Case No. D6/15

Profits tax – failing to file tax return – estimated assessment – notice of appeal out of time – section 66(1A) of the Inland Revenue Ordinance – whether or not the director's absence from Hong Kong had prevented the Appellant from filing the notice of appeal within time – whether or not it took time for legal consultation on the subject matter could be reasonable cause for exercising discretion to extend the time period – deadlock and disputes between parties and difficulties in finalizing its accounts

Panel: Chow Wai Shun (chairman), Chow Mun Wah Anna and Patrick Wu Yung Wei.

Date of hearing: 16 April 2015.
Date of decision: 2 June 2015.

The Appellant was incorporated as a private company in Hong Kong and the nature of business was money exchange. The Appellant failed to furnish its profits tax return for the year of assessment within the stipulated time. As shown from notices of Profits Tax Assessment for the two years of assessment immediately before that in dispute, the assessments were estimated assessments raised because the Appellant failed to file its tax return. The Appellant objected to the assessment on the ground that the assessment was excessive. The Assessor raised on the Appellant the Profits Tax Assessment. The Appellant argued that it only operated for three and a half months during the assessment year and in such circumstances it is unlikely to have generated such level of turnover as in the previous year. Up to the point of the appeal hearing, the Appellant's accounting books and records were still incomplete.

The Appellant objected to the Profits Tax Assessment. The Appellant's notice of appeal was out of time. The preliminary issue for this appeal is whether the Appellant's late appeal could and should be entertained. The Appellant did not call any witness to give any oral evidence at the hearing. The Appellant contended that the delay was caused by the director of the Appellant being out of Hong Kong and its need for more time for legal consultation on the matter given that it had been involved in court proceedings and receivers had been appointed. The Respondent submitted that the Appellant's failure to file its appeal in time was not prevented by absence from Hong Kong, illness or other reasonable cause.

Held:

1. The Board is given by the power to extend the appeal period under section 66(1A) of the Inland Revenue Ordinance if the Board is satisfied that the Appellant was prevented by illness or absence from Hong Kong or other

reasonable cause to have lodged the appeal in time. The Board did not find that the director of the Appellant being absent from Hong Kong had prevented the Appellant from filing the notice of appeal within time. The case authorities also did not support the Appellant's another reason that it took time for legal consultation on the subject matter. There is a difference between lodging an appeal and preparing for an appeal. The Appellant could and should have enquired the Clerk to the Board by telephone, facsimile or email and by then sent in its notice of appeal with all specified accompanying documents to reach this Board within the statutory time limit first before further substantiating its case. The Board found no reasonable cause for exercising discretion in favour of the Appellant to extend the time period (D9/79, IRBRD, vol 1, 354; D11/89, IRBRD, vol 4, 230; D19/01, IRBRD, vol 16, 183; D14/06, (2006-07) IRBRD, vol 21, 371; D33/07, (2007-08) IRBRD, vol 22, 791 and D55/09, (2009-10) IRBRD, vol 24, 993 followed).

2. The Appellant failed to file its profits tax return for the year of assessment within time. The law allows the assessor to 'estimate' or as the case may be to assess 'according to his judgment' without necessarily proving facts justifying his assessment in the precise amount thereof, or indeed, in any particular amount. The estimated assessment cannot be disturbed so long as the assessor did not act capriciously or dishonestly, except upon the Appellant discharging its onus of proof (Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166 followed).

3. The Board found that the Appellant has clearly failed to satisfy the onus of proof. The Board also accepted that deadlock and disputes between the Appellant and other parties and difficulties in finalizing its accounts should not take precedence over its statutory obligations including in this context due and proper filing of its tax return and the burden to show that the assessment appealed against was excessive or incorrect (D66/97, IRBRD, vol 12, 398; D10/98, IRBRD, vol 13, 108 and D112/99, IRBRD, vol 14, 642 followed).

Appeal dismissed.

