

Case No. D21/14

Profits tax – extension of time for lodging notice of appeal – sections 2, 66 and 71 of the Inland Revenue Ordinance ('IRO')

Panel: Cissy K S Lam (chairman), Liu Kin Sing and Lo Chin Fai Paul.

Dates of hearing: 26 and 27 April 2014.

Date of decision: 12 November 2014.

The Appellant was late by some 16 weeks in lodging the notice of appeal. The Appellant applied for an extension of time under section 66(1A) of the IRO alleging that 'due to the incompetence and/or negligence of its tax consultant/representative, the Appellant was prevented from and/or unable to give notice of appeal within the prescribed period in accordance with section 66(1)(a) IRO'. The Appellant invited the Board to decide this application as a preliminary issue.

Held:

1. Ignorance of one's legal rights or of the steps to be taken was a unilateral mistake which did not constitute a reasonable cause under section 66(1A).
2. The failure of the Appellant's tax consultant/representative to give any advice on the appeal time limit was an internal reason, a unilateral mistake, and could not constitute an external impediment to prevent the Appellant from giving due notice under section 66(1A).
3. Further, and in any event, even if the failure of the Appellant's tax consultant/representative to advise was a reasonable cause, the Board did not think it fit to extend the period of time to 17 February 2014, some 16 weeks after the expiration of the appeal time limit and 8 weeks after the boss/his secretary of the Appellant became aware of that time limit.

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
Moulin Global Eyecare Trading Limited v CIR (2014) FACV No 5 of 2013

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D9/79, IRBRD, vol 1, 354

D11/89, IRBRD, vol 4, 230

D3/91, IRBRD, vol 5, 537

Lincoln Cheung, Counsel, Valent Tse, Timothy Fung and Samuel Chu, Handling Solicitors, instructed by Messrs Tung, Ng, Tse & Heung Solicitors, for the Appellant.
Chow Cheong Po and Lee Shun Shan for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to the Profits Tax Assessment for the year of assessment 2008/09 on the ground that the gain it derived from the sale of a property was capital in nature, and thus not chargeable to tax.

2. By a Determination dated 24 September 2013 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Commissioner') confirmed the assessment.

3. The notice of appeal against the Determination was lodged on 17 February 2014, late by some 16 weeks. The Appellant applies for an extension of time under section 66(1A) of the Inland Revenue Ordinance, Chapter 112 ('IRO') and invites this Board to decide this application as a preliminary issue.

Relevant Provisions of the IRO

4. Section 66(1) stipulates: '*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;*'

5. Section 66(1A) allows for an extension of time: '*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).*'

6. Sections 66(1) and 66(1A) are comparable to section 64(1)(a) which provides: '*Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment; but no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within 1 month after the date of the notice of assessment: Provided that- (a) if*

the Commissioner is satisfied that owing to absence from Hong Kong, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving such notice within such period, the Commissioner shall extend the period as may be reasonable in the circumstances

7. By section 2(1), ‘authorized representative’ is defined as ‘a person authorised in writing by any other person to act on his behalf for the purposes of this Ordinance’.

8. Section 71(2) entitles the Commissioner to, *inter alia*, allow for payment of tax to be withheld pending the result of an objection, on condition that the taxpayer purchases a Tax Reserve Certificate as security.

9. By section 71(4), where upon the final determination of the objection, any tax which has been held over under section 71(2) becomes payable, the Commissioner shall give to the taxpayer a notice in writing fixing a date on or before which the tax shall be paid.

Relevant Authorities

10. Woo VP in the Court of Appeal in Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 held that ‘prevented’ should be best understood by reference to the Chinese language version of the IRO as ‘unable to’ which ‘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.’ The rationale for the stringent time limit for raising tax objections and appeals was that ‘the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community.’

11. In Moulin Global Eyecare Trading Limited v CIR (2014) FACV No 5 of 2013, (‘Moulin’) after the taxpayer, a limited company, was wound up, its liquidators discovered that its former directors (later convicted of fraud) had fraudulently inflated the taxpayer’s earnings through creation of fictitious sales. Profits tax returns were submitted based on such falsified accounts. The taxpayer paid a total of almost HK\$89 million in profits tax when it had in fact made no profit. The liquidators claimed under section 64(1)(a) for an extension of time to object to the assessments; and under section 70A to correct mistakes in the assessments. The central issue under consideration was whether the fraudulent intention of the directors could be attributed to the appellant. The majority held that it could, so that the appellant was not prevented from filing the objection in time under section 64(1) and there was no mistake to correct under section 70A.

