

Case No. D11/17

Profits tax – notice of appeal out of time – proving service by post – section 58 of the Inland Revenue Ordinance ('IRO') – relevant time to consider the filing of notice of appeal – discretion to extend time – section 66 (1A) of the IRO – whether or not absence from Hong Kong is a reason for granting time extension – whether or not insufficient postage for the mail could be considered as a 'reasonable cause' – the intention of the taxpayer at the time of acquisition

Panel: Elaine Liu Yuk Ling (chairman), Chan Yue Chow and David Tai Wai Lai.

Date of hearing: 28 June 2017.

Date of decision: 12 September 2017.

The Appellant appealed against the Determination and contended that the profits derived from the sale of the Properties should not be chargeable to profits tax. There is a preliminary issue concerning the failure of the Appellant to lodge the appeal within 1 month after the transmission to him of the Commissioner's written determination together with the reasons therefor and the statement of facts under section 66(1) of the IRO. The notice of appeal was more than 4 months out of time. The Appellant stated that she had been out of town and requested for an extension of time to file the appeal. No evidence on her absence was produced. The Appellant further claimed that the submission of appeal was further delayed due to the insufficient postage.

Held:

1. Pursuant to section 58(4) of the IRO, in proving service by post, it shall be sufficient to prove that the letter containing the notice was duly addressed and posted. Once the presumption in section 58(3) come into play, it falls upon the taxpayer to rebut the presumption and establish the absence of actual notice (Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379 followed)
2. The relevant time in considering whether an Appellant has filed the notice of appeal within the statutory time limit is the time when the notice of appeal was received by the Clerk to the Board.
3. Under section 66(1A) of the IRO, the Board may only exercise the discretion to extend time if it is satisfied that the Appellant was prevented by illness or absence from Hong Kong or other reasonable notice. The onus of proof is on the Appellant (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 followed).

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4. Absence from Hong Kong, by itself, is not a reason for granting time extension under section 66(1A) of the IRO. The Appellant must establish that she was prevented from giving the notice of appeal in time because of the absence from Hong Kong. The Board found that her absence did not prevent her or the Representative from giving the Notice of Appeal.
5. The insufficient postage for the mail could not be possibly considered as a 'reasonable cause'. It is the Appellant and/or the Representative's own mistake for failing to ensure sufficient postage was made. Unilateral mistake does not constitute 'reasonable cause' under section 66(1A) of the IRO.
6. In determining whether a property was acquired as a capital asset or a trading asset, one would consider the intention of the taxpayer at the time of acquisition (Lionel Simmons Properties Ltd (in liquidation) v Commissioner of Inland Revenue (1980) 53 TC 461 followed). The taxpayer's own declaration of intention is inconclusive. It is a question of fact to be determined after considering all the objective facts and circumstances. There are badges of trade which would give indication on whether or not the transaction concerned is a trade that falls within section 14. A one-off transaction can be a trade. All the circumstances shall be examined objectively, and no single test can produce the answer (All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750; Marson (H.M. Inspector of Taxes) v Morton Ch D 1986, 59 TC 381; and Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51 followed). The burden of proof is on the Appellant.
7. The Appellant's grounds of appeal are not supported by evidence. The Representative's oral testimony is not credible, and the Board does not accept her evidence. The objective facts and circumstances, including the short holding period, the frequency of similar transactions and the lack of credible reasons given by the Appellant to explain the transactions, suggested that the properties are trading assets and the profits tax are chargeable on the profits derived therefrom.

Appeal dismissed.

Cases referred to:

Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
Lionel Simmons Properties Ltd (in liquidation) v Commissioners of Inland Revenue (1980) 53 TC 461
All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750
Marson (H. M. Inspector of Taxes) v Morton Ch D 1986, 59 TC 381

Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51

Appellant's daughter, for the Appellant.

Lai Wai Sum and Lo Hok Leung, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. By a Determination dated 30 August 2016 in respect of the Profits Tax Assessment for the years of assessment 2010/11 and 2011/12 raised on the Appellant ('Determination'), the Deputy Commissioner confirmed that the profits derived by the Appellant from the sale of three properties should be chargeable to Profits Tax. The Appellant's assessable profits for the year 2010/11 was assessed to be \$196,516, and the assessable profits for the year 2011/12 was assessed to be \$1,140,246.

