respondent was informed of the change of address of the Appellant to Macau. Duplicate letter and notices were sent under the cover of that subsequent letter to the Appellant's given address in Macau.

14. Among those other notices, the Appellant showed us a notice of statement of loss which was not included in the hearing bundle submitted by the Respondent. That statement of loss shows assessable profits of 2,688, followed by loss set off of 2,688, giving rise to assessable profits after loss set off equal to 0 (zero). We compared these with the figures shown in paragraph 16 of the Determination and found no substantive difference between the two sets of figures. The figures in paragraph 16 of the Determination include expenses which were disallowed being added back to the accounts but the amounts of assessable profits, loss set off and assessable profits after loss set off are the same as those shown on the statement of loss. In short, there has not been any information missing or not provided to this hearing panel as well as the Appellant which would have been prejudicial to the preparation or adjudication of this appeal.

(d) Provisions of the IRO

15. The Appellant attempted to explain the relevance of provisions such as sections 3A in the contexts of section 64 and subsequently section 66. In essence, he argued that powers which are vested in the hands of the Respondent by law have been exercised by assessors including the claim that his appeal was out of time. Those attempts, in our view, were far from convincing. The matter was ultimately resolved because each of the members of this hearing panel has a copy of the IRO on the desk in front of us. If we need to rule on this part of the application, we would find that none of those provisions suggested in the Appellant's application has any relevance to either the preliminary issue or the substantive issue. Indeed, during his subsequent submission, the Appellant rarely referred to any of those provisions.

Preliminary issue

16. The preliminary issue for this appeal is, therefore, whether the Appellant's appeal could be entertained. This depends on whether the statutory time period for lodging an appeal against the Determination has either been observed or should be extended.

Facts

17. On the documents made available to us and after considering the submissions made by both sides, we find the following facts basic and relevant to the preliminary issue of this case:

(a) The Determination was sent under cover of a letter of the same date, i.e. 30 April 2015, from the Deputy Commissioner to the Appellant's address on record which was in Macau by registered post. They were, however, returned to the sender on 15 June 2015.

(b) The letter, together with the Determination, was redirected to the Appellant at his Macau address by ordinary post on 30 June 2015, with a record of posting of the same date.

(c) By a fax dated 28 December 2016, the Appellant informed the IRD of his change of mailing address to an address in Shatin and directed the latter to 'send tax demands of 2011/12 & 2012 together with 2009/2010 director's decisions and any letters from May 2015 onwards.'

(d) The letter, together with the Determination, was redirected again to the Appellant to his Shatin address by ordinary post on 24 January 2017.

(e) The Appellant filed his notice of appeal on 22 February 2017.

The statutory provisions

18. Section 66 of the IRO is the relevant statutory provision to the preliminary issue:

'*(1) 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.*
>
> (1A) *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)….'*

19. Section 58 of the IRO provides:

> '…
>
> (2) *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, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business….*
>
> (3) *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.*
>
> …'

Submissions of both sides

20. The Assessor (Appeal) raised this preliminary issue by a letter dated 12 May 2017. It was the Respondent's case that latest at the time of the first redirection on 30 June 2015 to the Appellant's last known postal address on record at the relevant time, i.e. his Macau address, the notice in the form of a letter enclosing the Determination dated 30 April 2015 had been validly served according to section 58(2) of the IRO and as stipulated under section 58(3) it was deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post unless the contrary is shown. As such, by filing his notice of appeal only on 22 February 2017, more than one and a half years later, the Appellant's appeal is out of time unless the Board is willing to extend the time pursuant to section 66(1A) of the IRO.

21. The Appellant disagreed. In his submission, the Appellant argued that the notice should have been sent to his 'place of abode', his 'business' and his 'employment'. In addition, he had only changed his correspondence address to Macau; he did not change his business address which remained to be in Hong Kong during the relevant period. By only sending the notice to his postal address, he submitted, did not satisfy section 58(2) of the IRO.

