

Case No. D13/16

Profits tax – the requisite documents not accompanying the notice of appeal – the chop of the Office of the Clerk to the Board – Chinese version of section 66(1) – unilateral mistake – sections 66(1) and 66(1A) of the Inland Revenue Ordinance

Panel: Lo Pui Yin (chairman), Fan Cheuk Hung and Ma Lai Yuk.

Date of hearing: 27 October 2015.

Date of decision: 20 June 2016.

The Office of the Clerk to the Board (the Office) through ‘by hand’ delivery received on 27 January 2015 a letter dated 23 January 2015 wherein it was stated that the Taxpayer’s company decided to appeal, under section 66 of the Ordinance, against the determination of the Deputy Commissioner dated 30 December 2014 and applied for an extension of time of one month to 28 February 2015 for the submission of the statement of the grounds of appeal as the director and major shareholder would leave Hong Kong on 25 January 2015 and only return on 1 February 2015. The Office sent a letter dated 28 January 2015 to the Taxpayer and stipulated in the letter, *inter alia*, that a written notice of appeal, together with a copy of the Commissioner’s determination and a statement of grounds of appeal should be filed. The Taxpayer’s counsel submitted that the affixing of the chop of the Office on the Taxpayer’s letter dated 23 January 2015 gave the Taxpayer an expectation that it had already done what the Board wanted it to do or that everything was in order. He also contended that section 66(1) of the Ordinance requires only that the notice of appeal be given within 1 month after the transmission to it of the Deputy Commissioner’s written determination and that the requisite documents may be given afterwards. His submissions made references to the Chinese version of section 66(1) to persuade the Board not to follow the previous decisions of the Board.

Held:

1. The Board does not accept that the Taxpayer had a legitimate expectation of any description over how the Board would treat its appeal arising out of the Office of the Clerk to the Board affixing on the copy of the Taxpayer’s notice of appeal the chop of ‘RECEIVED by hand’. The chop signified no indication, representation or promise that the notice of appeal would be entertained by the Board or that the requirements of section 66(1) of the Ordinance had been complied with. The Board could not possibly promise or purport to promise or be thought to have promised any benefit or procedural advantage to a taxpayer seeking to lodge an appeal if the implementation of such a promise or purported promise was contrary to or in conflict with its statutory duty.

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2. The Board takes the view that the Chinese version of section 66(1) does not suggest any difference, discrepancy or lack in precision when the Chinese version is compared with the English version, be it in language or in sentence structure, that might advance the Taxpayer's case. Indeed, one possible meaning of '並附有' in the context of section 66(1) suggests that the requisite documents are meant to be attached to the notice of appeal.
3. The Board considers that the Taxpayer has failed to establish that it was prevented by absence from Hong Kong from giving notice of appeal. The Board further considers that any misunderstanding about the meaning of section 66(1)(a) on the part of the Taxpayer's director would have been a unilateral mistake and could not constitute reasonable cause preventing the lodging of a valid appeal.

Appeal dismissed.

Cases referred to:

D2/07, (2007-08) IRBRD, vol 22, 219
D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629
D24/08, (2008-09) IRBRD, vol 23, 482
R v Secretary of State of the Home Department ex p Doody [1994] 1 AC 531
D176/98, IRBRD, vol 14, 58
D19/01, IRBRD, vol 16, 183
D33/07, (2007-08) IRBRD, vol 22, 791
D14/06, (2006-07) IRBRD, vol 21, 371
D55/09, (2009-10) IRBRD, vol 24, 993
D5/11, (2011-12) IRBRD, vol 26, 72

Leon Tang instructed by Messrs Jal N Karbhari & Co, for the Appellant.
To Yee Man and Yu Wai Lim, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Taxpayer, Company A, objected to the Profits Tax Assessments for the years of assessment 2001/02, 2006/07, 2008/09 and 2009/10 and the Additional Profits Tax Assessments for the years of assessment 2002/03 to 2005/06 raised on it by the Assessor of the Revenue. The Deputy Commissioner of Inland Revenue made a

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Determination dated 30 December 2014 rejecting the Taxpayer's objections, confirming the Additional Profits Tax Assessments for the years of assessment 2003/04 and 2005/06, and revising the Profits Tax Assessments for the years of assessment 2001/02, 2006/07, 2008/09 and 2009/10 and the Additional Profits Tax Assessments for the years of assessment 2002/03 and 2004/05 in accordance with the opinion of the Assessor stated in Fact (30) to the Determination.

