Case No. BR 19/71

Board of Review:

S. V. Gittins, Q.C., *Chairman*, K. Y. Chau, G. E. Fowle, and G. S. Ford, *Members.*

13th April 1972.

Profits tax—jurisdiction of Board to hear appeal when grounds of appeal not furnished within time—Inland Revenue Ordinance, section 66(1).

The appellant gave a notice of appeal and furnished a copy of the Commissioner's written determination together with the reasons therefor and a statement of facts within the time allowed for appeal under section 66(1) of the Ordinance. No grounds for appeal were furnished within the stipulated time and the appellant sought leave of the Board to extend time and the preliminary issue before the Board was whether it had a discretion to do so.

Decision: The Board has no power to extend time for filing grounds of appeal.

The Appellant in person.

B. M. Kelly for the Commissioner of Inland Revenue.

Case referred to: — Reg. V. H.M. Inspector of Taxes, *ex parte* Clarke, The Times Newspaper of 29th October 1971.

Reasons:

We would say at the outset that if this Board had a discretion to extend time to the taxpayer for him to supply the missing item required by s. 66(1), we would do so in this case subject to any submission on behalf of the Commissioner to the contrary. It remains to be considered whether this Board has such a power in this case.

For the taxpayer it was argued :—

(*a*) That the Board is a judicial tribunal and therefore has an inherent jurisdiction to extend time.

The authorities cited all concern the jurisdiction of the Supreme Court in England, the Rules of which first appeared in the First Schedule to the Judicature Act 1875 and by Order 1 Rule 4(2) "the Court" means the High Court, c.f. Supreme Court Ordinance, Cap. 4 of the Laws of Hong Kong where s. 2 defines "court" as the Supreme Court.

Those Rules were constituted by statute and relate only to the High Court. Clearly, the judicial decisions on those Rules can only refer to the High Court.

The Board is therefore of the opinion that the authorities cited by the taxpayer are not applicable to the Board of Review, a body constituted by the Inland Revenue Ordinance, and which can only have such powers as are conferred on it by that Ordinance.

(*b*) That since s. 66(3) gives the Board a discretion to admit grounds of appeal after the expiration of the 1 month specified in s. 66(1), the Board must have power to extend time under subsection (1).

We do not think this is a valid point. An application under s. 66(3) would be made to a Board properly seised of an appeal, and the statute expressly gives the Board a discretion to admit a new ground of appeal, despite notice of it was not given within the time limit of 1 month. We consider that the Board must be entertaining an appeal before s. 66(3) can be availed of. The issue before us is whether this Board can or should entertain the taxpayer's appeal in the face of the express statutory direction that "no such notice shall be entertained . . ."

(*c*) That various sections in the Ordinance prescribing a time limit contains a provision for the Commissioner to extend such period, so that where there is no provision for extension, a power to do so should be implied.

This provision is contrary to the maxim "*expressio unius exclusio alterius*". We take the view that because the Ordinance makes specific provision for extension of time as in sections 64(1)(*a*), 64(1)(*b*), 51A(3) & 7B(1), there is no implied discretion to extend time when there is no express statutory provision to do so.

(*d*) That it would be contrary to natural justice if the taxpayer is barred from having his appeal heard.

We think the short answer to this point is that the Ordinance lays down a procedure to be followed where a taxpayer wishes to appeal and that the taxpayer cannot complain of being shut out where he fails to follow such procedure.

(*e*) That s. 66(1) is subordinate to s. 63.

The latter section provides that :—

> "No notice . . . or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed or deemed to be void . . . for want of form, or be affected by reason of an . . . omission therein . . ."

Section 63 comes within Part X of the Ordinance which deals with Assessments and we think that the section is only concerned with documents emanating from the Inland Revenue Department. We do not consider that it has any bearing on s. 66(1) or affects it.

Even if s. 63 is given the wide ambit suggested by the taxpayer, the absence of the grounds of appeal from his notice of appeal dated 3/11/71 would render the notice to be different "in substance and effect" and not "in conformity with or according to the intent and meaning of this ordinance".

(*f*) That where jurisdiction exists and there is no procedure the Board should mould the form of procedure.

We take the view that unfortunately for the taxpayer that there is an express procedure in this case and that procedure has not been complied with.