22. The Appellant also referred us to section 64(4) of the IRO which provides that the Commissioner shall, within 1 month after his determination of the objection, transmit in writing to the person objecting to the assessment his determination. He argued that the Determination should have been served on him but was not just sent to his postal address. He further argued that by sending to his address, the Determination would have reached only the letter box at the lobby on the ground floor of the building where he resided, which could not be taken as his address. Further or alternatively, the Appellant, relying on section 64(4) of the IRO, denied that the Determination had been transmitted to him within one month after the determination of his objection given that the first delivery of it on 30 April 2015 had never reached him and on redirection on 30 June 2015 it had already been beyond the one month period. He also stressed that the assessment he objected to was the statement of loss of his business. As such, the Determination should have also been sent to his place of business.

23. The Appellant also challenged that since the letter together with the Determination redirected on 30 June 2015 had not been received by him nor returned to the IRD, they might have lost and his personal and business particulars as appeared might have been leaked out. He accused, accordingly, that the relevant officer(s) of the IRD had committed breach of secrecy as required under section 4 of the IRO, which is an offence under section 81 of the IRO. He also reserved his right to claim damages.

24. In response, the Respondent referred to Chan Chun Chuen v CIR [2012] 2 HKLRD 379 and quoted the following passage of the leading judgement of the Court of Appeal, at page 389:

> '*Under the statutory framework there is no requirement to serve on all the known addresses of the taxpayer. The taxpayer's rights are further protected because he has the right under section 51(8) to choose which address he wishes the notices from the IRD to be sent to him...*'

25. In essence, the Respondent's submission is that there is no legal requirement to send the Determination to all the addresses of the Appellant because the Appellant can choose which address he wishes the Determination from the IRD to be sent to him by informing the Commissioner of his change of address in accordance with section 51(8). As the Appellant did not change his postal address until December 2016, sending the Determination to his Macau address as his last known postal address on record at the relevant time complied with section 58(2). Moreover, personal service is not the only way prescribed for service.

26. With regard to the accusation of breach of secrecy, the Respondent referred to the Court of Appeal decision of Chan Chun Chuen in which it was also held, at page 388, that '*once the document was properly served under section 58(2) of the IRO, actual notice was treated to have been given to the taxpayer and 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*'.

27. It was also the Respondent's submission that since the Determination was first delivered to the Appellant's last known postal address on record on the same date of the Determination, the one-month requirement of section 64(4) of the IRO had been complied with. In addition, the Respondent referred to Chan Chun Chuen again but this time the judgement of Johnson Lam J at page 393 which pointed out that '*lack of actual knowledge would not impinge on the validity and effect of*' a decision as '*communication does not necessarily require the decision-maker to establish that the recipient has actual knowledge*'.

28. In his last reply, the Appellant raised that on the Respondent's claim that the first delivery of the Determination on 30 April 2015 complied with section 64(4) of the IRO, he had been prevented from lodging an appeal within the one-month deadline under section 66(1) because factually he did not have the Determination with him within a month from 30 April 2015.

Our analysis

29. We find it clear to follow the Court of Appeal decision in Chan Chun Chuen as an authority binding on us regarding the service of the notice, in this case, comprising the covering letter and the Determination. Section 58(2) clearly uses the conjunctive 'or' in between the various places. It has also been confirmed by the Court of Appeal at page 387 that the giving of a notice is accomplished and time will run when it is served by one of the two methods identified in section 58(2), namely, either by personal service on the taxpayer or by postal service on either one of the following addresses:

(a) last known postal address;

(b) place of abode, business or employment;

(c) place at which the taxpayer is or was during the year to which the notice relates, employed or carrying on business;

(d) the land or/and buildings in respect of the property tax assessment.

Personal service is, therefore, not the sole method. Similarly, registered post is not so required under the section. Reading the provision to mean to require either personal service or posting the notice to all these addresses is ungrounded.