Cases referred to:

Chow Kwong Fai Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D9/79, IRBRD, vol 1, 354
D11/89, IRBRD, vol 4, 230
D19/01, IRBRD, vol 16, 183
D14/06, (2006-07) IRBRD, vol 21, 371
D33/07, (2007-08) IRBRD, vol 22, 791
D55/09, (2009-10) IRBRD, vol 24, 993

D35/12, (2012-13) IRBRD, vol 27, 768
Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166
D69/97, IRBRD, vol 12, 398
D10/98, IRBRD, vol 13, 108
D112/99, IRBRD, vol 14, 642

Anita Li Ho Ping, Wong Yung Chak and Ip Pak Cho of Florida Money Exchange for the Appellant.
Wong Pui Ki and Ng Lai Ying, Vivian for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 23 September 2014 ('the Determination') which confirmed the Profits Tax Assessment for the year of assessment 2009/10 raised on the Appellant. The notice of appeal of the Appellant was received by the Office of the Clerk to this Board on 12 December 2014.

The preliminary issue

2. As to be seen below, it is common ground that the Appellant's notice of appeal is out of time. The preliminary issue for this appeal is, therefore, whether the Appellant's patently late appeal could and should be entertained. This depends on whether the statutory time period for lodging an appeal against the Determination should be extended. The Appellant did not call any witness to give any oral evidence at the hearing.

Facts

3. On the documents made available to us and after considering the submissions made by both sides, we find the following facts relevant to the preliminary issue of this case:

(a) The Determination was sent under cover of a letter of the same date from the Deputy Commissioner to the Appellant, care of Mr A, the joint and several receiver of the Appellant, at the address as informed by Mr A in his objection to the assessment concerned lodged for and on behalf of the Appellant.

(b) The letter, together with the Determination, was sent by registered post on 23 September 2014 and was delivered to the said address on 24 September 2014.

(c) The letter, in addition to enclosing the full text of the relevant provision of the Inland Revenue Ordinance ('the IRO'), set out in detail the

procedures and the time limit in lodging an appeal to this Board.

(d) Ms B, director of the Appellant, was absent from Hong Kong from 17 October to 25 October 2014.

(e) Ms B sent an email to Ms C of Mr A's office on 17 October 2014, informing Ms C of her absence from Hong Kong and that she had been seeking legal advice. Ms B also requested Ms C to seek an extension of 14 days for submission of the appeal. Consequentially, Mr A applied to the Clerk to this Board on 22 October 2014 accordingly.

(f) Ms C, after clarifying with the Clerk to this Board, pointed out to Ms B by an email dated 22 October 2014 that the request for extension would 'not serve any real purpose' and urged Ms B to provide her submission to them as soon as possible.

(g) On 12 December 2014, the Appellant's notice of appeal which was signed by Ms B, together with the statement of grounds of appeal, was received by this Board.

(h) Mr A further wrote to the Clerk to this Board on 17 December 2014, in his capacity of the joint and several receiver appointed, confirming his no objection to Ms B having filed the documents for appeal and acting in relation to this appeal.

The statutory provisions

4. Section 66 of the IRO is the relevant statutory provision to the preliminary issue:

> ' *(1) 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; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the*

reasons therefor and of the statement of facts and a statement of the grounds of appeal.

(1A) 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)….'

The Appellant's submission

5. In its notice of appeal, the Appellant did not dispute that the appeal was filed out of time but contended that the delay was caused by:

(a) Ms B being out of Hong Kong from 17 to 25 October 2014; and

(b) its need for more time for legal consultation on the matter given that it had been involved in court proceedings and receivers had been appointed.

6. Ms B stressed repeatedly on the extra time spent in dealings with the receivers and the other parties to the court proceedings before any action could be taken in respect of matters involving the Appellant including this appeal. She also mentioned about the latest change of lawyers in June 2014, the new ones took up time to review all the papers relating to the court proceedings.

7. In her reply to a question from this Board, Ms B roughly recalled that she had received the Determination more than a week before she left Hong Kong in October 2014.

The Respondent's submission

8. On this preliminary issue, the Respondent submitted that the Appellant's failure to file its appeal in time was not prevented by absence from Hong Kong, illness or other reasonable cause. In this regard, the Respondent referred to and relied upon the following cases:

(a) Chow Kwong Fai, Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687;

(b) D9/79, IRBRD, vol 1, 354;

(c) D11/89, IRBRD, vol 4, 230;

(d) D19/01, IRBRD, vol 16, 183;

(e) D14/06 (2006-07) IRBRD, vol 21, 371;

(f) D33/07, (2007-08) IRBRD, vol 22, 791;

(g) D55/09, (2009-10) IRBRD, vol 24, 993; and

(h) D35/12, (2012-13) IRBRD, vol 27, 768.