2. The three properties ('Properties') are:

- (a) Address A ('Property 1')
- (b) Address B ('Property 2');
- (c) Address C ('Property 3').

3. The Appellant appealed against the Determination and contended that the profits derived from the sale of the Properties should not be chargeable to profits tax.

4. There is a preliminary issue concerning the failure of the Appellant to lodge the appeal within the time stipulated by the Inland Revenue Ordinance.

5. At the hearing, Ms D, the Appellant's daughter, whom the Appellant has appointed as her authorized representative ('the Representative') gave oral evidence on both the preliminary and substantive issues.

Preliminary Issue

6. Pursuant to section 66(1) of the Inland Revenue Ordinance, an appeal to this Board shall be lodged within 1 month after the transmission to him of the Commissioner's written determination together with the reasons therefor and the statement of facts.

7. Under section 66(1A) of the Inland Revenue Ordinance, if the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the 1 month's specified period, the Board may extend for such period as it thinks fit.

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8. The Determination was issued on 30 August 2016. Together with a cover letter, the Determination was sent to the Appellant, by registered post on 30 August 2016. It was also copied to the Representative at the same time. In the cover letter, the Respondent has enclosed the full text of section 66 of the Inland Revenue Ordinance and set out in detail the procedure and time limit for lodging an appeal to this Board. These two letters sent respectively to the Appellant and the Representative were unclaimed and returned to the Respondent.

9. On 21 September 2016, the Determination and the cover letter were redirected to the Appellant and the Representative by ordinary post.

10. The Representative wrote to the Respondent by email on 3 October 2016 stating that she received the payment notices but contended that the profits derived from the sale of the Properties should not be subject to tax.

11. By reply letter dated 27 October 2016, the Respondent referred the Appellant to the right to appeal under section 66 of the Inland Revenue Ordinance.

12. The Representative sent a mail to the Clerk to the Board on 24 November 2016, which was returned to the sender due to insufficient postage. There is no evidence on the content of the mail.

13. On 1 March 2017, the Clerk to the Board received the Appellant's Notice of Appeal dated 21 November 2016 issued by the Representative.

14. The Appellant wrote to the Clerk to the Board dated 10 March 2017 (which was received by the Board on 15 March 2017) stating that she had been out of town from 21 September 2016 to 20 December 2016 and requested for an extension of time to file the appeal. No evidence on her absence was produced. The Appellant further claimed that the submission of appeal was further delayed due to the insufficient postage.

Decision on the Preliminary Issue

15. The Determination was sent to the Appellant and the Representative by ordinary post on 21 September 2016.

16. Section 58(3) of the Inland Revenue Ordinance provides that '*any notice sent by post shall be 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. Pursuant to section 58(4) of the Inland Revenue Ordinance, in proving service by post, it shall be sufficient to prove that the letter containing the notice was duly addressed and posted. Once the presumption in section 58(3) comes into play, it falls upon the taxpayer to rebut the presumption and establish the absence of actual notice. [Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379 §22]

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17. The Determination was sent to the Appellant and the Representative duly addressed and posted. There is no contention otherwise. There is no evidence to rebut the presumption or establish the lack of actual notice of the Determination.

18. In the normal course, it would have taken two working days for the postal package to be delivered locally in Hong Kong to the Appellant and the Representative's addresses. Taking into account the postal time of two working days, the Determination is deemed to have been served on 24 September 2016 by virtue of section 58(3) of the Inland Revenue Ordinance.

19. The Appellant shall lodge her notice of appeal on or before 24 October 2016 in accordance with section 66(1) of the Inland Revenue Ordinance.

20. Although the Notice of Appeal was marked with the date of 21 November 2016, it was only received by the Board on 1 March 2017. The Appellant did not dispute that the Board only received the notice of appeal on 1 March 2017. Section 66 of the Inland Revenue Ordinance requires the Appellant to 'give' notice of appeal to the Board. Clearly, the Notice of Appeal should not and could not be considered as having been given on 21 November 2016 (which was also beyond the statutory time limit) simply because it was so dated. The relevant time in considering whether an appellant has filed the notice of appeal within the statutory time limit is the time when the notice of appeal was received by the Clerk to the Board.

