

**Case No. D22/15**

**Appeal out of time** – whether appeal lodged out of time – whether hearing panel shall be reconstituted – whether appeal should be dismissed because of appellant’s absence – Section 68(2), (2B), (2C) and (2D) of the Inland Revenue Ordinance (‘IRO’)

Panel: Chow Wai Shun (chairman), Wong Wai Yee Pauline and James Todd Wood.

Date of hearing: 17 December 2015.

Date of decision: 18 January 2016.

A determination relating to the Appellant was sent to his last known address by registered post on 12 March 2015, but it was returned on 9 April 2015. Further redirection by registered post was done on 10 April 2015 but it was also returned on 5 May 2015. The determination was then redirected by ordinary post on 7 May 2015. The Appellant filed a notice of appeal by email on 3 July 2015, without specifying the date of the receipt of the determination. The Clerk of the Board sent a letter informing the Appellant of the hearing date by registered post and ordinary post. The registered mail was again returned on 11 November 2015. On 11 December 2015, the Appellant emailed the Clerk of the Board, requesting the Clerk to amend the subject line of the correspondence ‘LATE APPEAL TO THE BOARD OF REVIEW’, as he claimed that his appeal was wrongly treated as a late submission. The Appellant further requested the hearing panel be reconstituted because he believed the allegedly wrong classification of his appeal indicated that he could not have a fair hearing. The Presiding Chairman determined that the hearing would proceed as scheduled. The Appellant was also informed that one of the issues at the hearing would be whether the appeal was indeed a late appeal, if so, whether time for lodging appeal could be extended. The Appellant was absent at the hearing on 17 December 2015, and did not send any representative to attend the same.

**Held:**

1. There is no evidence to show that the Appellant was absent as a result of sickness, so the hearing could not be adjourned or postponed by section 68(2B)(a) of the IRO.
2. There was no reasonable cause to adjourn or postpone the hearing under section 68(2B)(a). The appeal was *prima facie* late because, contrary to section 58(2) of the IRO, the notice of appeal was filed more than 1 month after the determination was sent by post (Chan Chun Chuen v CIR [2012] 2 HKLRD 379 considered). The subject line of the correspondence was never

taken as part of the evidence on which facts were to be found. It just served as a reminder to all parties involved that there existed such an issue to be dealt with.

3. Also, the fact that the request for the hearing panel to be reconstituted had not been acceded to could not be a reasonable cause. Members of any hearing panel would consider the evidence, deliberate on the issues, and make a decision on the appeal based on the facts found and according to the law. Any reconstituted panel would not differ in this respect. The request was not justified.
4. Section 68(2B)(b) did not apply because there was no application by the Appellant under section 68(2D) to hear the appeal in its absence.
5. The only remaining alternative was under section 68(2B)(c) to dismiss the appeal.

**Appeal dismissed.**

Case referred to:

Chan Chun Chuen v CIR [2012] 2 HKLRD 379

Appellant in absentia.

Cheung Ka Yung and Chow Cheong Po for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal by the Appellant in respect of a Determination dated 12 March 2015 by the Deputy Commissioner of Inland Revenue ('the Determination').
2. The Determination was first sent to the Appellant's last known postal address by registered post on 12 March 2015. It was returned to the sender on 9 April 2015. It was then redirected by registered post, to the same address, on 10 April 2015. It was returned, again, to the sender on 5 May 2015. It was redirected again on 7 May 2015 by ordinary post.
3. On 3 July 2015, the Appellant filed a notice of appeal by email, saying that he had received the Determination 'recently' without specifying the date of his receipt.
4. By letter dated 14 October 2015, the Clerk informed the Appellant that his case was scheduled to be heard on 17 December 2015. The letter was sent to the Appellant by

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ordinary and registered mail, as well as by email. The registered mail was returned to the Clerk's Office on 11 November 2015.

5. Apart from the notice of appeal, the Clerk's Office had not received any oral or written communication from the Appellant until 11 December 2015. Indeed, the Appellant did not even leave with the Clerk's Office any contactable phone number.

6. In his email dated 11 December 2015 to the Clerk, the Appellant claimed that he was not late for the appeal and requested to amend the subject line of the correspondence from the Board, i.e. 'LATE APPEAL TO THE BOARD OF REVIEW'.

7. We do not see it necessary to go into any further detail in relation to the subsequent correspondence between the Clerk and the Appellant on this matter. Suffice to say, the Appellant opined in his subsequent email to the Clerk sent at 17:33 on 16 December 2015 that his appeal had been wrongly treated 'as a late submission without solid evidence'. The Appellant said that it might be 'an indication of' an approach 'to recklessly or even intentionally make presumptions groundlessly' and so he could not believe that he would have a fair hearing. On such basis, he requested that the hearing panel be reconstituted 'with different members who have not committed the same mistake'.

8. The request was faxed to the Presiding Chairman with a copy to the Members of this Panel. The Presiding Chairman directed that the hearing would proceed as scheduled. In the Clerk's email reply to the Appellant at 18:51 on 16 December 2015, it was stressed again that one of the issues to be addressed at the scheduled hearing would be whether the Appellant's appeal was indeed a late appeal and if so, whether time for lodging the appeal can be extended.

9. The Appellant emailed back to the Clerk, saying that it would be a waste of taxpayers' money to allow the same panel which had false presumption to proceed with the case. He considered this 'maladministration'.

10. The Appellant did not attend the hearing on 17 December as scheduled, whether in person or by an authorized representative.

11. 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.'*

*'(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-*

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- (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.'*

12. 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.

13. Was there any other reasonable cause for the Appellant's failure to attend the hearing?

14. Apparently, the Appellant was cross with the subject line used in the correspondence from the Clerk's Office. However, this is a *prima facie* case of late appeal since the notice of appeal was filed more than one month after the Determination was sent by post to the Appellant's last known postal address (section 58(2) of the Ordinance and Chan Chun Chuen v CIR [2012] 2 HKLRD 379). One of the issues for this hearing panel to decide would have been whether this was indeed a late appeal and if so whether there might be any justification to extend the time for lodging the appeal.

15. Furthermore, for what it is worth, the subject line of the correspondence from the Clerk's Office has never been taken as part of the evidence on which facts were to be found. It just serves as a reminder to all parties involved that there exists such an issue to be dealt with, no more and no less. Indeed, members of any hearing panel of this Board, in the performance of their statutory functions and duties, come with an open mind, listen to what the parties are saying, consider all the evidence adduced by the parties, deliberate on the issues and, finally, make a decision on the appeal on the basis of the facts found and

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according to the law. We cannot see how a re-constituted panel would differ in this respect. On the same token, the fact that his request that the hearing panel be reconstituted (which, as explained, is not considered to be justified) had not been acceded to cannot be a reasonable cause for not attending the hearing.

16. We did not hear from the Appellant any other cause for his non-attendance. Thus, section 68(2B)(a) does not apply.

17. There is no application by the Appellant under section 68(2D) to hear the appeal in its absence either and therefore section 68(2B)(b) does not apply.

18. Given that neither section 68(2B)(a) nor section 68(2B)(b) applies, that leaves us with section 68(2B)(c).

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