30. In the present case, the Appellant had not updated his postal address until December 2016. As explained above, he could not have expected the IRD to send the relevant notice to his place of business so long as the IRD had duly served the notice by, *inter alia*, sending the same to his last known postal address on record, i.e., his Macau address.

31. Section 64(4) uses the verb 'transmit', emphasizing the act of sending the determination; whereas as section 66(1) uses the noun 'transmission', referring to the process which according to D2/04, IRBRD, vol 19, 76 normally comes to its end when the determination reaches the address that it was sent to, irrespective of whether the determination has physically reached the recipient. In D2/04, the determination was dated and posted on the same date by registered mail to the taxpayer at his residential address, with a record of the Post Office showing that it was delivered to the taxpayer's residence on the third day given that the day in between was a public holiday. The notice of appeal was received by the Board within a month of the later date and was held to have been lodged within time under section 66(1).

32. The facts in the present case are different. We do not have any evidence of delivery of the registered post, we have the record of posting the same on the same date which we consider sufficient for the purpose of the act of sending the determination under section 64(4) of the IRO. Further or alternatively, the Determination must then have been first delivered to the Appellant's Macau address, being his last known postal address on record at the relevant time, before it could be subsequently returned to the sender on non-collection. The process of transmission came to its end when the Determination was delivered to and reached the address that it was sent to. Accordingly, the time period within which the notice of appeal had to be lodged had started to run, whether or not the Determination had physically reached the Appellant.

33. Had the Appellant been 'prevented' to lodge an appeal within a month from 30 April 2015 for any specific reason listed under section 66(1A)? He claimed that he had not had any sight of the Determination as he had already been back to Hong Kong since 30 April 2015 and did not return to Macau. He relied on the movement record provided by the Immigration Department. Although he did come and go from Hong Kong, he said that he departed via either the airport or the China Ferry Terminal. He did not, however, give any oral evidence and therefore was not challenged by the Respondent. On the other hand, he did not claim either of the specific reasons being absent from Hong Kong and any illness.

34. We note from the movement record, however, that the Appellant left Hong Kong on two occasions in May 2015: departing on 11 May and arriving back on 14 May; and departing on 19 May and returning on the same day, both via the China Ferry Terminal. As we understand, there have been regular ferry services to and from Macau at the China Ferry Terminal.

35. Furthermore, as shown in the hearing bundle provided by the Respondent, a copy of the 'Tax Return – Individual 2014/15' dated 4 May 2015 was sent to the

Appellant's Macau address. The Appellant completed the return and dated it on 3 June 2015. When asked, he confirmed his signature on the tax return but could not offer any explanation why and how he could have received the tax return shortly after 30 April 2015.

36. Our inference is that since the Appellant could receive the tax return in May 2015 and completed it in early June, he could have possibly collected the Determination and lodged his appeal within the same period. As a result, we find no reasonable cause for exercising our discretion in favour of the Appellant to extend the time period.

37. Even if we should have done so, the next question would remain for how long the period should have been extended. The Determination, and the covering letter, were redirected to the Macau address on 30 June 2015. The one-month period would have started after the end of the transmission process. Appellant claimed that he came back to Hong Kong in May 2015. However, he had not updated his record with the IRD until December 2016. Should he have updated his postal address in accordance with section 51(8), the IRD might not have redirected the notice including the Determination to the Appellant's Macau address or it would have redirected the same to his updated address. If an extension should have been given at the first place, it would not have been sufficiently long to save the Appellant's appeal.

38. From the analysis above, we conclude that the appeal was lodged late and no extension, if any, could have been so long to have saved the Appellant's appeal. This could have put this appeal to its end. We decide, however, to continue with the analysis of the substantive issue of this case.