Our Analysis

9. It is common ground that the Appellant's notice of appeal is out of time. This Board is given by the power to extend the appeal period under section 66(1A) of the IRO if we are satisfied that the Appellant was prevented by illness or absence from Hong Kong or other reasonable cause to have lodged the appeal in time. Therefore, the issue for this Board is whether the circumstances of this case warrant such extension to at least 12 December 2014.

10. In Chow Kwong Fai v Commissioner of Inland Revenue, the Court of Appeal held that in order for an extension of time, an appellant must show that there is a reasonable cause *and* because of that reason the appellant does not file the notice of appeal within time [emphasis added]. The Court also held that the word 'prevented' is best understood to bear the meaning of the term in the Chinese language version of the subsection which means 'unable to' and although providing a less stringent test than the word 'prevent' imposes a higher threshold than a mere excuse.

11. The Board, by different hearing panels, has considered this same issue and the decisions have been consistent.

(a) In D9/79, a decision before the Chow Kwong Fai case, the Board opined that the word 'prevent' is opposed to a situation where an appellant is able to give notice but has failed to do so.

(b) In D11/89, another decision before the Chow Kwong Fai case, the Board commented that the provisions of section 66(1A) are 'very clear and restrictive' and 'an extension of time can only be granted where the taxpayer has been prevented from giving notice of appeal within the prescribed period of one month.' In that case, the Board held that the taxpayer could well have appealed within the time prescribed and he did not have evidence to prove that he was in any way prevented from so doing. Even if he had been prevented, the Board did not considered he had any reasonable excuse because he had had more than sufficient time to put his house in order.

(c) In D33/07, rejecting the taxpayer's application, the Board expressed its view that the time limits that are imposed by the IRO must be observed

and from the authorities 'the mere fact that one is travelling or one's tax affairs are complex cannot be said to prevent a timely appeal'. The same was said as to the mere absence from Hong Kong which 'does not necessarily prevent a timely appeal within the statutory one-month period'. This last point in fact had been made in D19/01, an earlier decision of the Board.

(d) In D55/09, the Board held, among other things, that 'there is a difference between lodging an appeal and preparing for an appeal', and since the taxpayer was fully aware as to the various issues set out in the commissioner's determination, it did not accept the taxpayer's contention of the necessity to sort out certain issues and receive clarification from the IRD before filing the notice of appeal. It echoed an earlier decision of the Board, D14/06, in which the Board held that extra time required to gather information and taking advice to substantiate an appeal did not constitute a reasonable cause for lodging the appeal out of time. Similarly, the Board in a subsequent decision, D35/12, did not find much difference between the appellant's statement of grounds of appeal and the arguments raised during objection and so did not accept the appellant's reason that it took time for her to review the papers before she could prepare the notice.

12. The Appellant contended that the delay was caused by the absence of Ms B from Hong Kong from 17 to 25 October 2014 but failed to adduce any further evidence, in particular, oral evidence, to prove why Ms B's absence had prevented the Appellant from filing the notice of appeal within time. Indeed, we do not find that such absence from Hong Kong had prevented the Appellant from doing so. During the statutory one-month period for lodging the appeal, Ms B was away from Hong Kong for only 8 days. Ms B, in her response to a question from this Board, did said that there had been at least more than a week's time between she knew of the Determination and she left Hong Kong.

13. We appreciate the complexity added to the Appellant's dealing of its matters once receivers were appointed. However, from the correspondence between Ms B and Ms C, as well as between Mr A and the Clerk to this Board, we do not find the office of the several and joint receiver had unduly obstructed in any way the handling of the Appellant's tax matter by Ms B. Indeed, the email of 22 October 2014 from Ms C to Ms B already urged the latter to provide the submission as soon as possible. Ms B explained that she did not have internet access while she was out of Hong Kong. However, the Appellant failed to file the notice of appeal until 12 December 2014, after Ms B had returned back to Hong Kong on 25 October 2014. In our view, the Appellant had had ample opportunity to lodge the appeal within time or shortly after Ms B's return to Hong Kong. More than 1 month delay is unduly and unreasonably long.