2. The Deputy Commissioner of Inland Revenue's Determination was sent to the Taxpayer's address at Building B in Location C together with a covering letter dated 30 December 2014. The covering letter stated that the law allows the Taxpayer to appeal against the Determination to the Board of Review, described in broad terms of the relevant legislation, section 66 of the Inland Revenue Ordinance (Chapter 112), and enclosed a copy of the full text of section 66. A copy of the covering letter and its enclosures were also sent to Company D, Certified Public Accountants.

3. The Office of the Clerk to the Board of Review received on 27 January 2015 through 'by hand' delivery a letter dated 23 January 2015 signed by an authorized signatory of the Taxpayer. The material parts of this letter states:

'The company decides to appeal against the decision to the Board of Review under Section 66 of the Inland Revenue Ordinance.

We apply an extension of time of one month to 28 February, 2015 submitting the statement of the grounds of appeal as the director and major shareholder [Mr E], will leave for [City F] on 25, this Sunday, and return Hong Kong on 1 February, 2015.

We hope you could grant us the extension.'

4. The Clerk to the Board of Review sent a letter dated 28 January 2015 marked 'URGENT' to the Taxpayer at Building B address. The Clerk referred to section 66(1) of the Inland Revenue Ordinance and the stipulation therein that 'any person who wishes to appeal to the Board should file a written notice of appeal, together with **a copy of the Commissioner's determination and a statement of grounds of appeal, within one month from the date of the Commissioner's determination.** As a matter of practice, any appeal filed beyond the one-month period would be treated as a late appeal and that an application for an extension of time under section 66(1A) of the IRO will be considered by the Board **at the hearing.** If the Board accepts the appellant's reasons for being late in lodging an appeal, it will proceed to hear the merits of his/her appeal in the usual way either on the same day as appropriate, or on the other date(s) to be fixed later on' (bolded text in the original). The substantive part of this letter ended with: 'As such, please forthwith ensure compliance with section 66(1) of the IRO should you intend to lodge an appeal with this Board.'

5. The Office of the Clerk to the Board of Review received on 2 April 2015 a letter of authorization in the Chinese language dated 19 March 2015, by which Mr E, a director of the Taxpayer, appointed Company G to be its tax representative. Later, the

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Office of the Clerk to the Board of Review received on 17 April 2015 a letter of Company G, by which Company G purportedly lodged on behalf of the Taxpayer a notice of appeal against the Determination of the Deputy Commissioner of 30 December 2014 on two particularized grounds, with enclosures including a statement of facts, the Deputy Commissioner's written determination and the Deputy Commissioner's reasons for the determination.

6. The Clerk to the Board of Review sent a letter dated 20 April 2015 to Company G stating that: 'The determination issued by the Deputy Commissioner ... is dated 30 December 2014 and your notice of appeal dated 23 January 2015 was not accompanied by the required document which was not received by this Board until 17 April 2015'; and that 'Your notice of appeal may be invalid if it and the documents required under section 66(1) were not received by this Office within the statutory 1 month period'. The Clerk then identified 3 preliminary issues: (1) Whether the appeal is out of time; (2) If it is out of time, then the next issue is whether this Board has jurisdiction to extend time for appeal under section 66(1A) of the Inland Revenue Ordinance; and (3) If this Board has jurisdiction, the next issue is whether this Board should exercise its discretion to extend time for appeal. The Clerk then invited Company G to provide information for the fixing and preparation of the hearing of this Board. Such information was subsequently provided by Jal N Karbhari & Co, Solicitors & Notaries, representing the Taxpayer in the stead of Company G, including the information that Mr Tang of counsel had been instructed to represent the Taxpayer and that no witnesses would attend the hearing of this Board, while affirmations of the two directors of the Taxpayer were provided.

7. Directions were given by the presiding chairman of this Board on 20 July 2015 for the Taxpayer's case to be heard in English, with a half-day hearing to be scheduled to determine the application to appeal out of time first. The directions also indicated that since this Board is bilingual, there is no need to translate original Chinese documents into English. Thereafter, the hearing was scheduled to take place on 27 October 2015.

8. On 27 October 2015, the Taxpayer was represented by Mr Tang of counsel instructed by Jal N Karbhari & Co. Mr E, one of the directors of the Taxpayer, attended. This Board invited Mr Tang to take instructions from Mr E as to whether Mr E wished to give oral evidence in Cantonese at the hearing. This Board explained to Mr Tang that although this Board had been informed earlier by letter of Jal N Karbhari & Co that no witnesses would attend the hearing and as a result, the Office of the Clerk to the Board of Review had not engaged an interpreter, this Board, being a bilingual hearing board, was able to hear from Mr E giving oral evidence in Cantonese should he wish to do so. Mr Tang requested an adjournment to take instructions. After the adjournment, Mr Tang informed this Board that Mr E had elected not to testify and the Taxpayer would rely on the affirmations of Mr E and his fellow directors of the Taxpayer, Ms H.