The substantive issue

39. We had a usual adjournment before hearing the substantive issue of the appeal, before which we asked the representatives for the Respondent for any written submission. It had been prepared, as usual, and a copy of the written submission was given to the Appellant. After the adjournment, the Appellant put to this panel on what basis the written submission was allowed to be handed in on the spot, particularly given that he had only just the time over the adjournment to go through and digest it. Nothing indeed unexpected appeared in the written submission in terms of both the reasons and authorities backing up the Respondent's case. Nevertheless, and since the Respondent did not insist either, we decided to put the written submission aside entirely.

40. We also asked the Appellant, again and indeed the third time, if he would give any oral evidence at the hearing. Despite our explanation at the beginning of the hearing, the Appellant chose not to go to the witness box.

Facts

41. On the submissions from both sides and the documents before us, we find

the following facts relevant to the substantive issue of this case:

(a) The Appellant's wife is Ms A and their son is Mr B.

(b) The Appellant and his wife were the owners of the following properties:

Owner	Property
The Appellant	Address CC ('Property C')
His wife	Address DD ('Property D')
	Address EE ('Property E')
	Address FF ('Property F')

(c) The Appellant had a sole-proprietorship business ('the Business') named Company G. The Business closed its accounts on 31 March 2010.

(d) Company H filed an Employer's Return of Remuneration and Pensions for the year ended 31 March 2010 in respect of the Appellant which showed, among other things, the following:

(i)	Period of employment	01-04-2009 to 31-03-2010
(ii)	Capacity	Position J
(iii)	Particulars of income	$
	Salary	540,000
	Gratuity	162,116
		702,116

(e) Company K filed a Notification of Remuneration Paid to Persons other than Employees for the year ended 31 March 2010 in respect of the Appellant which showed, among other things, the following:

(i)	Period of employment	01-04-2009 to 31-03-2010
(ii)	Capacity	Position L
(iii)	Particulars of income	$
	Lecturer fee	58,937

(f) In his Tax Return – Individuals for the year of assessment 2009/10 ('the Return'), the Appellant declared, among other things, the following:

(i) Employment income from Company H of $702,116 accrued to him during the year.

(ii) The operating results of the Business during the year were:

	$
Gross income	63,140
Turnover	502,121
Gross profit / (loss)	(375,841)
Net profit / (loss) per accounts	(375,841)

(g) The Appellant and his wife elected Personal Assessment for the year. His wife did not have income assessable under the IRO during the year.

(h) The Assessor issued to the Appellant the following Statement of Loss and Personal Assessment in accordance with the Return for the year of assessment 2009/10:

(i) Statement of Loss

	$
Loss for the year and transferred to Personal Assessment	375,841
Loss brought forward	28,845
Add: Loss for the year	375,841
	404,686
Less: Loss transferred to Personal Assessment	375,841
Loss carried forward	28.845

(ii) Personal Assessment

	$
Employment income from Company H	702,116
Less: Deductions	52,600
	649,516
Less: This year's loss from the Business	375,841
	273,675
Less: Allowances	246,000
	27,675
Tax Payable thereon	138

The Appellant did not object to the assessment.

(i) The Assessor raised an enquiry on the Appellant to request him to supply a certified copy of balance sheet, profit and loss account and tax computation in respect of the Business. Having failed to receive a reply from the Appellant, the Assessor did not accept that there were any losses incurred by the Business and revised the Statement of Loss for the year of assessment 2009/10 as follows:

	$
Loss brought forward	28,845

	$
Less: Loss for the year	0
Loss carried forward	28,845

On this premises, the Assessor annulled the Personal Assessment for the year of assessment 2009/10 since it was no longer advantageous to the Appellant.