12. Tang PJ gave the minority decision in Moulin by which he decided that there was no such attribution so that the Appellant could apply under section 70A for correction. But of more relevance to our present consideration is his decision regarding section 64(1). The liquidators’ argument was that the fraud of its previous management (which was not discovered until after the provisional liquidators were appointed in June 2005) had

prevented the taxpayer from giving notice of objection within the statutory time limit of one month. Despite accepting that the fraud of the directors could not be attributed to the taxpayer, Tang PJ rejected the liquidators' argument. He held at paragraph 10: *'I am of the view that MGET's reliance on s 64(1)(a) is misplaced. Like Lord Walker, I am inclined to accept Mr Brennan's submission for the Commissioner, that s 64(1)(a) contemplates some temporary impediment of an external and physical nature, rather than something internal and psychological. Thus, if a taxpayer failed to object within the statutory time limit because of wrong advice from his accountants, the taxpayer could not be said to have been prevented from giving timely notice of objection. Nor when the "cause" is said to be the undiscovered fraud of its management. This is so, even when the fraud is not attributed to the corporate taxpayer.'* Although this is a minority decision, this part of his decision is not in conflict with the majority decision and is nonetheless binding on this Board.

13. Moulin is a decision on section 64(1) of the IRO, but as is apparent from a comparison of the wordings of the statutory provisions that Tang PJ's dictum are equally applicable to an application under section 66(1A).

The Ground of Appeals

14. By the Amended Notice of Appeal and Statement of the Grounds of Appeal, the Appellant alleges that 'due to the incompetence and/or negligence of its tax consultant/representative, the Appellant was prevented from and/or unable to give notice of appeal within the prescribed period in accordance with section 66(1)(a) IRO.' The Appellant's authorized tax representative was Company A.

The Relevant Facts

15. Most of the facts relating to the preliminary issue are not in dispute. It is helpful to summarise the relevant events in the following chronology:

24-09-2013	The Commissioner issued and sent the Determination together with a covering letter by registered post to the Appellant's business address and copies thereof to Company A. The covering letter set out the Appellant's rights of appeal, the appeal procedures and the one month time limit for lodging an appeal to the Board of Review. Both the Determination and the covering letter were in English.
25-09-2013	The Determination and the covering letter were received by the Appellant.
24-10-2013	One month time limit for giving the notice of appeal lapsed.

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09-12-2013	The Commissioner issued and sent his determination ('the Company B determination') together with a covering letter regarding Company B, a related company also 'owned' by Mr C. The Company B determination and its covering letter were in English.
10-12-2013	The Company B determination was received by Miss D / Mr C.
20-12-2013	Having received no notice of appeal from the Appellant, the Commissioner issued and sent to the Appellant, with copy to Company A, a notice of payment under section 71(4) of the IRO ('the Notice of Payment'). The Notice of Payment was in bilingual standard form and set out clearly in both English and Chinese that by section 71(4) of the IRO, the Commissioner cancelled the order made under section 71(2) for holding over payment of tax and the Appellant was required to pay the held over tax on or before 30 December 2013.
23-12-2013	The Notice of Payment was received by the Appellant. Miss D / Mr C became aware that the time limit for filing a notice of appeal was 1 month after the transmission of the Determination.
08-01-2014	Notice of Appeal was filed on behalf of Company B against the Company B determination.
29-1-2014	Resolution was passed by the Appellant's Board, <i>inter alia</i> , to appeal against the Determination.
17-2-2014	Notice of Appeal in relation to the present appeal was filed.

16. The Appellant called Miss D and Mr C as witnesses. Mr C is the director of the Appellant and its directing mind, or in vernacular, the boss. Miss D is his secretary and has been working for him for some 20 years.

17. Both Mr C and Miss D appear to us to be sincere and honest and they tried to answer the questions as best they could. We have no hesitation in accepting their evidence.

