

Case No. D13/17

Appeal out of time – notice of appeal being lodged out of time – whether postpone or adjourn the hearing – whether absence due to sickness or any reasonable excuse – sections 68(2), 68(2B), 68(2C) and 68(2D) of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Chow Wai Shun (chairman), Cheng Wing Keung Raymond and Patricia Joy Shih.

Date of hearing: 15 September 2017.

Date of decision: 3 October 2017.

The Appellant, who appealed against a determination by the Deputy Commissioner ('Determination'), was a company incorporated in Hong Kong with shareholders and sole director residing in Europe, but with company secretary and tax representative in Hong Kong.

It was undisputed that the Determination was sent to the Appellant's registered office in Hong Kong by registered post with a copy to its tax representative, who acknowledged receipt and transmitted the same to the appellant's formation agent in Europe. The Appellant's company secretary also received the Determination and transmitted the same to the Appellant's registered office and formation agent in Europe. However, no notice of appeal was received from the Appellant until 22 May 2017, outside the statutory period of 1 month for lodging of appeal. Further, despite reminders being given by the clerk to the Board as to the date and time of appeal hearing, language of witness, witness(es) to be called and the attendance of the Appellant's representative, the clerk had not heard from the Appellant until 13 September 2017 when the Appellant's director confirmed that he would not be able to attend the hearing, and its tax representative could not represent it and its lawyer in Europe would not be available. Neither the Appellant's director nor its authorized representative attended the appeal hearing. There was also no application being made by the Appellant to postpone or adjourn the hearing, or proceed to hear the appeal in its absence.

Held:

1. There was no material to satisfy the Board, and the Board was not satisfied that the Appellant's failure to attend the hearing was due to sickness.
2. The Appellant had been given ample time and reminders to arrange its director or authorized representative to attend the hearing. In such circumstances, the busy business schedule of its director, the unavailability of its lawyer in Europe, the alleged incompetence of its

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Hong Kong tax representative, or any combination of these, could not constitute reasonable cause for its absence from the hearing.

3. Indeed, none of the above excuses would have been considered reasonable and so favourably for extending the time for lodging the late appeal.

Appeal dismissed.

Appellant in absentia.

Fu Hoi Kong, for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant in respect of a Determination dated 6 April 2017 by the Deputy Commissioner of Inland Revenue ('the Determination').

2. The Appellant is a company incorporated in Hong Kong with its shareholders and sole directors residing in Europe. It has its company secretary in Hong Kong and a tax representative on record, also in Hong Kong.

3. On the documents provided to this panel prior to the hearing, against which the Appellant has not raised any dispute, we are satisfied that the Determination was sent to the address of its registered office in Hong Kong by registered post under cover of a letter of the same date, with a copy to its tax representative. The letter set out in detail matters including the procedure and the time limit in lodging an appeal to this Board if the Appellant so wished. We are also satisfied that its tax representative acknowledged receipt of the letter and the Determination.

4. It is attached to the Appellant's notice and statement of grounds of appeal a copy of an email dated 10 April 2017 indicating that its tax representative transmitted the letter and the Determination to the Appellant's formation agent in Europe.

5. On the documents provided to this panel prior to the hearing, we find that the company secretary of the Appellant acknowledged receipt of the letter and the Determination sent to the registered office of the Appellant. There is also attached to the Appellant's notice and statement of grounds of appeal a copy of an email dated 18 April 2017 indicating that the company secretary transmitted the letter and the Determination to the same formation agent in Europe.

6. In the notice and statement of grounds of appeal, the Appellant acknowledged the transmission of the letter and the Determination from its formation agent to its accountant in Europe by email on 19 April 2017. It also acknowledged that the same was forwarded to it by its accountant via email on the same day and was read by its sole director on the following day. It was, however, not until 22 May 2017 that the Clerk

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to this Board receive the notice of appeal dated 4 May 2017 from the Appellant. By letter dated 23 May 2017, the Clerk alerted the Appellant, among other things, that subject to such submission it might wish to make, its notice was prima facie invalid as it fell outside the statutory period of one month and it might consider invoking the jurisdiction of the Board to grant it extension of time. The Clerk also asked the Appellant to respond by 31 May 2017 the language or dialect in which any witness whom the Appellant would call to give evidence so that appropriate interpreters could be arranged. Reminders were sent on 1 June 2017 and 9 June 2017.

7. By letter dated 30 June 2017, the Clerk informed the Appellant that its case was scheduled to be heard on 15 September 2017 and requested the Appellant, *inter alia*, to inform the Office of the Clerk if it would engage any witness to give oral evidence other than English. By another letter dated 3 August 2017, the Appellant was, among other things, reminded of the date and time of the scheduled hearing and was asked to confirm if the sole director would attend the hearing in person or a tax or legal representative was authorised to act and on behalf of the Appellant to attend the hearing and present its case and whether the sole director or any witness would give evidence in any language or dialect. The Appellant's attention was drawn again to statutory provision under which it was required to attend in person or by an authorised representative or alternatively it might apply to have the appeal heard in its absence or the absence of its authorised representatives with justification and supporting documents.

8. Apart from the notice and statement of grounds of appeal, the Clerk's Office had not heard from the Appellant until 13 September 2017 when an email was sent from its company secretary with a letter dated 11 September 2017 attached to it. The letter was purportedly signed by the appellant's director, confirming that he would not be able to attend the hearing. The director also indicated that its tax advisor could not represent it and its lawyer in Europe would not be available. Later on the same day, a person purportedly representing the Appellant's company formation agent in Europe emailed the company secretary with a copy to this Board claiming that the Appellant had been trying to contact its lawyer but it was without success and it was still trying to sort out the situation.

9. By letter dated 14 September, the Clerk to this Board again drew the Appellant's attention particularly to the statutory provisions set out below and urged the Appellant to make any application having regard to those provisions. The Appellant did not attend the hearing as scheduled, whether in person or by an authorized representative. No application whatsoever has been made either.

10. Sections 68(2), (2B), (2C) and (2D) of the Inland Revenue Ordinance provide that:

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

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- (2B) If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board may-*
- (a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;*
 - (b) proceed to hear the appeal under subsection (2D); or*
 - (c) dismiss the appeal.*
- (2C) If an appeal has been dismissed by the Board under subsection (2B)(c) the appellant may, within 30 days after the making of the order for dismissal by notice in writing addressed to the clerk to the Board, apply to the Board to review its order and the Board may, if satisfied that the appellant's failure to attend at the meeting of the Board for the hearing of the appeal was due to sickness or any other reasonable cause, set aside the order for dismissal and proceed to hear the appeal.*
- (2D) The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.'*

11. There is no application made under section 68(2D) and therefore section 68(2B)(b) does not apply. There is no material to satisfy us, and we are not satisfied, that the Appellant's failure to attend the hearing was due to sickness. Was there any other reasonable cause for the Appellant's failure to attend the hearing?

12. The Appellant has been given ample time, and reminders, to arrange to have either its director or an authorized representative to attend the hearing and present its case to this panel. In such circumstances, the busy business schedule of its sole director, the unavailability of its lawyer in Europe, its alleged incompetence of its tax representative in Hong Kong or indeed any combination of these cannot constitute reasonable cause for its absence from the hearing. Thus, section 68(2B)(a) does not apply. Indeed, none of these excuses would probably have been considered reasonable and so favourably for extending the time for lodging this apparently late appeal.

13. Accordingly, we are left with no choice but to dismiss the appeal under section 68(2B)(c).