

Case No. D19/20

Procedure – appeal out of time – whether extension of time should be granted – whether the Taxpayer was prevented from giving notice of appeal within one month – section 66 of the Ordinance

Panel: William M F Wong SC (chairman), Lai Ka Ho Alan and Lau Wan Ching.

Date of hearing: 14 January 2021.

Date of decision: 19 March 2021.

The Taxpayer objected to the assessment of profits tax for the 2014/15 and 2015/16 years of assessment. The Deputy Commissioner issued a determination rejecting the Taxpayer's objection, and sent it to the Taxpayer and its tax representative on 3 March 2020 by registered mail. The tax representative acknowledged receipt of the determination on 5 March 2020, and wrote to the Inland Revenue Department ('the Revenue') on 9 March 2020 about its previous reply to the Revenue's letter. The Revenue replied on 22 May 2020 that the Taxpayer had the right to appeal against the determination to the Board, the notice of which must be given in writing to the Clerk of the Board within one month of the issue of the determination.

The tax representative sent a letter to the Revenue on 26 May 2020 stating its intention to appeal against the determination, which was copied to the Board on 29 June 2020. The Board replied on 30 June 2020 that it was an independent statutory body not under the purview of the Revenue, and any notice of appeal should be addressed to the Clerk of the Board. The Board only received a letter from the Taxpayer on 14 September 2020 (which was dated 11 September 2020) purporting to give notice of appeal.

The tax representative stated that the Taxpayer was not equipped to function after March 2020 because of COVID-19. It further submitted that the Taxpayer's intention was to deal with the Revenue directly, and had no intention to delay the lodging of any appeal.

Held:

1. No extension of time should be granted for a delay of 5 months and 8 days, and the appeal must be dismissed. The tax representative could not be taken to be unaware of the time limit to lodge an appeal. Any mistake was made solely on the Taxpayer's part, and it was not prevented from filing a notice of appeal within time, within the meaning of section 66(1A) of the Ordinance (Chow Kwong Fai v CIR [2005] 4 HKLRD 687 applied; D1/15, (2015-16) IRBRD, vol 30, 272 considered). The statutory time limit must

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be observed (D3/91, IRBRD, vol 5, 537; D6/15, (2015-16) IRBRD, vol 30, 426 considered).

2. The Taxpayer consciously decided to ignore the advice given by the Revenue and the Clerk of the Board. There was no obligation on the Revenue's part to perform extra tasks to facilitate the Taxpayer (D9/79, IRBRD, vol 1, 354; D139/00, IRBRD, vol 16, 24; D2/03, IRBRD, vol 18, 301; D55/09, (2009-10) IRBRD, vol 24, 993 considered).

The Taxpayer and/or its tax representative were not prevented by COVID-19 from submitting its notice of appeal within time, as the tax representative was able to acknowledge the receipt of the determination within a short time, and was able to write to the Revenue stating its intention to lodge an appeal around 2 months after the issue of the determination (D63/04, IRBRD, vol 19, 512 considered).

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D9/79, IRBRD, vol 1, 354
D139/00, IRBRD, vol 16, 24
D2/03, IRBRD, vol 18, 301
D63/04, IRBRD, vol 19, 512
D1/15, (2015-16) IRBRD, vol 30, 272
D55/09, (2009-10) IRBRD, vol 24, 993
D3/91, IRBRD, vol 5, 537
D6/15, (2015-16) IRBRD, vol 30, 426

Sharma Manish Narain of Akin Professionals Limited, for the Appellant.
Ng Sui Ling Louisa, Fung Chi Keung and Chan Lok Ning Loraine, for the Commissioner of Inland Revenue.

Decision:

Appeal

1. This is the appeal of Company A ('the Taxpayer'/'the Appellant') against the Commissioner's Determination dated 3 March 2020 (the 'Determination') under which the Commissioner determined that for the year of assessments 2014/15 and 2015/16, the Taxpayer did carry out business in Hong Kong and should be taxed under section 14 of the Inland Revenue Ordinance (the 'Ordinance').