18. Miss D told us that she was educated up to Form 4. Her competence in English was only basic with essentially no ability to read or write English beyond a few simple

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words.

19. Mr C told us that while he was educated up to Form 5, his English was likewise poor because he did not study hard at school, failing both his English and Chinese exams. Be that as it may, Mr C is obviously an intelligent man and it is not difficult to understand why he is now the successful businessman that he is.

20. Mr C has diverse business interests and owns a number of different companies, including the Appellant and Company B. Company A has been his auditors for many years. Company A was, and remain, the auditors of both the Appellant and Company B. Mr E was the person in Company A whom Miss D would liaise with. For the purpose of the Appellant and Company B's objections to the Commissioner, Mr C had also retained the service of a tax consultant, namely Mr F of Company G.

21. When Miss D received the Determination on 25 September 2013, she did not understand it as it was in English, so she contacted Mr E for advice. Mr E told her it was the Commissioner's determination by which the Commissioner confirmed the relevant profit tax assessment and the Appellant's objection failed.

22. She took instructions from Mr C who told her to ask Mr E to seek advice from the tax consultant Mr F. This she did, but she heard nothing from Mr E in the next few days. She then called Mr E and was told that the matter was under review and she would be informed of the progress in due course.

23. On or about 9 December 2013, Miss D received the Company B determination. She likewise called Mr E for advice. Mr E told her that, same as the Appellant, the objection of Company B also failed.

24. In none of the conversations Miss D had with Mr E did he mention any statutory time limit for filing the appeal.

25. On or about 20 December 2013, Miss D received the Notice of Payment which was in both English and Chinese. She called Mr E on the same day to ask about the notice. She was told by Mr E, quite erroneously, that the payment of tax demanded in the Notice of Payment and the appeal against the Determination were separate matters; and the Appellant had one month from the date of the Notice of Payment to appeal.

26. Miss D reported the matter to Mr C. It so happened that Mr C was in the company of a Mr H at the time, who was a practising barrister, and on showing Mr H the relevant documents, Mr H told them right away that the time limit of the appeal had passed and advised Mr C to seek proper legal advice.

27. Mr C duly instructed solicitors to review the matters and through the solicitors, Company B managed to lodge its appeal in time on 8 January 2014, but still no appeal was forthcoming from the Appellant.

28. Miss D/Mr C held a meeting with Mr F on 21 January 2014, together with Mr E and his superior of Company A. Following that meeting, the Appellant in their Board Meeting of 29 January 2014, resolved, *inter alia*, to appeal against the Determination.

29. In their letter of 29 January 2014, Company A alleged, *inter alia*, that it was ‘a mis-communication’ between their staff and Miss D that she was mis-informed of the appeal deadline. But copies of emails provided by Mr F reveal that by email of 3 October, Mr F distinctly told Mr E that the deadline for lodging the appeal was 23 October 2013.

30. Finally, by letter of 16 June 2014, Company A admitted, *inter alia*, that they had failed to convey the advice of Mr F to the Appellant and that their staff mistakenly thought that the time for appeal was within one month from the date of payment notice.

Our Decision

31. On the facts, we are not satisfied that the Appellant has shown any reasonable cause that prevented it from giving the Notice of Appeal in time.

32. First of all, we agree with Mr Chow for the Commissioner that ultimately, the reason the notice of appeal was not filed in time was that Miss D/Mr C failed to acquaint themselves with the contents of the Determination and the covering letter. Time and again, the Board of Review has pointed out that ignorance of one’s legal rights or of the steps to be taken is a unilateral mistake which does not constitute a reasonable cause under section 66(1A) – see D9/79 and the Court of Appeal decision in Chow Kwong Fai above. Of course, it was not their ‘fault’ that they could not read English, but it was imprudent of them not to ask Mr E to explain the appeal procedure to them or to read the covering letter more closely in which the appeal procedure is stated in simple and straightforward English. Irrespectively, this is not a fault finding exercise. Whether or not Miss D/Mr C could read the Determination or whether they chose to leave the matter entirely in the hands of the auditors are no more than internal management or mismanagement of the Appellant, with which we are not concerned. So in Moulin, the liquidators there sought to argue that the failure to appeal in time was due to the fraud of the then directors which could not be attributed to the taxpayer company. Despite accepting that there was no attribution, Tang PJ nonetheless concluded that the fraud of the then directors was an ‘internal’ reason which could not constitute reasonable cause within section 64(1)(a).