In addition to the oral arguments set out in the preceding paragraph, the taxpayer made a lengthy written submission supported by copies of letters and documents passing between him and the I.R.D. The points taken by him included the following : —

That the taxpayer had disagreed with the computations made by the Assessor for the years 1965/66, 1966/67, 1967/68, on the point of the quantum of loss to be carried forward and had maintained his objections throughout the correspondence; that the assessor failed to make an assessment of the assessable profits or losses for each of those years as required by s. 15A(1); that instead the C.I.R. issued a Notice of Assessment for 1968/69 on 11/1/71 which was an aggregated assessment for that year purporting to incorporate the losses carried forward from preceding years, that by non-compliance with statutory requirements the Notices of Assessment for 1968/69 and 1969/70 (issued on 23/9/70) and the C.I.R.'s Determination on the objections thereto were nullities. We are of the opinion that this argument can only be ruled upon by the Board of Review after a hearing on the merits but is not an element which the Board can properly take into consideration in coming to a decision as to whether it has jurisdiction to entertain the appeal.

That the I.R.D. by its non-compliance with s. 15A(1) is precluded from invoking s. 66(1) and say that the taxpayer is out of time with his notice of appeal. We are of the opinion that even if the I.R.D. is at fault (and we have not heard argument in defence of the allegations against the I.R.D.), this would not justify the taxpayer's default. If the taxpayer had not been out of time he could have taken all his points on the hearing of the appeal. Further, even if the C.I.R.'s representative had not taken the point of non-compliance with s. 66(1), it is a matter for the Board to take of its own volition.

That a person should not be prejudiced for non-compliance with a statutory provision where compliance is impossible in his circumstances, particularly where the offence was an omission to do his duty rather than the doing of a prohibited act (12th Maxwell on the Interpretation of Statutes 327). We do not have to decide whether this principle is

applicable to the time limit in s. 66(1) because we are satisfied that there is no question of impossibility in this case. The taxpayer admitted that he was misled into thinking that he could rely on s. 66(1A). It is unfortunate that the text of that subsection was cited in the covering letter forwarding the Determination and informing him of his right of appeal. Even if, as he maintains, he could not understand the fourth reason given by the C.I.R. for his Determination, he could have got his appeal launched on a general ground like "the Commissioner was wrong in law in coming to his Determination", and particularise it at a later stage if required to do so.

Although not raised by the taxpayer the Board has considered the point as to whether the requirements of s. 66(1) are directory or mandatory. S. 66(1) requires an intending appellant to give notice of appeal within one month after the transmission to him of the Commissioner's written determination. The section lays down the following requirements—

(*a*) the notice of appeal must be given in writing to the clerk to the Board; and be accompanied by;

(*b*) a copy of the Commissioner's written determination;

(*c*) a copy of the Commissioner's reasons for his determination;

(*d*) a copy of the statement of facts;

(*e*) a statement of the grounds of appeal.

The Court of Appeal, in **Reg. v. H.M. Inspector of Taxes,** *ex parte* **Clarke**[1], held that where s. 64(1) of the Income Tax Act 1952 required a party dissatisfied with the determination of the general commissioners to declare his dissatisfaction "immediately", a declaration given 13 days after the determination was not invalidated by delay, and that the statutory requirement for a notice to be given immediately was directory and not mandatory.

A point considered by the Court of Appeal was the fact that the delay did not affect in any way and could not conceivably prejudice the other party.

It would seem that in an appeal under s. 66(1) of the Hong Kong Ordinance, the omission by the taxpayer to forward copies of the Commissioner's written determination, the Commissioner's reasons and the statement of facts (which are usually comprised in one document), would not prejudice the other party being the Commissioner, who would have the omitted documents. We are not required to decide whether such omissions would constitute non-compliance with a mandatory or directory requirement, and we do not decide. But it appears clear that a notice of appeal without a statement of the grounds of appeal

[1] The Times Newspaper of 29th October 1971.

renders the notice of appeal nugatory, and we hold that the requirement for the latter is mandatory, so that a notice of appeal without the statement of the grounds is of no effect.

Therefore we find against the taxpayer on the preliminary point that by his non-compliance with the requirements of s. 66(1), this Board has no jurisdiction to entertain his appeal.