21. In any event, the Notice of Appeal was clearly given after the statutory time period of 1 month. It was more than 4 months out of time.

22. Under section 66(1A) of the Inland Revenue Ordinance, the Board may only exercise the discretion to extend time if it is satisfied that the Appellant was prevented by illness or absence from Hong Kong or other reasonable notice. The onus of proof is on the Appellant.

23. The Court of Appeal in Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 has held that,

'while a liberal interpretation must be given to the word "prevented" used in s.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.'

24. The Appellant's reasons for the delay were that:

- (1) the Appellant was out of town between 21 September 2016 and 20 December 2016;
- (2) the delivery was delayed due to insufficient postage.

25. At cross examination, the Representative confirmed that at the time when she wrote the email dated 3 October 2016, she had already received the Determination.

26. Absence from Hong Kong, by itself, is not a reason for granting time extension under section 66(1A) of the Inland Revenue Ordinance. The Appellant must establish that she was prevented from giving the notice of appeal in time because of the absence from Hong Kong.

27. The Representative was able to write the email on 3 October 2016, and also the Notice of Appeal on 21 November 2016 (as it was so dated). These are the periods while the Appellant was away from Hong Kong. Her absence did not prevent her or the Representative from giving the Notice of Appeal.

28. The insufficient postage for the mail could not be possibly considered as a 'reasonable cause'. It is the Appellant and/or the Representative's own mistake for failing to ensure sufficient postage was made. Unilateral mistake does not constitute 'reasonable cause' under section 66(1A) of the Inland Revenue Ordinance.

29. We do not find any reasonable cause to extend the time under section 66(1A). The Appellant's appeal shall not be entertained. This will dispose of the appeal entirely. As we have also heard on the substantive issue, we will also deal with it below.

The Substantive Issue

30. The legal principles are clear. Under section 14(1) of the Inland Revenue Ordinance, profits tax shall be charged on every person carrying on trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong from such trade, profession or business (excluding profits arising from the sale of capital assets).

31. Section 2 defines 'trade' as including 'every trade and manufacture, and every adventure and concern in the nature of trade'.

32. In determining whether a property was acquired as a capital asset or a trading asset, one would consider the intention of the taxpayer at the time of acquisition. [Lionel Simmons Properties Ltd (in liquidation) v Commissioners of Inland Revenue (1980) 53 TC 461 at 491G]. The taxpayer's own declaration of intention is inconclusive. It is a question of fact to be determined after considering all the objective facts and circumstances. There are badges of trade which would give indication on whether or not the transaction concerned is a trade that falls within section 14. A one-off transaction can

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be a trade. All the circumstances shall be examined objectively, and no single test can produce the answer. [All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750; Marson (H. M. Inspector of Taxes) v Morton Ch D 1986, 59 TC 381; Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51].

33. The burden of proof is on the Appellant.

Undisputed Facts

34. Property 1 was purchased on 23 November 2009 at the purchase price of HK\$1,720,000, with the assignment dated 23 February 2010. The purchase was financed by bank loans. About a year after the purchase, on 24 December 2010, it was sold at the price of HK\$1,980,000 and the assignment was dated 28 March 2011. With reference to the dates of the two assignments, the Appellant held Property 1 for 13 months.

35. Property 2 was purchased on 14 December 2009 at the purchase price of HK\$1,550,000, with the assignment dated 4 February 2010. The purchase was financed by bank loans. On 4 April 2011, it was sold at the price of HK\$2,138,000 and the assignment was dated 6 July 2011. With reference to the dates of the two assignments, the Appellant held Property 2 for 17 months.

36. Property 3 was purchased on 8 February 2010 at the purchase price of HK\$1,330,000, with the assignment dated 4 May 2010. The Appellant purchased the same by own funds, but the Assessor ascertained that a bank loan was obtained by the Appellant and the Representative on 2 June 2010 using Property 3 as a security. On 11 March 2011, it was sold at the price of HK\$2,000,000 and the assignment was dated 27 April 2011. With reference to the dates of the two assignments, the Appellant held Property 3 for 12 months.