(j) To substantiate his claim for the loss incurred, the Appellant submitted a profit and loss account of the Business for the year ended 31 March 2010 which showed the following:

		$	$
	Income		63,140
	Less:		
(i)	Property expenses		
	Electricity ($4,838 x 40%)	1,935	
	Management fee ($10,788 x 40%)	4,315	
	Rates ($2,570 x 40%)	1,028	7,278
(ii)	Motor car expenses (Car M, Car N, Car P)		
	Autotoll	20,000	
	Carpark fee	12,000	
	Insurance	6,505	
	Gasoline	47,551	
	Maintenance fee	69,419	
	Management fee for carparking spaces	7,380	
	Rates	864	
	Registration fee	31,050	194,769
(iii)	Subcontractor payment		141,881
(iv)	Motor car monthly instalment (Car P)		56,400
(v)	Mobile phone		1,082
(vi)	Octopus		15,100
(vii)	Business registration		2,450
(viii)	Overseas travelling		2,535
(ix)	Reference book		3,160
(x)	Telephone charges		1,558
(xi)	Miscellaneous items		12,739
	Casting adjustment		29
	Total expenses		438,981
	Net (Loss)		(375,841)

(k) In answering to the enquiries raised by the Assessor concerning the income and expenses recognized in the Business' accounts for the year ended 31 March 2010, the Appellant advanced certain contentions which we shall deal with so far as relevant below.

(l) The Appellant also provided copies of the following documents in respect of various expenses charged in the profit and loss account to the Business for the year of assessment 2009/10:

(i) Electricity bills totally $4,838 issued to his wife in respect of the Property.

(ii) Official receipts to confirm the receipt of building management fee totally $10,788 in respect of the Property.

(iii) Vehicle registration documents showing the Appellant as the registered owner of the motor cars Car M, Car N and Car P.

(iv) Official receipts to confirm the receipt of building management fees totaling $7,380 in respect of Property E, Property F and Property C.

(v) Hire purchase agreement in respect of the motor car Car P.

(vi) A statement made by his son to confirm the receipt of driver fee in one lump sum of $141,881 for the period between 1 April 2009 and 31 March 2010.

(m) In response to the Assessor's enquiry, Company K stated, among other things, the following:

(i) The Appellant was one of its lecturers. He conducted tutorial classes in the field of "Interior & Environment" and marked assignments of the students.

(ii) The Appellant's engagement was on project basis, usually 8-12 lessons each.

(iii) Basically, it paid the Appellant $407 to $520 per lesson for different classes he served.

(iv) A monthly breakdown of the Appellant's lecturer fee income for the year ended 31 March 2010 was as follows:

Month	No. of lessons			Amount
	Lesson fee $505 each	Lesson fee $470 each	Total	$
April 2009	12	0	12	6,060
May 2009	13	0	13	6,565
June 2009	13	0	13	6,565

Month	No. of lessons Lesson fee $505 each	Lesson fee $470 each	Total	Amount $
July 2009	5	12	17	8,165
August 2009	3	10	13	6,215
September 2009	1	16	17	8,025
October 2009	5	2	7	3,465
November 2009	2	0	2	1,010
December 2009	0	0	0	0
January 2010	0	0	0	0
February 2010	8	0	8	4,040
March 2010	8	0	8	4,040
	70	40	110	54,150
February 2010 (Incentives)				4,787
				58,937

(v) It provided classrooms for conducting the classes. The classrooms had basic equipment (computer and projector) but usually the lecturers would use their own notebook or even projector.

(vi) It would not provide any assistant, course materials or handout to the lecturers.

(vii) The Appellant was required to provide his own equipment and facilities and was required to incur outgoings and expenses.

(n) The Assessor ascertained from Company H that the Appellant was not required to incur outgoings and expenses in the performance of his duties.

(o) The Assessor did not accept that all the expenses charged in the Business' accounts were incurred by the Appellant for the purposes of producing assessable profits. By a letter dated 22 April 2014, the Assessor explained to the Appellant the relevant provisions of the IRO and proposed to disallow the expenses in paragraph 41(j)(i)-(vi) above in full or in part. The Appellant was invited to supply further information or evidence to support his claims should he disagree with the proposal.

