INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D106/00

Salaries tax – appeal – extension of time – merits – home loan interest deduction – sections 26E(9), 26E(3)(a), 64(4), 66 and 68(4) of the Inland Revenue Ordinance (' IRO') – sections 19 and 71(1)(b) of the Interpretation and General Clauses Ordinance, Chapter 1.

Panel: Kenneth Kwok Hing Wai SC (chairman), Andrew Mak Yip Shing and Thong Keng Yee.

Date of hearing: 28 October 2000.
Date of decision: 12 December 2000.

The taxpayer sought to appeal against the Commissioner of Inland Revenue' s determination on 31 March 2000 out of time. He filed the notice of appeal on 8 May 2000.

The taxpayer gave evidence that he received the determination sometime in April and that he had been out of Hong Kong. His absence from Hong Kong did not give him sufficient time to take care of his business and to lodge his appeal. The Commissioner opposed the application for an extension to appeal out of time.

On the ground of appeal, the taxpayer claimed that he should be granted the maximum amount of the home loan interest deduction of $100,000. The Commissioner took the view that as the taxpayer and his wife purchased their residence in late 1989 and borrowed the Second Bank Loan in June 1995, they could not have applied the Second Bank Loan, whether wholly or in part, for acquiring their residence; that no part of the Second Bank Loan was in fact applied for acquiring their residence and that the Second Bank Loan was not a ' home loan' within the meaning of section 26E(9).

Held:

1. The Board exercised its discretion to grant an extension of time to the taxpayer to lodge his appeal on the basis that:

   (a) It is clear from section 66(1)(a) that the time for transmission of the determination is excluded in computing the one month period because the one month period is ' after' the transmission;

(b) The determination was transmitted to the taxpayer by 7 April 2000 and that the taxpayer was out of time by one day, 7 May 2000 being a Sunday.

2. On the merits, the Board decided:

(a) If the re-mortgaged loan was used to repay the original loan which was executed for acquisition of his dwelling so as to enjoy a lower interest rate, the portion of loan interest paid, pro-rata to the outstanding balance of the original loan, is tax deductible.

(b) On the fact of this case, only $675,489.89 from the Second Bank Loan was applied in paying off the First Bank Loan. On this basis, as only part of the Second Bank Loan had been applied in paying off the outstanding principal under the First Bank Loan, apportionment under section 26E(3)(a) was necessary. The taxpayer advanced no argument on the reasonableness of the assessor' s computation.

(c) Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. The taxpayer has not discharged this onus.

Appeal dismissed and a cost of $1,000 charged.

Cases referred to:

D9/79, IRBRD, vol 1, 354
D11/89, IRBRD, vol 4, 230
D3/91, IRBRD, vol 5, 537
D32/99, IRBRD, vol 14, 345

Chow Cheong Po for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. By her determination dated 31 March 2000, the Commissioner of Inland Revenue reduced the salaries tax assessment for the year of assessment 1998/99 under charge number 9-0706857-99-6, dated 2 September 1999 showing net chargeable income of $1,069,527 with tax

payable thereon of $171,319 to net chargeable income of $1,064,189 with tax payable thereon of $170,412.

Whether period to give notice of appeal should be extended

2. The Taxpayer's notice of appeal dated 8 May 2000 was sent to the Clerk to the Board of Review by fax and by post and received on 9 May 2000 and 10 May 2000 respectively.

3. The Taxpayer requested an extension of the one month period to give notice of appeal. He said that he received the determination sometime in April; that it was sent by registered post; that he did not have a record of when he received it; that he had not kept the envelope; that he received it within a week; that he had been out of Hong Kong; that the immigration records produced by the Respondent were correct; and that because of his absence from Hong Kong he did not have sufficient time to take care of his business and to lodge his appeal.

4. Mr CHOW Cheong-po who represented the Respondent at the hearing of the appeal submitted that the appeal was out of time and opposed the extension of the period for the Taxpayer to give notice of appeal. Mr Chow asserted that the determination was sent to the Taxpayer's residential address on 31 March 2000 by registered post. When asked whether we had any evidence that it was actually sent on 31 March 2000, he said he had not got the record from the Post Office. He went on to assert that according to the immigration records, the Taxpayer was 'present' in Hong Kong 'on the following dates during the period from 31 March 2000 to 9 May 2000':

'Date		**No of days**
April 2000	2-5	4
	6-10	5
	12	1
	13-17	5
	20-22	3
	24-25	2
	30	1
		21
May 2000	1-4	4

5-6	2
7-9	3
	9 '

He submitted that:

> ' provided the appellant has received the determination, even though he is outside Hong Kong for a long period, then I think he is not prevented from giving a notice of appeal, even though I say he was only present in Hong Kong on the last date of the appeal period' .

