

Case No. D25/19

Profits tax – reasonable cause that justify an extension of time under section 66(1A) of the Ordinance – whether previous Chief Executive Office’s inability to come to Hong Kong and/or the misplacement of the documents are reasonable cause – the locality of the source of income

Panel: Elaine Liu Yuk Ling (chairman), Law Wing Chung Vincent and Anita H K Yip SC.

Date of Hearing: 4 October 2019

Date of Decision: 16 March 2020

The Appellant is a company incorporated in Hong Kong. The Appeal was against the determination of the Profits Tax Assessment. The appellant’s notice of appeal was received by the Board 4 months and 4 days after the statutory time limit. The main ground of appeal was that the source of the income was outside Hong Kong and therefore not taxable under section 14(1) of the Ordinance.

Before the Board deal with the substantive ground of the appeal, the Board shall first determine whether the appellant has lodged this appeal within the statutory time limit. The question is whether this Board is satisfied that the Appellant was ‘prevented by other reasonable cause’ from giving the notice of appeal within the one-month statutory time limit.

Held:

1. The Board’s power to extend the time limit for the lodging of the appeal was restricted to the grounds stated in section 66(1A) of the Ordinance, namely whether the Appellant was prevented by (a) illness; or (b) absence from Hong Kong; or (c) other reasonable cause from giving the notice of appeal on time.
2. There are clear decisions from the Board of Review that the following reasons do not amount to a reasonable cause that justify an extension of time under section 66(1A) of the Ordinance: (a) the appellant was travelling for his wife’s operation and treatment, his household and personal effects were in storage or one’s tax affairs were complex; (b) further time was required to gather information including researching and taking advice to substantiate an appeal; (c) the appellant was not familiar with Hong Kong tax laws and required time to sort out certain issues; and (d) the director of the appellant was out of Hong Kong and more time for legal consultation was needed (D33/07, (2007-08) IRBRD, vol 22, 791; D14/06, (2006-07) IRBRD, vol 21,

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371; D55/09, (2009-10) IRBRD, vol 24, 993 and D6/15, (2015-16) IRBRD, vol 30, 426 considered)

3. The Board is of the view that the Appellant's previous Chief Executive Officer's inability to come to Hong Kong and/or the misplacement of the documents are not a reasonable cause that prevents the lodging of the appeal within time. The appeal was clearly lodged out of the statutory time limit and there is no justification for time extension under section 66(1A) of the Ordinance.
4. The board guiding principle in determining the locality of the source of income is that one looks at what the taxpayer has done to earn the profits and where he has done it. The focus must be on the nature of transactions and the effective cause which give rise to the profits without being distracted by antecedent or incidental matters or technical assistance (Commissioner of Inland Revenue v Hang Seng Bank Limited [1991] 1 AC 306; HK-TVB International Limited v Commissioner of Inland Revenue [1992] 2 AC 397 and ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 417 followed).
5. The Board found the profits producing activities of the appellant were the activities done by the previous Chief Executive Officer outside Hong Kong, but not the paper works issued in the name of the appellant in Hong Kong. The Board are of the view that the source of the income covered by the assessments was outside Hong Kong.
6. Irrespective of the Board's views on the source of the relevant income, the appeal is dismissed for the reason that the appeal was lodged out of time and there is no ground on which an extension of time could be allowed pursuant to section 66(1A) of the Ordinance.

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D33/07, (2007-08) IRBRD, vol 22, 791
D14/06, (2006-07) IRBRD, vol 21, 371
D55/09, (2009-10) IRBRD, vol 24, 993
D6/15, (2015-16) IRBRD, vol 30, 426
Commissioner of Inland Revenue v Hang Seng Bank Limited [1991] 1 AC 306
HK-TVB International Limited v Commissioner of Inland Revenue [1992] 2 AC 397
ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 417

Previous principal of the company, for the Appellant.
Chan Wai Lin, Cheng Po Fung and Lai Ming Yee, for the Commissioner of Inland Revenue.

Decision:

A. The Appeal

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 18 December 2018 ('the Determination') whereby the Deputy Commissioner confirmed the Profits Tax Assessment for the year of assessment 2010/11 on the Appellant of an assessable profit of \$2,065,471 with tax payable thereon of \$340,802 ('the Assessment').

B. Whether the appeal was lodged out of time

2. Before we deal with the substantive ground of the appeal, we shall first determine whether the Appellant has lodged this appeal within the statutory time limit.

B1. The relevant legal principles

3. Section 66(1) of the Inland Revenue Ordinance ('the Ordinance') provides that an appeal with this Board shall be lodged within 1 month after the transmission of the Determination to the appellant under section 64(4) of the Ordinance or such further period as the Board may allow under section 66(1A).

4. 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).'

5. The Board's power to extend the time limit for the lodging of the appeal was restricted to the grounds stated in section 66(1A) of the Ordinance, namely whether the Appellant was prevented by (a) illness; or (b) absence from Hong Kong; or (c) other reasonable cause from giving the notice of appeal within time.

6. In Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD687, the Court of Appeal had held that the word 'prevented' used in section 66(1A) meant 'unable to' and imposed a higher threshold than a mere excuse. Unilateral misunderstanding or misinterpretation of the rules did not amount to a reasonable cause under section 66(1A) of the Ordinance.