9. The Revenue, represented by Ms To, Acting Senior Assessor of the Inland Revenue Department, did not call any witness to give oral evidence but it provided this Board and the Taxpayer a bundle of documents, including correspondence between the

Revenue and the Post Office regarding the posting of the Deputy Commissioner's determination and correspondence between the Revenue and the Immigration Department for the movement records of the two directors of the Taxpayer.

The Taxpayer's Case on Whether the Appeal is out of time and on Extension of time

10. Mr Tang for the Taxpayer made his first submission as follows:

- (a) Mr E of the Taxpayer received the written determination of the Deputy Commissioner on or about 3 January 2015. On 23 January 2015, Mr E wrote to the Clerk to the Board of Review indicating that the Taxpayer decided to appeal against the determination of the Deputy Commissioner and that because Mr E himself would be going to City F on a business trip on 25 January 2015, returning on 1 February 2015, an application was made for extension of one month to 28 February 2015 for submitting the statement of the grounds of appeal. According to a chop affixed to the copy of the letter on file, the Office of the Board of Review received the letter, which was served by hand, on 27 January 2015. Mr Tang, on this basis, submitted that the affixing of the chop on the Taxpayer's letter dated 23 January 2015 gave the Taxpayer an expectation that it had already done what the Board of Review wanted it to do or that everything was in order, and so if later on, the Board of Review required it to submit the notice of appeal together with other documents, that was a breach of a legitimate expectation.
- (b) Mr Tang, when questioned by this Board, submitted that the expectation he stated that the Taxpayer had, was reasonable. Mr Tang said that if the Clerk to the Board of Review, after a detailed checking, might know that the Taxpayer needed to submit more document(s), she must inform the Taxpayer that it needed to submit those document(s) together and the Taxpayer would have sufficient time to remedy before the expiry of the statutory time limit. When this Board directed Mr Tang's attention to the letter of the Clerk to the Board of Review of 28 January 2015 and its contents (which were quoted in paragraph 4 above) and pointed out that the Clerk's letter was sent within time, so that there was still time for the Taxpayer to comply with section 66(1) of the Inland Revenue Ordinance, Mr Tang responded that his interpretation of the letter was that the practice that the Clerk to the Board of Review referred to suggested that everything would be considered at the hearing and so why the Taxpayer should file those document(s) immediately. Mr Tang also responded that the Clerk to the Board of Review's letter was ambiguous, giving the impression that the more important thing was 'at the hearing' (which were highlighted in bold), notwithstanding that it was pointed out to him that the Clerk, after referring to the practice, wrote that: 'As such, please forthwith

ensure compliance with Section 66(1) of the IRO should you intend to lodge an appeal with this Board'. Mr Tang also suggested that the ordinary reader would read this letter to mean that all things would be considered by the Board of Review at the hearing; and that the words 'please forthwith ensure compliance with Section 66(1)' did not mean anything to the Taxpayer.

- (c) When this Board directed Mr Tang's attention to the terms of the chop, which was 'RECEIVED by hand', his submission was that the chop was not ambiguous.
- (d) Mr Tang contended that this legitimate expectation argument was crucial and this argument distinguished the Taxpayer's case from the previous decisions of the Board of Review that the Revenue had relied on.
- (e) Mr Tang however did not submit on the legal consequences of the alleged breach of the legitimate expectation that he contended for and on behalf of the Taxpayer.

11. Mr Tang's second submission raised the principle of legality to support the Taxpayer's reading of section 66(1)(a) and (1A) of the Inland Revenue Ordinance of requiring only the notice of appeal to be submitted within the statutory time limit, with the consequence that the other documents mentioned, including the statement of the grounds of appeal, could be provided later, so long as the Board of Review grants permission. The Taxpayer also considered that the fact that Mr E was about to leave Hong Kong at the time when he signed the letter of 23 January 2015 (which was deposed in Mr E's affirmation) and the fact that Ms H, the other director, was not in Hong Kong for long periods of time (which was deposed in Ms H's affirmation) together satisfied the requirement of absence from Hong Kong in section 66(1A). Mr Tang noted that section 66(1)(a) was imprecise in that the similar expressions of 'accompanied by' and 'together with' are included in the same sub-section and appear in the Chinese version as '附有' and '連同' respectively and submitted that if the law was to be certain, the same word should be used. Mr Tang also submitted that the condition for not entertaining a notice of appeal refers only to not having the documents and not failing to have the documents together at the same time. Hence, while the Taxpayer accepted that it should have the documents stated in the sub-section before the Board of Review could entertain the appeal, the requirement was not that those documents must be submitted together.