(p) In giving effect to the amounts of deductible expenses computed in paragraph 41(o) above, the Assessor issued to the Appellant the Statement of Loss in respect of the Business and raised on him the Personal Assessment for the year of assessment 2009/10 as follows:

(i) Statement of Loss

	$
(Loss) per accounts	(375,841)
Add: Property expenses	
($7,278 - $(4,838+10,788+2,570) x 1/6	4,246
Motor car expenses ($194,769 x 5/6)	162,307
Subcontractor payment	141,881
Motor car monthly instalment	56,400
Mobile phone	1,082
Octopus ($15,100 x 5/6)	12,584
	$
Casting adjustment	29
Assessable Profits	2,688
Less: Loss set off	2,688
Assessable Profits after loss set off	0
Loss brought forward	28,845
Less: Loss set off	2,688
Loss carried forward	26,157

(ii) Personal Assessment

	$
Employment income from Company H	702,116
Less: Deductions	52,600
	649,516
Less: Allowances	246,000
Net Chargeable Income	403,516
Tax Payable thereon	50,597

(q) The Appellant objected to the above Personal Assessment. Despite the Assessor’s request, the Appellant made no attempt to provide any further evidence to support the claim for the deduction of various expenses.

The statutory provisions

42. We find the following provisions of the IRO relevant to the substantive issue of this appeal.

(a) Section 42 provides:

‘*(1) For the purpose of this Part the total income of an individual for any year of assessment shall be the aggregate of the*

following amounts –

……

(b) *the net assessable income of the individual for that year of assessment; and*

(c) *… the assessable profits of the individual for that year of assessment computed in accordance with Part 4;*

……

(2) *There shall be deducted from the total income of an individual for any year of assessment -*

……

(b) *the amount of the individual's loss or share of loss for that year of assessment computed in accordance with Part 4. …*'

(b) Section 16 provides:

'*(1)* *In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period, ...* '

(c) Section 17 provides:

'*(1)* *…… no deduction shall be allowed in respect of –*

(a) *domestic or private expenses, …*

(b) *…… any disbursements or expenses not being money expended for the purpose of producing such profits;*

(c) *any expenditure of a capital nature……*'

(d) Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

The Appellant's grounds of appeal and submission

43. The Appellant gave a 'STATEMENT OF APPEAL' of slightly more than four pages. After setting out in some detail the Business, he referred to its profit/loss accounts of a number of years before 2009/10, the year of assessment in issue, and compared the amounts of turnover the business and the proportions of expenses allocated for office use. According to the information he set out, he attached a lower percentage (reduced from 60/70% to 40%) of expenses allocated for office use for the year of assessment 2009/10. When asked by this hearing panel, he explained that the percentages were set on pure assumptions. He also attempted to explain his dealings with Company K. He stressed, in particular, that the course he taught at Company K required a lot of samples and he had to provide his own equipment which had incurred outgoings and expenses by the Business. Since Company K did not provide any storage facilities, the samples had to be transported every time and be stored in the Property. The Appellant also claimed that he had to travel from Company H after working hours to Company K to deliver classes by one of his cars Car P.

44. The major discontent of the Appellant seems to be that the IRD has for a long time allowed his proposed apportionment of expense but changed since the year of assessment 2009/10 without any explanation. Further, since the Determination acknowledged the existence of those outgoings and expenses, the amounts claimed by the Appellant under such outgoings and expenses should have been allowed deduction accordingly.

45. The Appellant made his oral submission along more or less the same line. He submitted, in his hearing bundle, copies of payments for car insurance, car maintenance, mobile phone and Octopus, in addition to what he had provided. He also complained against the Respondent for not including the relevant assessment in the hearing bundle, which had hindered his preparation for the appeal.

The Respondent's submission

46. The Respondent's case is that the connection between certain outgoings and expenses and the profit-earning process of the Business has not been clearly established. Representatives of the Respondent further clarified that some outgoings and expenses had been allowed deduction in a reduced percentage (reduced from 40% claimed to 1/6 allowed in the instances of the expenses in relation to the Property and; and from 100% claimed to 1/6 allowed in the instances of expenses in relation to the three cars and Octopus). As seen below, a few others had been allowed deduction in full as claimed while some others are denied.