33. Secondly, even if, as per the Amended Grounds of Appeal, the reason for the delay was solely ‘the incompetence and/or negligence’ of Company A, we do not accept that this constitutes an ‘impediment of an external and physical nature’ either. As made clear by Tang PJ in Moulin, ‘*if a taxpayer failed to object within the statutory time limit because of wrong advice from his accountants, the taxpayer could not be said to have been prevented from giving timely notice of objection.*’

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34. Arguably, Company A did not give any ‘wrong advice’, because Mr E did not give any advice at all as to the time limit, not until he was asked about the Notice of Payment by Miss D on 23 December 2013, by which time the deadline had already passed. But we fail to see how this ‘lack of advice’ can take the case out of the rationale of Tang PJ’s dictum, viz., mistake of the accountants is not an external impediment. The Appellant being a limited company, a *persona ficta*, obviously has to act through living person or persons. It has to act through its director and staff, and in a fiscal context, its auditors and tax representative and consultant. One does not draw the line by simply looking at the Appellant’s payroll. The fact is the Appellant acted through Company A as its auditors and authorised tax representative. Company A, for reasons best known to themselves, failed the Appellant. This failure was an internal reason, a unilateral mistake, and cannot constitute an external impediment to prevent the Appellant from giving due notice under section 66(1A).

35. Further, and in any event, even if we were to accept that Company A’s failure to advice was a reasonable cause, we do not think it fit to extend the period of time to 17 February 2014, some 16 weeks after the expiration of the appeal time limit and 8 weeks after Miss D/Mr C became aware of that time limit.

36. There can be no dispute that by 23 December 2013, when Miss D/Mr C received the Notice of Payment, they knew or ought to have known of the prescribed time limit. The Notice of Payment was in both English and Chinese. It specified that by section 71(4) of the IRO, the Commissioner cancelled the order allowing for the tax to be held over. This must be crystal clear to them that the Determination had become final. Again, if Miss D/Mr C failed to acquaint themselves with the terms of section 71(4), they had themselves to blame. In any event, they were informed by Mr H of the time limit on the same day. Cognizant of their predicament, they should have acted forthwith without delay to lodge the appeal. Company B’s appeal was filed in time on 8 January, just over two weeks from 23 December. We see no reason why they could not do the same with the Appellant’s appeal. The Appellant’s Notice of Appeal relied on essentially the same grounds as its objections to the Commissioner. It could have been filed in no time. As explained in Chow Kwong Fai above, there are good reasons for the stringent and rigorous time limit imposed by the IRO and it must be respected.

37. Mr Cheung sought to explain the delay by arguing that the Appellant need to ascertain from Company A the reason for their negligence in order to see if there was any ground to apply for an extension of time. We do not accept that the Appellant could delay the filing of the Notice of Appeal for this reason. It has been held in previous Board of Review decisions that the gathering of evidence (D11/89) and the need to seek Counsel’s opinion (D3/91) do not constitute ‘reasonable cause’ under section 66(1A). Likewise, we do not see how the need to ascertain the reason for a tax representative’s ‘negligence’, if any, could excuse a delay upon delay of 8 weeks. Further, and in any event, the Minutes of 29 January 2014 showed clearly that in that Board meeting, resolution was passed to appeal against the Determination. Notwithstanding, the appeal was not lodged until another two and a half weeks. Even allowing for the intervention of the Chinese New Year holidays, such dilatory approach of the Appellant is totally unacceptable.

Conclusion

38. In conclusion, we are not satisfied that the Appellant has shown any reasonable cause that prevented it from giving its notice of appeal in time so as to enable us to grant an extension of time under section 66(1A). In any event, even if, which is not accepted, a reasonable cause existed, the facts do not justify an extension of time until 17 February 2014 and we do not think it fit to do so. It follows that the Appellant fails in the preliminary issue and no order will be made regarding the substantive appeal.