12. Mr Tang's third submission relied on the 'golden rule' and 'literal rule' in statutory interpretation to reinforce the statutory construction he contended for and on behalf of the Taxpayer. Mr Tang submitted that in the Taxpayer's case, it would be absurd that the Taxpayer was deprived of the right of appeal because of 'some formality', so his contended 'broader sense' of construction of section 66(1)(a) of the Inland Revenue Ordinance, which suggested that the condition was only one 'that the Board will entertain, not the condition that they should submit (sic) together', should be preferred.

13. Mr Tang's fourth and last submission sought to invoke the right to be heard to say that since the Taxpayer had already lodged the notice of appeal, it should not be deprived of having the appeal heard due to the failure to submit the documents mentioned in section 66(1) of the Inland Revenue Ordinance within the period of 1 month after the transmission to him of the Deputy Commissioner's written determination together with the reasons therefore and the statement of facts.

14. This Board was obliged to point out to Mr Tang that the 'Appellant's Skeleton Submission' (which was written primarily in Chinese with the occasional peppering of English expressions, in spite of its title and the direction of this Board) dealt only with the question of whether the Taxpayer's case was a late appeal. This Board then asked Mr Tang the position of the Taxpayer on the other issues identified in the letter of the Clerk to the Board of Review dated 20 April 2015 and quoted in paragraph 6 above. Particularly, this Board asked Mr Tang to comment on whether this Board has no authority to extend time under section 66(1A) of the Inland Revenue Ordinance in the Taxpayer's case in light of the fact that notice of appeal was lodged within time and section 66(1A) only empowers this Board to extend the time 'within which notice of appeal may be given under subsection (1)'. In response, Mr Tang submitted that this Board has inherent discretionary power, not limited by any legislation, to grant extension of time by reason of its quasi-judicial function and position as the highest administrative body for tax appeals. Mr Tang also submitted that the Taxpayer had tried its every best to supply the documents referred to in section 66(1) albeit that its director had laboured under a certain understanding of the legislation and/or certain ambiguous language of the letter of the Clerk to the Board of Review dated 28 January 2015, with the result that the documents were not sent at the same time. Mr Tang stressed that the Taxpayer had not neglected its duties. Mr Tang therefore submitted that these matters constituted a sufficient reason to extend time; and that so long as the relevant duty was complied with before the hearing, this Board should entertain the Taxpayer's appeal.

The Revenue's Submissions

15. Ms To for the Revenue made the following submissions:

- (a) The notice of appeal of the Taxpayer (which the Office of the Clerk to the Board of Review received on 27 January 2015) was given within the 1 month time period specified in section 66(1)(a) of the Inland Revenue Ordinance. However, it was not accompanied by the statement of the grounds of appeal and a copy of the written determination of the Deputy Commissioner. Following previous decisions of the Board of Review of D2/07, (2007-08) IRBRD, vol 22, 219 and D16/07, (2007-08) IRBRD, vol 22, 454, the notice of appeal was not a valid one under section 66(1)(a) that this Board shall entertain. The Taxpayer's appeal was out of time.
- (b) The Taxpayer had not made out a case for this Board to extend time under section 66(1A) of the Inland Revenue Ordinance. The Taxpayer's reliance on the absence from Hong Kong of its directors

by itself did not confer an automatic extension of time. The Taxpayer must and had failed to satisfy this Board that it was prevented by such absence to lodge the appeal within the time prescribed, bearing in mind that the movement records of Mr E obtained from the Immigration Department suggested that he spent more than half of his time in the month of January 2015 in Hong Kong. Ms To therefore submitted that Mr E had every opportunity and was able to submit the requisite documents within the time prescribed for the Taxpayer and he had failed to do so. Accordingly, the Taxpayer was in no way prevented from lodging a valid appeal within time by Mr E's short periods of absence from Hong Kong in January 2015. Ms To added that the Taxpayer also had appointed tax representatives, Company D, at the material time and there was no suggestion that the appointment had ceased at the time.

- (c) Ms To also made the following points: (i) The Appellant was a legal entity separate from its director. It had its own duty to arrange its own affairs to comply with the requirements of the Inland Revenue Ordinance; (ii) The Taxpayer had not explained why it was not until 17 April 2015 when its appointed tax representative sought to submit the statement of the grounds of appeal when its request for extension of time on 25 January 2015 was for about 1 month, namely to 28 February 2015; and (iii) The statement of the grounds of appeal that were eventually lodged stated grounds that were identical to the grounds of objection. No new grounds or evidence were adduced. Those grounds could have been easily formulated and submitted by the Appellant within the 1 month statutory period.
- (d) Ms To referred to the Deputy Commissioner's letter to the Taxpayer that was issued together with the written determination and pointed out that this letter enclosed the full text of section 66 of the Inland Revenue Ordinance and also set out its terms. The letter stated clearly that 'the notice of appeal given to the Board must be accompanied by a statement of grounds of appeal and the determination.' Ms To submitted, by reference to Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 that any alleged failure to read the letter properly or any misunderstanding about the meaning of section 66(1)(a) on the Taxpayer's part would have been a unilateral mistake and could not constitute reasonable cause preventing the lodging of a valid appeal. The same applied to any alleged misunderstanding on the Taxpayer's part to read the letters of the Clerk to the Board of Review.
- (e) As to the Taxpayer's reliance of the receipt chop of the Office of the Clerk to Board of Review, Ms To submitted that this in no way implied that the notice of appeal submitted was a valid appeal. This was particularly so in light of the letter of the Clerk to the Board of