47. In response to the Appellant's criticism of not following its previous assessing practice, the Respondent referred us to Interasia Bag Manufacturers Ltd v CIR [2004] 3 HKLRD 881. In particular, on page 907, Hartmann J reiterated that the notices of assessments for previous years were not communications in respect of the notices between the Commissioner and the applicant in terms of which the Commissioner gave any

promises, assurances or undertakings and held that there could be no basis for saying that the notices have constituted any form of representation binding on the Commissioner to future conduct. It was further held that the applicant was only entitled to expect that the assessments were for their own particular year and were subject to the power of the Commissioner under section 60 of the IRO to review and issue additional assessments. Given the decline in the turnover of the Business even with the inclusion of the income received from Company K and the fact that the Appellant had secured a full-time employment, it was the Respondent's case that the review and adjustment were just reasonable.

The Appellant's reply

48. In his reply, the Appellant linked the decline in the turnover of the Business with the financial tsunami in 2008. He also submitted that he continued the Business and incurred such outgoings and expenses for, hopefully, future profits. The Appellant referred to the disallowed expense for mobile phone, the claim of which was just over $1,000, to illustrate his point that the IRD was so unreasonable.

Our analysis

49. We find ourselves bound to follow the court decision in Interasia Bag and agree with the Respondent's submission that previous assessments do not constitute any form of representation binding on him to future conduct.

50. We also find the complaint of the Appellant that the relevant assessment had not been included in the hearing bundle ungrounded. The Appellant himself admitted that he had lost the assessment sent to him. Moreover, in our view, the accounts set out in the Determination are sufficient for the purposes. The Appellant knows what expenses and outgoings had been denied deduction entirely or in part. What he is required to do is to convince us, with evidence in support, that those expenses and outgoings should have been allowed deduction in full.

51. Among the outgoings and expenses claimed, the Respondent has allowed items (vii) to (xi) listed under paragraph 41(j). We do not intend to disturb any of them.

52. On the other hand, the claims for deduction of items (iii) to (v) and the last item 'Casting adjustment' were denied; whereas the claims for deduction of items (i), (ii) and (vi) were allowed in part. In these regards, we remind ourselves of section 68(4) of the IRO which imposes the burden of proof on the Appellant. What he has submitted to this Board, as supplement to what he submitted to the Assessor before and during his objection to the assessment, show no more than that he has incurred certain expenses and outgoings. However, this alone does not suffice for the purposes of deduction. In order to be a deductible expense or outgoing under Part 4 of the IRO, it must also have been incurred in the production of chargeable profits and it is not excluded by section 17 of the IRO. So far as the connection between the expenses and the production of chargeable profits is concerned, A Chung J in CIR v Chu Fung Chee [2006] 2 HKLRD 718, at page 725 has

made it clear that it '*must satisfy the tests of being "really incidental to the trade itself" or having been incurred "for the purpose of earning the profits"*.' While apportionment of such expenses and outgoings is possible under section 16, as envisaged by the phrase 'to the extent', the burden remains on the Appellant in this appeal to show that the portion allowed by the Respondent is too little and too small. The Appellant is in the best position to provide any information to substantiate the linkage between those expenses and outgoings on the one hand and the production of chargeable profits of the Business on the other. The fact that he chose not to go to the witness box to give evidence and stand up with any challenge from the representatives of the Respondent in relation to these matters means to us that he has failed to satisfy the burden of proof under section 68(4) of the IRO.

53. Further or alternatively, we deal first with those items of which deductions have been denied.

(a) Subcontractor payment

The Appellant acknowledged that the recipient was his son who, he submitted, served as a driver. According to the Appellant's submission, the payment was calculated on trip basis and made by cash. However, there was neither service agreement between the Business and his son nor routine itinerary of the trips made by him. No corroborative evidence was called for at least from his son. In our view, the arrangement looks private, between father and son. On the information made available to us, we do not find it convincing that the payment was incurred in any way connected to the production of chargeable profits by the Business.