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2. The Taxpayer disagrees with the Determination but only filed its notice and statement of the grounds of appeal to the Board of Review on 11 September 2020. The Inland Revenue Department (the ‘Revenue’) unsurprisingly takes the preliminary objection that the present appeal is out of time and should not be entertained.

3. There is no dispute that the Determination was sent to the Taxpayer by registered post on 5 March 2020. However, the Taxpayer’s notice of appeal was only received by the Board of Review on 14 September 2020, after the expiry of the statutory one-month appeal period.

4. This Board agrees that we should determine the preliminary issue first because if the appeal is out of time, then there is no need for the Board to consider the substantive merits of the appeal.

Relevant Legal Principles

5. Section 66(1) of the Ordinance provides that:

‘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 ... 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.’

6. Section 66(1A) of the Ordinance provides that:

‘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).’

7. The provisions of section 66(1A) of the Ordinance are fairly clear and restrictive. An extension of time could only be granted where the appellant had been ‘prevented’ by one of the specified causes from giving notice of appeal within the prescribed period of one month. We agree that the word ‘prevented’ cannot appropriately be used in a

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situation where a taxpayer is able to give notice, but has failed to do so.

8. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687, the taxpayer claimed that he was late (for three months) in filing an appeal to the Board because he misunderstood the meaning of section 66(1) of the Ordinance in that he had to prepare a statement of facts himself and file it together with the statement of grounds of appeal. The Court of Appeal held that the word ‘prevented’ used in section 66(1A) of the Ordinance was best understood to bear the meaning of ‘unable to’ and, although it provided a less stringent test than the word ‘prevent’, it imposed a higher threshold than a mere excuse. Woo VP at paragraph 20 said:

‘20. ... 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.’

9. In determining whether a taxpayer is ‘prevented’ from giving notice of appeal within the statutory time limit by other reasonable cause, the following decisions are relevant:

(1) A unilateral mistake caused by the taxpayer’s misunderstanding could not properly be described as a reasonable cause which prevented him from lodging the notice of appeal within time: see Chow Kwong Fai, Cheung JA in paragraph 45.

(2) Neither laches nor ignorance of one’s right or the steps constitutes a reasonable cause. In D9/79, IRBRD, vol 1, 354, the following was said:

‘The word “prevented” ... is opposed to a situation when an appellant is able to give notice but failed to do so. In our view, therefore, neither laches nor ignorance of one’s right or of the steps to be taken is a ground upon which an extension may be granted.’

(3) Where the proper procedure and the address of the Clerk to the Board for filing a notice of appeal were given to the taxpayer in the Commissioner’s letter attached with the determination, the mistake made by the taxpayer, in sending notice of appeal to the Revenue, was caused by the taxpayer’s failure to exercise due care. The Revenue, having discharged its duties prescribed by law, was under no obligation to perform extra tasks to facilitate each individual taxpayer

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or its case: see paragraph 15 in D139/00, IRBRD, vol 16, 24.

- (4) Similarly, in D2/03, IRBRD, vol 18, 301, the taxpayer had no difficulty in sending his letter of challenge to the Revenue within the period of filing an appeal, and his delay was attributable solely to his failure to read the letter that accompanied the determination properly. The Board refused the extension sought by the taxpayer [see paragraphs 9 and 10].
 - (5) In D63/04, IRBRD, vol 19, 512, the taxpayer only made general reference to the difficulties arising from the SARS crisis. The Board was not persuaded that the SARS crisis had any material impact on the taxpayer's preparation of its accounts. It was held that the default was attributable to the taxpayer's general failure to pay due regard to its obligations under the Ordinance [see paragraph 6].
 - (6) Where a tax representative was engaged by the taxpayer, the mistake, if any, as to the party with which to file the notice of appeal was unilateral and made solely on the taxpayer's part. It did not amount to a reasonable cause. As details of time limit and procedures for an appeal were set out in the Commissioner's letter attached with the determination, there was no obligation on the Commissioner's part to remind the taxpayer the same again: see paragraphs 31-33 in D1/15, (2015-16) IRBRD, vol 30, 272.
 - (7) Not familiar with Hong Kong tax laws and the necessity to sort out certain issues and receive clarification from the Revenue before filing the notice of appeal were not accepted as reasons to allow further time for him to file an appeal: see paragraphs 17 and 19 in D55/09, (2009-10) IRBRD, vol 24, 993.
10. In D3/91, IRBRD, vol 5, 537, the notice of appeal was late for one day only. In rejecting the taxpayer's application for extension of time, the Board said at page 541 that '*Time limits are imposed and must be observed.*' In D6/15, (2015-16) IRBRD, vol 30, 426 , (DOJ:D6/15 first appears. Full citation should be listed out) the Board takes the view that '*More than 1 month delay is unduly and unreasonably long.*' [paragraph 13].