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Review dated 28 January 2015, the day following the receipt of the notice of appeal. Such a course of events should not have given the Taxpayer any legitimate expectation about lodging of a valid appeal to the Board of Review.

- (f) As to the Taxpayer's claim that the letter of the Clerk to the Board of Review dated 28 January 2015 was ambiguous, Ms To submitted that the letter should be read in its whole context and one should not take a few bolded words out of context. The letter in its whole context was clear that the highlighted documents must be submitted within the 1 month time period, otherwise any appeal lodged beyond that period would be treated as a late appeal and an application for extension of time would only be heard by the Board of Review at the hearing. According to Ms To, the most important part of the letter was that it was given within time and it urged the Taxpayer to comply with section 66(1) of the Inland Revenue Ordinance forthwith.

Discussion and Findings

16. This Board has considered the submissions of the parties. This Board is of the view that none of the Taxpayer's submissions for this Board to entertain its appeal or for this Board to grant extension of time to give notice of appeal have merit. This Board's reasons for coming to his view are stated in the following paragraphs.

17. This Board does not accept that the Taxpayer had a legitimate expectation of any description over how the Board of Review would treat its appeal arising out of the Office of the Clerk to the Board of Review affixing on the copy of the Taxpayer's notice of appeal received by the Office the chop of 'RECEIVED by hand' on 27 January 2015. In Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, the Privy Council held at 636D-G that a legitimate expectation means a reasonable expectation and at 638D-G that a legitimate expectation based on a promise to follow a certain procedure would be implemented provided that the implementation did not conflict with the authority's statutory duty. In the Taxpayer's case, the chop unambiguously and plainly stated that the Taxpayer's notice of appeal was received by the Office on that date. The chop signified no indication, representation or promise that the notice of appeal would be entertained by the Board of Review or that the requirements of section 66(1) of the Inland Revenue Ordinance had been complied with. The Taxpayer's suggestion that the chop gave the Taxpayer an expectation that it had already done what the Board of Review wanted it to do or that everything was in order was not reasonable in the circumstances of the case.

18. Further, the Board of Review could not possibly promise or purport to promise or be thought to have promised any benefit or procedural advantage to a taxpayer seeking to lodge an appeal if the implementation of such a promise or purported promise was contrary to or in conflict with its statutory duty. Section 66(1) provides, *inter alia*, that:

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‘(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; ...

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.’

A plain reading of this provision suggests that the Taxpayer’s claimed expectation, particularly the associated claim that it allegedly arose out of the affixing of the chop of ‘RECEIVED by hand’ on the notice of appeal hand delivered to the Office of the Clerk to the Board of Review without any accompanied document(s) (presumably delivered shortly after the notice of appeal was so delivered), would have been in conflict with the Board of Review’s statutory duty not to entertain a notice of appeal that was not 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. The Clerk to the Board of Review wrote on 28 January 2015, the next day after receiving the notice of appeal, to remind the Taxpayer of section 66(1)’s requirements and to urge it to comply with them. Any expectation that the Taxpayer might have from the Office of the Board of Review receiving the notice of appeal would have been extinguished or dispelled by this letter. Putting the matter in another way, as the Revenue had submitted, this course of event should not have given the Taxpayer any legitimate expectation.

19. The Taxpayer contended in light of the above matters that section 66(1) of the Inland Revenue Ordinance requires only that the notice of appeal be given within 1 month after the transmission to it of the Deputy Commissioner’s written determination and that the copy of the Deputy Commissioner’s written determination, the copy of the reasons therefor and of the statement of facts, and the statement of the grounds of appeal (collectively known as ‘the requisite documents’) may be given afterwards. The Taxpayer also contended that the letter of the Clerk to the Board of Review of 28 January 2015 was ambiguous.