(b) Monthly instalment for motor car Car P

The Appellant was the registered owner and has provided a copy of the hire purchase agreement in respect of the car. It is, however, clearly capital and so the expense in acquiring it is capital in nature and denied deduction anyway. The capital expense does not qualify for depreciation allowance either if it is not shown to be connected to the production of chargeable profits. It was his submission that he used this car between the two places of work: Company H and Company K. It was also necessary to use this car to carry with him samples for classes at Company K. Apart from the confirmation from Company K that it would not provide any teaching aids, which is in our view neither here nor there, no corroborative evidence has ever been provided to substantiate this claim.

(c) Mobile phone

Similarly, the mobile phone is capital and so equally the expense in

acquiring it is capital in nature and denied anyway. In addition, the capital expense does not qualify for depreciation allowance either if it is not shown to be connected to the production of chargeable profits by the Business. No evidence has been adduced to show such connection.

(d) Casting adjustment

The Appellant has never explained and shown what it was and how that related to the production of chargeable profits of the Business.

As such, we cannot agree with the Appellant that any of these expenses and outgoings should be given any deduction.

54. With regard to those items of which deductions have been allowed in part, albeit at a lower percentage than that claimed by the Appellant, we were given to understand that the respective percentages were pure assumptions and no more than guesses. In the Determination, the Deputy Commissioner commented that the amounts allowed by the Assessor were more than generous at any rate.

(a) Property expenses

The Appellant allocated 40% of the electricity fee, management fee and rates of the Property as the running cost of the Business based on his own assumption. The Assessor reduced the portion to 1/6 on the assumption that the flat was being shared for use by the Appellant, his wife and his son and split the Appellant's share equally between private and business uses.

(b) Motor car expenses

The Appellant was the owners of the three motor cars concerned which he claimed were wholly for business use and promotion. He said that he kept three motor cars to suit different terrains and occasions. He claimed all the expenses for deduction but only 1/6 was allowed which was on more or less the same assumption that each of the Appellant, his wife and his son used one motor car and split the Appellant's use in one of those cars equally between private and business uses.

(c) Octopus

There were three Octopus cards held by the Appellant, his wife and his son respectively. Those cards were used for paying car parking meters and expenses for travelling by other means. Again, the Appellant claimed all expenses for deduction but only 1/6 was

allowed on the same assumption as above.

Apart from the lack of evidence in support of such claims, in none of these expenses could we be satisfied that they were 'really incidental to the trade itself' or have been incurred 'for the purpose of earning the profits.' In our view, the Property is acquired as residence of the Appellant and his family members; the Business did not appear to require three motor cars or indeed any motor car and the same can be said to the three Octopus cards.

55. Given our analysis above, we comment that the extent of the concession given by the Assessor was not well-grounded either. However, it does not affect the assessment appealed against per se. Therefore, the assessment in paragraph 41(p)(ii) above would be confirmed even if we extended the time for lodging the appeal.

Costs order

56. Section 68(9) and Part 1 of Schedule 5 of the IRO gives this Board the power to order the Appellant to pay as costs of the Board a sum not exceeding $25,000, which shall be added to the tax charged and recovered therewith, where the Board does not reduce or annul the assessment appealed against.

57. From the account above, the appeal is obviously unsustainable and the Appellant is patently frivolous and vexatious. We find this appropriate to order the Appellant to pay as costs of the Board the amount of $25,000.

Epilogue

58. The Appellant wrote to the Office of the Clerk to this Board the day following the hearing, claiming that he had been prevented to defend for his Statement of Appeal due to our reluctance to entertain his application for those documents he applied for the day before the hearing. Specifically, he applied to this Board to exercise its power under section 68AA(1) of the IRO to give direction to the IRD on the provision of those documents or revised documents, except the provisions in the IRO, for future hearing if any. We see no need to deal with this as it bears no relevance to our disposal of this appeal.