Material Facts

11. The following chronology of events in the year 2020 is undisputed:
- 3 Mar The Deputy Commissioner issued a letter¹ enclosing the Determination ('the Packet') to the Taxpayer at Address B ('the Address') by registered mail. On the same day, a copy of the covering letter and its enclosures ('the TR Packet') were also sent to Akin Professionals Limited ('the Representative') at the Address.
 - 5 Mar The Packet and the TR Packet were duly delivered and were acknowledged receipt by the Taxpayer and the Representative respectively.
 - 9 Mar The Representative sent a letter to the Revenue acknowledging the receipt of the Determination and informing that the reply to the Revenue's letter of 12 July 2019 had been furnished to the Revenue on 11 February 2020² the latest.
 - 21 May The Representative's letters of 4 February 2020 and 9 March 2020 were passed to the Assessor of the Revenue.
 - 22 May The Revenue sent a letter to the Representative advising that the Deputy Commissioner had fully considered the facts of the case and reached the decision by issuing the Determination. The Revenue further advised the Appellant that, according to section 66 of the Ordinance, it had the right to appeal to the Board, an independent statutory body. The Revenue also drew the Taxpayer's attention that an appeal to the Board must be given in writing to the Clerk to the Board within one month after the date of issue of the Determination. For avoidance of doubt, the Revenue stressed that the Taxpayer's letter of 9 March 2020 had not been treated as an appeal to the Board.
 - 26 May The Representative sent a letter to the Revenue stating that the Appellant would like to appeal to the Board.
 - 23 Jun The Revenue sent a letter to the Representative advising the address and contact details of the Clerk to the Board.

¹ In the letter, the Revenue had advised the Appellant's right of appeal under section 66 of the Ordinance and an extract of the said section 66 was also annexed to the letter. The Revenue also advised that the notice of appeal has to be given to the Clerk to the Board and must be given within one month after the transmission to it of the Determination. The Appellant was also advised of the address, opening hours and contact details of the Clerk to the Board.

² The reply letter was dated 4 February 2020 and received by the Revenue on 14 February 2020.

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- 29 Jun The Representative sent a copy of its letter of 26 May 2020 to the Board.
- 30 Jun The Clerk to the Board sent a letter to the Taxpayer advising that the Board was an independent statutory body for hearing and not under the purview of the Inland Revenue Department. The Clerk further advised the requirement under section 66(1) of the Ordinance to lodge appeal, in particular that the notice of appeal should be addressed to the Clerk to the Board.
- 14 Sep The Board received a letter of 11 September 2020 (with the same content as that of 26 May 2020) sent by the Taxpayer purporting to give notice of appeal.
- 15 Sep The Clerk to the Board sent a letter to the Appellant advising that its notice of appeal of 11 September 2020 was prima facie invalid because it was lodged after the statutory period of one month as required under section 66(1)(a) of the Ordinance and it may wish to consider invoking the jurisdiction of the Board to grant an extension of time under section 66(1A) of the Ordinance. The Clerk further advised the Taxpayer that it would be notified to attend a hearing in due course, and that if the Board accepted its reasons for being late in lodging an appeal, it would proceed to hear the appeal in the usual way.
- 18 Nov The Representative sent a letter to the Revenue stating the reason for submitting the notice to appeal to the Board only on 14 September 2020, after receiving the letter of 23 June 2020 from the Revenue.