20. This Board considers that these contentions do not assist the Taxpayer. As to the first point of the proper interpretation of the requirements of section 66(1) of the Inland Revenue Ordinance for the Board of Review to entertain a notice of appeal, previous decisions of the Board of Review have construed section 66(1) to require the requisite documents to be served on the Clerk to the Board of Review within the same time period for giving notice of appeal; see D2/07 (above), paragraph 20 and D16/07

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(above), paragraphs 9, 11. See also D24/08, (2008-09) IRBRD, vol 23, 482, paragraphs 10, 11 (decision in Chinese).

21. The Taxpayer's submissions made references to the Chinese version of section 66(1) of the Inland Revenue Ordinance to persuade this Board not to follow the previous decisions of the Board of Review. Having considered section 66(1)'s Chinese version as a whole, this Board agrees with the Revenue's submission that the Taxpayer had been picking a few expressions in the sub-section out of context.

22. The Chinese version of section 66(1) of the Inland Revenue Ordinance, in so far as it is relevant, states: '(1) 任何人(下稱上訴人)如已對任何評稅作出有效的反對,但局長在考慮該項反對時沒有與該人達成協議,則該人可 – (a) 在局長的書面決定連同決定理由及事實陳述書根據第 64(4)條送交其本人後 1 個月內...親自或由其獲授權代表向委員會發出上訴通知;該通知除非是以書面向委員會書記發出,並附有局長的決定書副本連同決定理由與事實陳述書副本及一份上訴理由陳述書,否則不獲受理。'. As it can be seen under sub-paragraph (a), '局長的書面決定連同決定理由及事實陳述書' is taken as one composite unit to be transmitted and the same treatment is taken in respect of copies of the same that the notice of appeal given in writing to the Clerk of the Board of Review has to '附有', whose corresponding expression in the English version set out above is 'is accompanied by'. The structure of the sub-clause beginning with '該通知除非是...' indicates that the same expression 'accompanied by' / '附有' applies also to '上訴理由陳述書' / 'statement of the grounds of appeal'. Thus this Board takes the view that the Chinese version of section 66(1) does not suggest any difference, discrepancy or lack in precision when the Chinese version is compared with the English version, be it in language or in sentence structure, that might advance the Taxpayer's case. While the Taxpayer's contention that there was no time limit requirement in respect of the documents other than the notice of appeal that are to be provided to the Clerk to the Board of Review under section 66(1) necessarily applies to both the Chinese version and the English version, there is no hint in the Chinese version that might tend to support this contention. Indeed, one possible meaning of '並附有' in the context of section 66(1) suggests that the documents are meant to be attached to the notice of appeal. Having considered the Chinese version of section 66(1), this Board is of the respectful view that the previous decisions of the Board of Review of D2/07 (above) and D16/07 (above) did properly construe section 66(1) and should be followed.

23. The Taxpayer had sought to rely on the 'golden rule' and the 'literal rule' of statutory interpretation to aid its preferred construction of section 66(1) of the Inland Revenue Ordinance. This Board finds that the factor of avoidance of absurdity had been considered in the previous decisions of the Board of Review of D2/07 (above) and D16/07 (above). This Board is of the respectful view that the reasoning in these two previous decisions on the relevance and application of this factor had been convincing. This is another reason that these two previous decisions should be followed.

24. The Taxpayer had also sought to claim that its right to have the appeal heard would be deprived of if this Board declined to entertain its appeal even though it had

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provided the Clerk to the Board of Review with the notice of appeal. The Taxpayer referred to R v Secretary of State of the Home Department ex p Doody [1994] 1 AC 531, HL, where Lord Mustill outlined the principles of fairness in administrative procedures. However, the Taxpayer failed to note that Lord Mustill stated in page 560 of his judgment that: ‘What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects ... An essential feature of the context is the statute which creates the discretion as regards both its language and the shape of the legal and administrative system within which the decision is taken’. Here, the Inland Revenue Ordinance provides in section 66(1) the several conditions that must be satisfied before the Board of Review may entertain a taxpayer’s appeal. Giving notice of the appeal to the Clerk to the Board of Review within the statutorily prescribed time period is one of them and only one of them. The Taxpayer’s claim in this respect therefore has no merit.

25. The Taxpayer also contended that the letter of the Clerk to the Board of Review of 28 January 2015 was ambiguous. Having read the letter, this Board disagrees. Instead, this Board agrees with the Revenue’s submission that the Taxpayer’s submissions in this respect had taken out of context some words in the letter, albeit they had been bolded. The letter informed the Taxpayer that copies of the Deputy Commissioner’s written determination and the statement of grounds of appeal had to be filed within one month from the date of the determination and urged the Taxpayer to ensure compliance forthwith. In Chow Kwong Fai v Commissioner of Inland Revenue (above) at paragraphs 27, 31, the Court of Appeal took the view that advice in similar terms by staff of the Office of the Clerk to the Board of Review was ‘correct and proper in the circumstances’. This Board also accepts the Revenue’s submission that the letter was sent and could and should have been received by the Taxpayer before the expiry of the statutory time period so that, if the Taxpayer had wished, compliance with the requirements of section 66(1) could have been achieved.

