Case No. D29/17

Profits tax – appeal out of time – whether to extend time to give notice of appeal – whether any 'reasonable cause' – sections 58(2), 58(4), 64(4), 66(1) and 66(1A) of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Anson Wong SC (chairman), Chan Yue Chow and Joes Fung.

Date of hearing: 7 September 2016.
Date of decision: 28 February 2018.

The Appellants were husband and wife. By a determination sent to the appellant's address by registered mail on 20 January 2016 to which receipt was acknowledged on 21 January 2016 ('Determination'), together with a letter which stated, inter alia, that notice of appeal must be given within one month after transmission of the Determination and the Board might only extend time if it satisfied that there was a reasonable cause preventing them from giving notice of appeal within the period ('Letter'), the Deputy Commissioner of Inland Revenue ('CIR') decided, *inter alia*, that the administrative fee of $322,280 ('Admin Fee') could not be deducted in computing assessable profits since the appellants had failed to provide their details.

The Appellants appealed against the Determination by a letter signed by one of the appellant notifying of their intention to appeal against the Determination on 31 March 2016. In the said letter, the Appellant indicated that they would only object to the decision that the Admin Fee was excluded from deduction in Profits Tax Assessment. At the hearing, the husband (who appeared on behalf of his wife and himself) accepted that it was due to their negligence that they failed to appeal within time. The Appellants were in Hong Kong during the period between 21 January 2016 and 22 February 2016.

Held:

1. Giving of notice did not imply that the taxpayer must have actual knowledge of the notice. The one-month period commenced to run after the process of transmission had been completed and that the process of transmission would normally end when the determination reached the address to which it was sent. (Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKLRD 379, D2/04, IRBRD, vol 19, 76 considered).

2. The word 'prevented' in section 66(1A) should best be understood to mean 'unable to'. Mistake on the part of the taxpayer 'could not be properly described as a reasonable cause which prevented him from

lodging the notice of appeal within time'. Also, neither laches nor ignorance of one's rights or of the steps to be taken was a ground upon which an extension might be granted (Chan Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687, D9/79, IRBRD, vol 1, 354 considered).

3. In the present case, the deadline for the appellants to give notice of appeal fell on 22 February 2016. It was clear that the appellants were not prevented from giving their notice of appeal within time. The appellants' explanation could not be regarded as 'reasonable cause' for extending time to appeal.

Appeal dismissed.

Cases referred to:

Chan Chun Chuen v Commissioner of Inland Revenue [2012] 2 HKRLD 379
D2/04, IRBRD, vol 19, 76
Chan Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D9/79, IRBRD, vol 1, 354
D2/03, IRBRD, vol 18, 301
D55/09, (2009-10) IRBRD, vol 24, 993

Appellant in person.
Ng Sui Ling Louisa and Fung Ka Leung, for the Commissioner of Inland Revenue.

Decision:

Background

1. This is the appeal by the taxpayers, who are husband and wife, from the determination dated 26 January 2016 (the 'Determination') of the Deputy Commissioner of Inland Revenue (the 'CIR') in respect of the taxpayers' Profits Tax Assessment for the year of assessment 2007/2008.

2. In the Determination, the CIR decided that the profit derived from the sale of a property at Road A (the 'Property') was chargeable to profits tax for the reason that the sale and purchase of the Property by the taxpayers amounted to an adventure in the nature of trade. The CIR, however, decided that administration fee of $322,280 (the 'Administration Fee') could not be deducted in computing the assessable profits since the taxpayers had failed to provide details of the Administration Fee.

3. On 20 January 2016, the CIR issued a letter to the taxpayers enclosing the Determination with reasons for decision and a statement of facts (the 'Packet'). It was

stated in the letter that if the taxpayers or their authorised representative wished to appeal, the notice of appeal must be given within one month after the transmission of the Determination. Further, it was also stated that this Board might extend the one-month appeal period in the event of it being satisfied that there was a reasonable cause, including sickness or absence from Hong Kong, which prevented the person from giving notice of appeal within that period.

4. The Packet was sent to the taxpayers' address by registered mail on 20 January 2016 and was acknowledged receipt on 21 January 2016.

5. The taxpayers, however, did not give their notice of appeal within the one-month period. It was only on 31 March 2016 that the taxpayers, by a letter signed by the husband, notified this Board of their intention to appeal against the Determination.

6. In their letter of 31 March 2016, the taxpayers indicated that they did not challenge the decision that the sale proceeds of the Property was chargeable to profits tax. They, however, objected to the decision that the Administration Fee was excluded from deduction in the Profits Tax Assessment.