14. The Appellant's another reason that it also took time for legal consultation on the subject matter does not help advance its case either. The authorities referred to above do

not support this. The letter of engagement dated 10 June 2014 from the firm of solicitors to the Appellant filed by the Appellant refers only to the court proceedings. The Appellant did not seek to adduce any further evidence with regard to seeking legal opinion of this tax matter. Furthermore, as suggested in D55/09, there is a difference between lodging an appeal and preparing for an appeal. The Appellant could and should have enquired the Clerk to the Board by telephone, facsimile or email and by then sent in its notice of appeal with all specified accompanying documents to reach this Board within the statutory time limit first before further substantiating its case.

15. The Respondent's representative pointed out that since there is not much difference between the Appellant's statement of grounds of appeal and the arguments raised in its objection to the Commissioner, it should not have taken so much time for the Appellant to lodge its appeal. Ms B and her colleagues attempted to argue that two (out of four) grounds of appeal were new. We accept the Respondent's submission.

16. The third ground of appeal indicates that some transaction records have been found to substantiate the second ground of appeal that the Appellant did stop business on 15 July 2009, three and a half months into the relevant year of assessment (see further below in relation to the substantive issue of this appeal). It is followed by the Appellant's offer to 'engage an independent accountant to reconstruct the data to form base for more realistic financial statement'. No action has been taken yet and as explained immediately below, a mere offer like this does not add much, if any, to the Appellant's case.

17. The fourth ground is premised on the absence in the law of any time limit for processing an objection, followed by a plea to withhold the objection with a pledge to provide the audited financial statement as soon as possible upon discovery of the necessary accounting documents. Section 64(2) of the IRO imposes a mandatory duty on the Commissioner to determine an objection (the power of which can be exercised by a Deputy Commissioner by virtue of section 3A(1) of the IRO) within a reasonable time. The financial document is exactly what has been asked and waited for since early 2011. The Appellant had never provided any of those and, when asked, was still not in a position to provide them and could not tell exactly whether and when they would be able to do so. It was just too late to ask anyone to withhold the objection since the Deputy Commissioner had determined. If the Appellant considered that the Deputy Commissioner had acted unreasonably in this regard and therefore was aggrieved, it had resorted to a wrong forum.

Conclusion

18. On the basis of the analysis above, we find no reasonable cause for exercising our discretion in favour of the Appellant to extend the time period. This could have put this case to its end. However, just in case we have erred in our decision above, the outcome of this appeal would have been the same as explained below.

The substantive issue

19. The Appellant stated four grounds in its statement of grounds of appeal, of which three have been mentioned above. Specifically, we do not see the fourth ground a ground of appeal per se. The second and third grounds are related, which will be dealt with in our analysis below. The first ground relates more to certain facts upon which the Determination was made, which in turn serves to support that the Appellant ceased its business on 15 July 2009. In essence, the Appellant argues that it only operated for three and a half months during the year of assessment 2009/10 and in such circumstances it is unlikely to have generated such level of turnover as in the previous year.

Facts

20. On the submissions from both sides and the documents before us, we find the following facts relevant to the substantive issue of this case:

(a) The Appellant was incorporated as a private company in Hong Kong in December 1981. On 1 November 1987, it registered a branch under the name of Company D ('the Branch'). The Branch's nature of business was money exchange. The Appellant closed its annual accounts on 31 March.

(b) According to the record of the Business Registration Office, the business address of the Appellant and the Branch was located at Address E ('Address E') since 9 March 1994. The Appellant's address was subsequently changed to Address F on 3 February 2010 and the Branch's address was changed to Address G ('Address G') on 7 October 2010.

(c) On 30 July 2010, Mr A and Mr H were appointed as Joint and Several Receivers over the Appellant by an order of the High Court.

(d) The Appellant failed to furnish its Profits Tax return for the year of assessment 2009/10 within the stipulated time. Pursuant to section 59(3) of the IRO, the Assessor raised on the Appellant the following Profits Tax assessment:

Estimated Assessable Profits	$800,000
Tax Payable thereon	$132,000

(e) Mr A, on behalf of the Appellant, objected to the assessment on the ground that the assessment was excessive.

(f) The Appellant submitted its Profits Tax return for the year of assessment 2009/10, declaring no gross income, no assessable profits or adjusted loss and that business had ceased on 15 July 2009.