Grounds of appeal

37. The Notice of Appeal states the following grounds:

- (1) Property 1 was purchased for the Appellant's youngest son ('the Son'). The Son left Hong Kong in the end of 2009 for study. As the inhabitant was no longer living in Hong Kong, there was no reason to hold Property 1 as the Appellant was not an investment buyer who acquires properties for rental or investment gain. Furthermore, as the Appellant had no income to repay the bank loan, selling the property was the only way for repayment.
- (2) The situation of Property 2 is similar, except that Property 2 was purchased for the Representative. It was sold as the Representative left Hong Kong in 2010 for work.
- (3) Property 3 was sold to finance the tuition fee of the Son.

- (4) The Appellant contended that ‘the financial ability to hold the properties has not been thoroughly assessed and could not be sustained by the tax return only. Besides, the bank financing could only be granted by the financial strength of the guarantors but not the borrower i.e. the [Appellant].’
- (5) The Appellant and the Representative had not been asked to provide information to substantiate the professed reasons of disposal. The Representative provided the visa copy of the Son and the relocation information of the Representative as proof.
- (6) The Properties were acquired at around the same time when the price was attractive and affordable to the Appellant. The reasons for selling the Properties have been explained. It is contended that if the Appellant were a professional trader, acquisition of properties would be repeated over a period of time following the sale of the Properties.

Decision on Substantive Issue

38. The evidence of or given by the Representative on behalf of the Appellant does not support the contention in the Notice of Appeal.

39. In the Notice of Appeal, the Appellant claimed that she sold Property 1 because the Son left Hong Kong for study and ‘the inhabitant[s] [are] no longer living in Hong Kong’. Property 1 was purchased on 23 November 2009. According to the copy of the Son’s passport provided by the Representative, the Son arrived at the United Kingdom on 3 October 2009, which was before the purchase of Property 1. Further, according to the land search records, Property 1 was sold by the Appellant subject to a tenancy agreement for two years from 1 August 2010 to 31 July 2012.

40. The Appellant claimed in the Notice of Appeal that she sold Property 2 because the Representative left Hong Kong for work, and ‘the inhabitant[s] [are] no longer living in Hong Kong’. The Appellant signed the sale and purchase agreement in respect of the purchase of Property 2 on 14 December 2009. At that time, the Representative had already left Hong Kong for work for almost 2 years. According to an email sent by the Representative to a moving company dated 15 January 2008, the Representative moved to Singapore for work in January 2008. The land search records also show that the Appellant purchased Property 2 subject to a then existing tenancy for the term until 4 June 2010.

41. The Appellant claimed in the Notice of Appeal that Property 3 was sold to finance the tuition fee of the Son. When the Appellant purchased Property 3 on 8 February 2010, the Son was already studying in the United Kingdom. The Appellant must have known the amount of tuition fee that she had to pay for the Son at the time when she purchased Property 3. There is no contention nor any evidence showing any change of circumstance.

42. When the above timing of the purchase and the Son's study in the United Kingdom were put to the Representative at cross-examination, she changed to say that Property 1 was purchased for the Son's future use. She further claimed during cross-examination that the reason for selling the Properties was also that the Appellant was moving to live in China, she could not handle the management of the Properties and there was no reason to continue holding the Properties. She could not give a satisfactory answer as to why these reasons were not mentioned in the Notice of Appeal. During the cross-examination, the Representative has been changing the evidence about the reasons for the sale.

43. The Appellant's grounds of appeal are not supported by evidence. The Representative's oral testimony is not credible, and we do not accept her evidence.

44. The objective facts and circumstances, including the short holding period, the frequency of similar transactions and the lack of credible reasons given by the Appellant to explain the transactions, suggested that the Properties are trading assets and the profits tax are chargeable on the profits derived therefrom.

Disposition of the Appeal

45. By reasons of the above, this appeal is dismissed both on the preliminary issue and the substantive issue.