26. For all the reasons stated above, this Board rejects the contentions raised by the Taxpayer in support of its case that its appeal was not out of time and should be entertained. Although the notice of appeal was received by the Office of the Clerk to the Board of Review within the statutory time period under section 66(1) of the Inland Revenue Ordinance, the requisite documents that were to accompany the notice of appeal were not. Accordingly, this Board finds that the Taxpayer’s appeal was out of time and requires extension of time from this Board under section 66(1A) of the Ordinance.

27. This Board now turns to the question of whether the Taxpayer has satisfied any of the criteria in section 66(1A) of the Inland Revenue Ordinance that would entitle this Board to exercise its discretion under this sub-section to extend time for giving the notice of appeal.

28. Section 66(1A) of the Inland Revenue Ordinance provides:

‘(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).'

29. The Affirmation of Mr E states in paragraphs 8 to 17 that:

- He was a director and the main shareholder of the Taxpayer.
- Since he had to leave Hong Kong on 25 January 2015 to City F on business, he made an application on behalf of the Taxpayer with the Board of Review on 23 January 2015 for extension of time of 1 month to 28 February 2015 in respect of the provision of the statement of the grounds of appeal.
- In the letter dated 23 January 2015 signed by him, it was stated that he would leave for City F on 25 January 2015 and return to Hong Kong on 1 February 2015.
- He considered that since he was to leave Hong Kong at the time, the requirement of absence from Hong Kong was met and so at the time when he gave the notice of appeal on behalf of the Taxpayer, he applied for extension of time for submitting the statement of grounds of appeal on behalf of the Taxpayer.
- The other director of the Taxpayer, Ms H, was outside Hong Kong for prolonged periods of time.
- He believed that he had acted diligently to give notice of appeal in writing to the Board of Review within 1 month after receiving the Deputy Commissioner's determination and so he asked the Board of Review to entertain the Taxpayer's appeal.

30. Ms H also made an Affirmation to state that:

- She was one of the directors of the Taxpayer.
- She had left the daily business of the Taxpayer to her brother and the other director of the Taxpayer, Mr E.
- She left Hong Kong for Country J on 6 February 2015 and did not return to Hong Kong until 9 April 2015.
- Because she was living in Country J for prolonged periods, she had left the matter of the Taxpayer's appeal to the Board of Review to her brother Mr E.
- She had read Mr E's Affirmation and agreed with those parts that referred to her.

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31. As this Board has noted above, Mr E was in attendance on the date of the hearing of the Taxpayer's appeal. This Board invited Mr E to consider giving oral evidence at the hearing and allowed time for Mr E to discuss and give instructions to his lawyers. Mr E in the end instructed his counsel Mr Tang to inform this Board that he would decline the invitation to give evidence and then left.

32. As a result, this Board has to consider the evidence adduced by the Taxpayer on whether the Taxpayer has satisfied the criteria in section 66(1A) of the Inland Revenue Ordinance without the benefit of having such evidence tested by cross-examination. As this Board remarked in the course of the hearing, there were issues in the Taxpayer's evidence that deserved testing by cross-examination, including why the Taxpayer had not taken action in respect of the Deputy Commissioner's determination until Mr E, one of its directors, was about to leave Hong Kong, in spite of the movement record obtained from the Immigration Department suggesting that Mr E was in Hong Kong for a substantial part of January 2015, the contents of Ms H's Affirmation suggesting that she might have been in Hong Kong in January 2015, and the delivery of the Deputy Commissioner's determination to the Taxpayer's then tax representatives Company D; when the Taxpayer and Mr E received the letter of the Clerk to the Board of Review of 28 January 2015 and how the Taxpayer and/or Mr E had understood the letter; and why the statement of grounds of appeal could not have been submitted earlier and within the period of time stipulated under section 66(1) of the Ordinance in light of the fact that those grounds were in similar terms with the objections already raised with the Revenue. In light of these legitimate questions which ought to have been answered, this Board gives both the Affirmation of Mr E and the Affirmation of Ms H no weight.

33. The Taxpayer's principal assertion under section 66(1A) of the Inland Revenue Ordinance is that it was prevented by absence from Hong Kong from giving notice of appeal. The Taxpayer might also have asserted that it was prevented by 'other reasonable cause' from giving notice of appeal under section 66(1) of the Ordinance.