(g) Despite repeated requests and reminders since January 2011 from the Assessor to the Appellant asking for, among other things, a certified copy of its balance sheet, profit and loss account, auditor's report and a tax computation in respect of the basis period for the year of assessment 2009/10, the Appellant had not been able to provide any of those.

(h) Up to the point of this hearing, the Appellant's accounting books and records of the relevant year of assessment were still incomplete.

(i) As shown from notices of Profits Tax Assessment for the two years of assessment immediately before that in dispute, the assessments were estimated assessments raised because the Appellant failed to file its tax return.

The statutory provisions

21. We agree with the Respondent that the following provisions of the IRO are relevant to the substantive issue of this appeal.

(a) Section 51 provides:

'*(1) An assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish any return which may be specified by the Board of Inland Revenue for –*

(a) Property tax, salaries tax or profits tax; or

(b) ….'

(b) Section 59 provides:

'….…

(3) Where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly ….'

(c) Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

22. In addition, section 15(1) of the Stamp Duty Ordinance ('SDO') provides that no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except criminal proceedings and civil proceedings by the Collector to recover stamp duty or any penalty payable under the SDO, or be available for any other purposes whatsoever, unless such instrument is duly stamped.

The Appellant's submission

23. The Appellant contended that due to disputes among the shareholders, it stopped its business in July 2009 and before that it operated on a very limited scale. In addition, because of the in-cooperative attitude of the other parties, it had experienced great difficulty in obtaining all relevant accounting records for completing the financial statements, despite its efforts in seeking legal remedies from the court, let alone to have them properly audited.

The Respondent's submission

24. It was the Respondent's submission that the Assessor at first instance acted properly within his legal power and so long as he did not act capriciously or dishonestly, the assessment could not be disturbed except upon the taxpayer discharging the onus of proof. On the other hand, the Respondent drew our attention to the Appellant's admission that it had operated, for the year of assessment 2009/10, from 1 April 2009 to 15 July 2009, contrary to what it declared in its return filed subsequent to the assessment. Furthermore, the Respondent argued that the Appellant fails to discharge its statutory burden of proof. In this regard, the Respondent referred us to Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166.

25. It was also the Respondent's contention that the disputes between shareholders and/or directors are internal matters of the Appellant and should not affect the Appellant's statutory obligation. On this point, the Respondent relied on the following decisions of this Board:

(a) D69/97, IRBRD, vol 12, 398;

(b) D10/98, IRBRD, vol 13, 108; and

(c) D112/99, IRBRD, vol 14, 642.

Our analysis

26. The Appellant failed to file its Profits Tax return for the year of assessment 2009/10 within time. According to Mok Tsze Fung, the law allows the assessor to 'estimate' or as the case may be to assess 'according to his judgment' without necessarily proving facts justifying his assessment in the precise amount thereof, or indeed, in any

particular amount. The assessor did so. As set out clearly by the Mok Tsze Fung case, the estimated assessment cannot be disturbed so long as the assessor did not act capriciously or dishonestly, except upon the Appellant discharging its onus of proof.

27. The Appellant made no claim that the assessor had acted capriciously or dishonestly. On the other hand, its contention that the level of assessable profits for the year of assessment 2009/10 could not be as much as that in previous years given that it operated for only three and a half months of that year simply cannot stand. First, up to the point of this hearing, the Appellant's accounting books and records of the relevant year of assessment were still incomplete. Despite the offer and pledge made in its statement of grounds of appeal, it was in no position to provide them and could not even indicate exactly whether and when they would be able to provide so. It has clearly failed to satisfy the statutory onus of proof. Moreover, the fact that estimated assessments were also made for the two years immediately before the year of assessment in dispute just put the Appellant's argument to its end. There is just no basis for the Appellant to compare and argue that the assessment was indeed excessive without being certain that how much the assessable profits were or should be in those years.

28. For the sake of completeness, we also accept the Respondent's submission, on the authorities submitted, that deadlock and disputes between the Appellant and other parties and difficulties in finalizing its accounts should not take precedence over its statutory obligations including in this context due and proper filing of its tax return and the burden to show that the assessment appealed against was excessive or incorrect.

Conclusion

29. On the basis of the above, we would dismiss this appeal in substance even if we extended the time for lodging the appeal.