

Case No. D20/14

Salaries tax – appellant in absentia – sections 68 and 82B of the Inland Revenue Ordinance – whether an appellant can prosecute an appeal in writing – whether the Board have jurisdiction to hear the appeal

Panel: Liu Man Kin (chairman), Lam Lai Kuen and Suen Man Tak Stephen.

Date of hearing: 15 September 2014.

Date of decision: 3 November 2014.

The Appellant lodged an appeal against the Respondent's assessment of additional tax by way of penalty under the Inland Revenue Ordinance (Chapter 112) ('IRO') section 82A for the year of assessment of 2012/13. By a notice of hearing, the office notified the Appellant that the appeal hearing was fixed to take place on 15 September 2014. In the morning of the hearing date, the Appellant sent an email to inform the Board that the Appellant was unable to attend the meeting and asked the Board to consider the Appellant's written reply which had fully explained the Appellant's intention and reason of appeal.

The Appellant did not provide any explanation as to why he was unable to attend the appeal hearing, let alone in support of the explanation.

Held:

1. The hearing and disposal of an appeal lodged under IRO section 82B is governed by section 68. As prescribed by section 68(2), an appellant shall attend the appeal hearing either in person or by an authorized representative. An appellant cannot prosecute an appeal in writing. The Board has no jurisdiction to hear the appeal while the appellant fails to attend the appeal hearing.
2. As there was no evidence showing that the Appellant's failure to attend the appeal hearing was due to sickness or other reasonable cause, section 68(2B)(a) was not applicable.
3. As there was no evidence showing that the Appellant was outside Hong Kong on the hearing date, section 68(2D) was not applicable, and in turn section 68(2B)(b) was not applicable. The Board therefore proceeded under section 68(2B)(c) and made an order dismissing the Appeal.

Appeal dismissed.

Appellant in absentia.

Kung Chun Fai and Leung Kar Kei for the Commissioner of Inland Revenue.

Decision:

1. By a notice of appeal dated 20 May 2014 but received by the Office of the Clerk to this Board ('the Office') on 27 May 2014 ('the Notice of Appeal'), the Appellant lodged an appeal against the Respondent's assessment of additional tax by way of penalty under Inland Revenue Ordinance ('IRO') section 82A in the sum of HK\$5,100 for the year of assessment of 2012/13 ('the Appeal'). That amount is equivalent to 8.04% of the salaries tax undercharged in that year of assessment. The Respondent's reason for imposing that penalty is that the Appellant has stated his income for the year of assessment 2012/13 as HK\$417,078 in his Tax Return submitted on 23 June 2013, but in fact his income in that year of assessment should be HK\$790,027. In other words, the Appellant has understated his income of around HK\$372,950.

2. The Respondent issued the assessment of additional tax on 22 April 2014. In the notice of assessment, the Respondent informed the Appellant that he had a right to lodge an appeal against the assessment to this Board in accordance with IRO section 82B. The Respondent reminded the Appellant that in accordance with IRO section 82B, the Appellant had to give a notice of appeal to this Board within 1 month, and the notice of appeal should be accompanied by the following documents:

- (a) a copy of the notice of assessment;
- (b) a statement of the grounds of appeal from the assessment;
- (c) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and
- (d) a copy of any written representations made under section 82A(4).

3. The additional tax was paid by the Appellant on 1 May 2014.

4. As said before, the Notice of Appeal was received by the Office on 27 May 2014, but was not accompanied by documents (a), (c) & (d) as set out in paragraph 2 above. On 29 May 2014, the Office wrote to the Appellant and told him the aforesaid omission, and told him to forthwith ensure due compliance with the statutory requirements should he wish to pursue the appeal. Thereafter, by an email dated 8 June 2014, the

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Appellant provided the documents. The email dated 8 June 2014 was sent to the Office from a particular email address ('the Email Address').

5. By a notice of hearing dated 30 July 2014, the Office notified the Appellant that the appeal hearing was fixed to take place on 15 September 2014 (Monday) at 9:30 a.m. ('the Appeal Hearing').

6. On 10 September 2014 (last Wednesday) at around 2:45 p.m., the Office sent an email to the Email Address reminding the Appellant the appeal hearing on 15 September 2014 at 9:30 a.m., and asking the Appellant whether he would attend the Appeal Hearing in person or by his authorized representative, and whether the Appellant or any witness would give evidence in the Appeal Hearing.

7. As there was no reply from the Appellant, on 11 September 2014 (last Thursday), the Office sent another email to the Email Address, in which the Office said:

' We refer to our preceding email of 10 September 2014, please provide the required information to this office by 12 September 2014 (Tomorrow).'

8. The staff of the Office managed to contact the Appellant by phone last Friday, 12 September 2014. The Appellant said that he might not be able to attend the appeal hearing on 15 September 2014, but he could not be sure at the time.

9. In early morning of the hearing date, 15 September 2014 (Monday), at around 8:07 a.m., the Appellant sent an email from the Email Address to the Office, in which the Appellant said:

' Apology for the late reply. As discussed over phone before, I'm sorry to inform that I am unable to attend the meeting today, I wish the board would consider my written reply which has fully explained my intention and reason of appeal. Thank you very much.'

10. The Appellant did not provide any explanation as to why he was unable to attend the Appeal Hearing, let alone evidence in support of the explanation.

11. The hearing and disposal of an appeal lodged under IRO section 82B is governed by section 68. See IRO section 82B(3).

12. IRO section 68 provides:

' (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. (Amended 40 of 1972 s. 8)*

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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. (Added 40 of 1972 s. 8)

(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.'
(Emphasis added)

13. As prescribed by section 68(2), an appellant shall attend the appeal hearing either in person or by an authorized representative. An appellant cannot prosecute an appeal in writing. We have no jurisdiction to hear the Appeal while the Appellant fails to attend the Appeal Hearing.

14. What we can do in this situation has been set out in section 68(2B).

15. As there is no evidence showing that the Appellant's failure to attend the Appeal Hearing was due to sickness or other reasonable cause, section 68(2B)(a) is not applicable.

16. Further, as there is no evidence showing that the Appellant is outside Hong Kong on the hearing date, section 68(2D) is not applicable, and in turn section 68(2B)(b) is not applicable.

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17. We therefore proceed under section 68(2B)(c) and make an order dismissing the Appeal.
18. The Appeal is dismissed.