Issue

7. In these circumstances, the preliminary issue which this Board has to decide is whether it should exercise its discretion under section 66(1A) of the Inland Revenue Ordinance, Chapter 112 (the 'IRO') to extend the time for the taxpayers to give notice of appeal.

Statutory Provisions and Case Law

8. Section 58(2) of the IRO provides, so far as material, that:

> '*Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, …*'

9. In relation to service by post, section 58(4) of the IRO provides that:

> '*In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.*'

10. In Chan Chun Chuen v CIR [2012] 2 HKRLD 379, the Court of Appeal held that the giving of notice under section 58(2) of the IRO does not imply that the taxpayer must have actual knowledge of the notice. At paragraph 27(2), Cheung JA held that:

> '*Once [s.58(2)] is invoked the Commissioner does not need to show further that the notice had "actually" come to the knowledge of the taxpayer. … In my view,* ***once the document was properly served under***

> ***s.58(2), actual notice was treated to have been given to the taxpayer****. It is then up to the taxpayer to ensure that the document which he had chosen to be sent to a specified address would be brought to his attention*.' (emphasis added)

11. As to the appeal period, section 66(1) of the IRO 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 of Review may allow under subsection (1A),*
>
> *either himself or by his authorized representative give notice of appeal to the Board ...*'

12. The meaning of the expression of '*within 1 month after the transmission to him under section 64(4) of the Commissioner's written determination*' was discussed in a decision of this Board in D2/04, IRBRD, vol 19, 76. In that decision, this Board held (at paragraph 7) that the one-month period under section 66 commenced to run after the process of transmission had been completed and that the process of transmission would normally end when the determination reached the address to which it was sent.

13. Where a taxpayer fails to give his notice of appeal within the one-month period, section 66(1A) of the IRO 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)*.' (emphasis added)

14. In Chan Kwong Fai v CIR [2005] 4 HKLRD 687, the Court of Appeal held (at paragraph 22) that the word '*prevented*' in section 66(1A) of the IRO should best be understood to mean '*unable to*'. The Court of Appeal further observed (at paragraph 45) that mistake on the part of the taxpayer '*cannot be properly described as a reasonable cause which prevented him from lodging the notice of appeal within time*.'

15. Similarly, in D9/79, IRBRD, vol 1, 354, D2/03, IRBRD, vol 18, 301, D55/09, (2009-10) IRBRD, vol 24, 993, this Board repeatedly held and affirmed that neither laches nor ignorance of one's rights or of the steps to be taken is a ground upon which an extension may be granted.

Discussions

16. In the present case, there is no dispute that the Packet enclosing the Determination (which was sent on 20 January 2016 by registered post) reached the taxpayers' address on 21 January 2016. Accordingly, the one-month appeal period started to run on 22 January 2016 and expired on 21 February 2016. Given that 21 February 2016 was a Sunday, the deadline for the taxpayers giving their notice of appeal against the Determination fell on 22 February 2016.

17. Given that the taxpayers failed to give their notice of appeal within the one-month appeal period, they need to persuade this Board that it should exercise its discretion under section 66(1A) of the IRO to extend time for their intended appeal.

18. At the hearing, the husband (who appeared on behalf of his wife and himself) accepted that it was due to the taxpayers' negligence that the taxpayers failed to appeal within time. The husband told this Board that he took a quick look at the documents in the Packet and did not then notice that the Administration Fee was not deducted from the assessable profits. He only discovered this matter when he later received the profits tax demand dated 24 March 2016. Upon discovering that the Administration Fee was not deducted from the assessable profits, he then wrote his letter dated 31 March 2016 to indicate his intention to appeal against such part of the Determination concerning the deductibility of the Administration Fee.

19. On this issue, the CIR drew the attention of this Board to the fact that according to the records provided by the Immigration Department, the taxpayers were in Hong Kong throughout the period between the serving of the Determination on 21 January 2016 and the expiry of the appeal period on 22 February 2016.

20. In these circumstances, this Board takes the view that it is clear that the taxpayers were not prevented by anything from giving their notice of appeal within time. The only reason why the taxpayers had failed to lodge their notice of appeal within time was due to their failure to read the Determination carefully after it reached their address on 21 January 2016. The authorities referred to above clearly demonstrate that this cannot be regarded as 'reasonable cause' for extending time to appeal under section 66(1A) of the IRO.

Conclusion

21. For the above reasons, the only conclusion that this Board can make is to dismiss the taxpayers' application for extension of time to file their notice of appeal against the Determination.

22. As there is no proper appeal before this Board, the taxpayers' Profits Tax Assessment for the year of assessment 2007/2008 should stand.