Reasons for Late Appeal

12. In the notice of appeal of 11 September 2020, the Representative did not state why it filed the appeal after the one-month appeal period.
13. In its letter of 18 November 2020, the Representative stated that the Appellant was not equipped to function in times of COVID-19 after March 2020, thus adding the response time and procedure to appeal.
14. During the oral hearing, the Representative submitted that it was the Taxpayer's intention to deal with the Revenue directly as it is the department which deals with tax matters and the Taxpayer has no intention to cause any delay in lodging the appeal.

Analysis

15. The Determination of 3 March 2020 was duly served to the Appellant on 5 March 2020. The one-month appeal period under section 66(1)(a) of the Ordinance

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commenced to run on 6 March 2020 (i.e. after the transmission of the Determination to the Appellant on 5 March 2020) and expired on 6 April 2020. The Board received the Appellant's notice of appeal on 14 September 2020, i.e. 5 months and 8 days after 6 April 2020. The Appellant's notice of appeal was clearly out of time under section 66(1) of the Ordinance.

16. The Board may grant the extension if it is satisfied that the Appellant was prevented by (a) illness or (b) absence from Hong Kong or (c) other reasonable cause from giving notice of appeal within the prescribed period of one month. According to Chow Kwong Fai [paragraph C.2], the word 'prevented' in section 66(1A) of the Ordinance means 'unable to'.

17. This Board unanimously considers that no extension of time should be granted because the Representative cannot be taken to be unaware of the one month appeal period.

18. More importantly, both the Revenue and the Clerk to the Board had informed the Taxpayer and the Representative about the proper avenue of appeal but the Taxpayer and the Representative chose to ignore such advices. This was a conscious decision and not the result of any 'prevention' which rendered the Taxpayer and/or its Representative not able to file a notice of appeal within time.

19. This Board takes the firm view that the relevant statutory period is to be observed and not breached. This is particularly the case when the Taxpayer is represented and the relevant appeal period and avenue were specifically drawn to the attention of the Taxpayer.

20. Secondly, this Board does not accept that the Taxpayer or the Representation was in any way prevented by COVID-19 pandemic from submitting its notice of appeal. On 9 March 2020, the Representative was able to send out a letter to the Revenue to acknowledge receipt of the Determination. On 26 May 2020, the Representative was able to send a letter to the Revenue stating that the Taxpayer would like to appeal to the Board.

21. Thirdly, in the present case, the Taxpayer does not argue that it was prevented by illness or absence from Hong Kong in lodging the appeal.

22. Fourthly, this Board agrees with the Revenue's submission that there were no reasonable causes which prevented the Taxpayer from lodging an appeal within the prescribed time period.

(1) In the Revenue's letter of 3 March 2020, the Revenue had advised the Taxpayer of its rights, the procedures and time limit in lodging an appeal to the Board. As the Revenue had discharged its duties prescribed by law, there was no obligation on the Revenue's part to perform extra tasks to facilitate the Taxpayer or its case.

(2) The Representative mentioned that it took a longer time to lodge

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appeal in times of COVID-19. As mentioned above, notwithstanding the effect of COVID-19, the Representative was able and did send a letter of 9 March 2020 (i.e. within the appeal period) to the Revenue confirming that it had received the Determination. The Appellant was therefore able to give notice of appeal within the appeal period despite the COVID-19 pandemic situation.

- (3) The Representative also sent a notice of appeal to the Revenue on 26 May 2020. As the Representative was engaged by the Appellant, this Board agrees that the mistake in filing the notice of appeal to the Revenue, rather than to the Board, was unilateral and made solely on the Taxpayer's part.

23. Time limits laid down by the Ordinance must be observed. In the present case, the delay was 5 months and 8 days. The Determination was transmitted to the Appellant on 5 March 2020.

24. This Board is satisfied that the Taxpayer is able to file the notice of appeal itself or instruct an authorized representative to do so for it. There was no reasonable cause which prevented the Taxpayer from lodging an appeal within the prescribed time limit.

Disposition

25. For all the reasons stated above, this Board concludes that the Taxpayer's notice of appeal is out of time under section 66(1) of the Ordinance and the Board sees no good reason to exercise its discretion to extend the time for giving notice of appeal under section 66(1A) of the Ordinance.

26. According, the present appeal is dismissed.