7. There are clear decisions from the Board of Review that the following reasons do not amount to a reasonable cause that justify an extension of time under section 66(1A) of the Ordinance:

- (a) the appellant was travelling for his wife's operation and treatment, his household and personal effects were in storage or one's tax affairs are complex (D33/07, (2007-08) IRBRD, vol 22, 791);
- (b) further time was required to gather information including researching and taking advice to substantiate an appeal (D14/06, (2006-07) IRBRD, vol 21, 371);
- (c) the appellant was not familiar with Hong Kong tax laws and required time to sort out certain issues (D55/09, (2009-10) IRBRD, vol 24, 993);
- (d) the director of the appellant was out of Hong Kong and more time for legal consultation was needed (D6/15, (2015-16) IRBRD, vol 30, 426).

B2. *The time when the appeal was lodged*

8. The Determination with reasons therefor and a statement of facts dated 18 December 2018 was duly served on the Appellant at its designated correspondence address and the address of its authorized representative, Lam & Chui CPA Limited, on 20 December 2018. Both the Appellant and Lam & Chui CPA Limited had acknowledged receipt of the same on 20 December 2018.

9. Pursuant to section 66(1)(a) of the Ordinance, the one-month period within which the Appellant could lodge its appeal expired on 20 January 2019.

10. The Appellant's notice of appeal was dated 24 May 2019 and was received by the Board on the same date, that is 4 months and 4 days after the statutory time limit. The Appellant's notice of appeal was out of time under section 66(1) of the Ordinance.

B3. *Whether discretion shall be exercised to extend the time*

11. The Appellant is a company incorporated in Hong Kong. The first two grounds provided in section 66(1A) of the Ordinance, namely (a) illness and (b) absence from Hong Kong are not engaged.

12. The question is whether this Board is satisfied that the Appellant was 'prevented by other reasonable cause' from giving the notice of appeal within the one-month statutory time limit.

13. In the notice of appeal, the Appellant stated that it was late in submitting the appeal because it had to contact its previous Chief Executive Officer, Ms A, who was not in Hong Kong, to gather all the information for the grounds of appeal. The Appellant further stated that Ms A was the principal who runs the business. The Appellant had lost contact

with Ms A since she had travelled to Europe from 2017 onwards. The Appellant got in touch with Ms A in December 2018. As Ms A's passport was stolen in City B on 22 January 2019, she could not come to Hong Kong. It was also stated that many documents were misplaced or thrown away and could not be found.

14. Ms A has given evidence for the Appellant at the hearing of the appeal. She said that she was first informed of the Determination in December 2018. She had planned to come to Hong Kong in December 2018 or January 2019 following the birth of her baby. Her passport and residence permit were stolen in City B in January 2019. She also told the Board that she had a complicated pregnancy and was put on bed rest in October 2018. No medical evidence was adduced to corroborate this testimony.

15. It is clear from the Appellant's own evidence that the Appellant and Ms A had knowledge of the Determination in December 2018.

16. The complication in pregnancy of Ms A happened in October 2018 which was before the Determination and is irrelevant in any event. Even if it happened after the Determination was issued, it does not amount to a 'reasonable cause' within the meaning of section 66(1A) of the Ordinance.

17. According to the Appellant's Annual Returns filed with the Companies Registry, Ms A is not a director of the Company. The Appellant's case was that Ms A is its principal owner. She engaged lawyers and secretarial services for the incorporation and maintenance of the Appellant in Hong Kong.

18. We are of the view that Ms A's inability to come to Hong Kong in December 2018 or January 2019 and/or the misplacement of the documents are not a reasonable cause that prevents the lodging of the appeal within time.

19. The appeal was clearly lodged out of the statutory time limit and there is no justification for time extension under section 66(1A) of the Ordinance. The appeal is dismissed.

C. The Determination

20. We have dismissed the appeal on the ground that it was lodged out of time. Since we have heard the parties on the substantive grounds of the appeal, we deal with them below.

21. The main ground of appeal against the Determination is that the source of the income was outside Hong Kong and therefore not taxable under section 14(1) of the Ordinance.

22. The legal principles and approaches to be applied in determining the locality of the source of income could be found in many authorities. The broad guiding principle is that one looks at what the taxpayer has done to earn the profits and where he has done it. The focus must be on the nature of transactions and the effective cause which gave rise to

the profits without being distracted by antecedent or incidental matters or technical assistance. (Commissioner of Inland Revenue v Hang Seng Bank Limited [1991] 1 AC 306; HK-TVB International Limited v CIR [1992] 2 AC 397; ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 417)

23. The Appellant had no establishment or employee in Hong Kong. Its address is the address of the corporate secretary's service address.

24. Based on the evidence from Ms A, we find that the Appellant's business was to sell kids' pretend play products designed by Ms A, who resided out of Hong Kong. We also accept that the negotiation for the sales of the products designed by Ms A, the placing of orders to the suppliers, shipping samples, arranging shipments from factories to Country C or Country D, were all handled by Ms A outside Hong Kong. The purchase orders and the invoices to the customers were issued in the name of the Appellant in Hong Kong, and the payment was made to the Appellant's bank account in Hong Kong.

25. The profits producing activities of the Appellant were the activities done by Ms A outside Hong Kong, but not the paper works issued in the name of the Appellant in Hong Kong. We are of the view that the source of the income covered by the Assessments was outside Hong Kong.

D. The Decision

26. Irrespective of our views on the source of the relevant income, this appeal is dismissed for the reason that the appeal was lodged out of time and there is no ground on which an extension of time could be allowed pursuant to section 66(1A) of the Ordinance.