34. In Chow Kwong Fai v Commissioner of Inland Revenue (above), the Court of Appeal endorsed the interpretation the Board of Review gave to the expression 'prevented' in section 66(1A) of the Inland Revenue Ordinance in D176/98, IRBRD, vol 14, 58 that this expression should best be understood in terms of the taxpayer being 'unable to' comply with section 66(1) of the Ordinance. This understanding imposes a higher threshold than a mere excuse. In D176/98 (above), which the Court of Appeal quoted in Chow Kwong Fai v Commissioner of Inland Revenue (above), the word 'prevented' was said to be 'opposed to a situation when an appellant is able to give notice but failed to do so'.

35. In respect of the criteria of 'prevented by absence from Hong Kong', the Board of Review had indicated in D19/01, IRBRD, vol 16, 183 and D33/07, (2007-08) IRBRD, vol 22, 791 that absence from Hong Kong does not by itself entitles the taxpayer to extension of time. Rather the taxpayer must satisfy the Board of Review that he was so prevented from giving notice of appeal within the statutory period. Additionally, the Board of Review had considered situations similar to the Taxpayer's case in the past

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where the taxpayer concerned wrote or emailed the Board of Review during the statutory period to ask for extension of time for filing a notice of appeal or preparing the appeal due to overseas travel in the near future and declined to extend time in those cases as the taxpayer had not satisfied the Board of Review that the absence from Hong Kong had prevented him from giving notice of appeal in compliance with section 66(1) of the Inland Revenue Ordinance; see D14/06, (2006-07) IRBRD, vol 21, 371; D33/07, (2007-08) IRBRD, vol 22, 791; D55/09, (2009-10) IRBRD, vol 24, 993; and D5/11, (2011-12) IRBRD, vol 26, 72.

36. This Board considers that the Taxpayer has failed to establish that *it* was prevented by absence from Hong Kong from giving notice of appeal. The Taxpayer is a company incorporated in Hong Kong and having a registered address in Hong Kong. In this respect, it is doubtful whether the Taxpayer could ever be absent from Hong Kong or be prevented by absence from Hong Kong from giving notice of appeal. Putting aside this concern and dealing with the Taxpayer's claimed reliance of being prevented by absence from Hong Kong due to the absence of its directors from Hong Kong, this Board is not satisfied that the Taxpayer was *so* prevented from giving notice of appeal in compliance with section 66(1) of the Inland Revenue Ordinance. This Board accepts the Revenue's submission that Mr E had every opportunity and was able to submit in the month of January 2015 the notice of appeal accompanied by the requisite documents within the time prescribed under section 66(1) and he had failed to do so. Further, the necessary work for giving notice of appeal in compliance with section 66(1) could have been done by the appointed tax representatives on the record and no explanation had been furnished before this Board on why it was not.

37. In respect of the criteria of 'prevented by other reasonable cause', and assuming that the Taxpayer had in mind in this connection Mr E's claimed understanding of the meaning of section 66(1) of the Inland Revenue Ordinance and of the letter of the Clerk to the Board of Review of 28 January 2015, this Board accepts the Revenue's submission that any misunderstanding about the meaning of section 66(1)(a) on Mr E's part (if Mr E were genuinely labouring under the claimed understanding at the material time) would have been a unilateral mistake and could not constitute reasonable cause preventing the lodging of a valid appeal; see Chow Kwong Fai v Commissioner of Inland Revenue (above) at paragraph 45. The alleged misunderstanding of the letter of the Clerk to the Board of Review of 28 January 2015 (if Mr E did have access to it prior to the expiry of the statutory period under section 66(1)(a)) likewise would have been a unilateral mistake and could not constitute reasonable cause preventing the lodging of a valid appeal.

38. For all the reasons above, this Board finds that the Taxpayer has failed to establish any of the criteria under section 66(1A) of the Inland Revenue Ordinance to give this Board jurisdiction to consider exercising its discretion under that sub-section to grant extension of time for it to give notice of appeal in compliance with section 66(1) of the Ordinance.

39. Before this Board concludes discussion of the issues involved in the Taxpayer's case, it may be useful to record discussion during the oral hearing on the ambit

of the discretion under section 66(1A) of the Ordinance. It appears doubtful whether this discretion is only in respect of the giving of notice of appeal under section 66(1) so that as a result, it does not encompass extending time for a taxpayer, who has given notice of his appeal, to comply with section 66(1) to provide the Clerk to the Board of Review with the documents that are to be accompanying the notice of appeal.

Conclusion

40. This Board finds that the Taxpayer's appeal was out of time. This Board also finds that the Taxpayer has failed to establish any of the criteria under section 66(1A) of the Inland Revenue Ordinance to enable this Board to exercise its discretion to grant extension of time. As a result, this Board declines to entertain the Taxpayer's notice of appeal.