He cited D9/79, IRBRD, vol 1, 354; D11/89, IRBRD, vol 4, 230; D3/91, IRBRD, vol 5, 537; and D32/99, IRBRD, vol 14, 354.

5. We deprecated Mr Chow's reliance on the Taxpayer's ' presence' in Hong Kong on 12 April 2000. We told the parties that we were reserving our decision on the Taxpayer's application to extend the period to give notice of appeal and heard the parties on the merits of the appeal.

Decision on application to extend time

6. We now give our decision on the Taxpayer's application to extend time.

7. Section 66 of the IRO, Chapter 112, provides that:

> *' (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) ...'

8. In laying down a one month period, it is clear that the object of section 66(1)(a) is that a person who is aggrieved by a determination should have one month to:

(a) consider whether he wishes to take the matter further;

(b) and if so minded, to seek, obtain and consider advice from his legal or tax advisers on the merits of an appeal; and

(c) draft the notice and grounds of appeal, whether personally or by his advisers, and to lodge them with the Clerk to the Board;

bearing in mind that such person has to work and has other matters in life other than a tax appeal to attend to.

9. The Board' s discretion under section 66(1A) to extend the one month appeal period was conferred by section 42 of the Inland Revenue (Amendment) Ordinance 1971. According to the Explanatory Memorandum of the Inland Revenue (Amendment) Bill 1971, the principal purpose of the Bill was to implement recommendations contained in Part II of the Report of the Inland Revenue Ordinance Review Committee, and the Bill contained a few other miscellaneous unrelated amendments the more important of which were referred to in the Memorandum. Paragraph 21 reads:

' Clause 42 gives the Board of Review discretion to extend the time for appealing against a determination of the Commissioner.'

10. Section 19 of the Interpretation and General Clauses Ordinance, Chapter 1, provides that:

' An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.'

11. To adopt the approach submitted by Mr Chow and quoted in paragraph 4 above would in our decision be unduly restrictive as it will nearly rob subsection (1A) of all effect. Further it will not attain the object of the IRO that a person who is aggrieved should have one month to lodge his appeal. It also ignores the fact that he has to work and has other matters in life other than a tax appeal to attend to. We do not think it is correct to construe subsection (1A) as being limited to cases such as coma or jail for the whole of the one month period.

12. In our decision, where by reason of a person' s absence from Hong Kong, he has materially less than the statutory one month period, then the Board has a discretion. How the Board will exercise that discretion depends on the circumstances of each case.

13. Needless to say, it is clearly in the interests of a person who intends to appeal to lodge his appeal within one calendar month of the date of the determination. If he does so, he does not run the risk that he may be out of time and he does not run the risk that the Board may have no discretion to extend time and he does not run the risk that the Board may not exercise the discretion in his favour.

14. It is clear from section 66(1)(a) that the time for transmission of the determination is excluded in computing the one month period because the one month period is ' after' the transmission.

15. It is common ground that the determination was transmitted by registered post. In this context, sections 8 and 71(1)(b) of the Interpretation and General Clauses Ordinance, Chapter 1, are relevant. We set out these two provisions:

> ' *8. Where any Ordinance authorizes or requires any documents to be served or any notice to be given by post or by registered post, whether the expression "serve" or "give" or "send" or any other expression is used, the service or notice shall be deemed to be effected by properly addressing, pre-paying the postage thereon and dispatching it by post or by registered post, as the case may be, to the last known postal address of the person to be served or given notice, and, unless the contrary is proved, such service or notice shall be deemed to have been effected at the time at which the document or notice would be delivered in the ordinary course of post.'*
>
> ' *71(1)(b) In computing time for the purposes of any Ordinance ... if the last day of the period is a public holiday or a gale warning day or black rainstorm warning day the period shall include the next following day, not being a public holiday or a gale warning day or black rainstorm warning day.'*

16. 31 March 2000 was a Friday. 4, 21, 22, 24 April 2000 and 1 May 2000 were public holidays.

17. There is no evidence on the point but we are prepared to assume that in the ordinary course of post, the determination would be delivered to the Taxpayer' s residential address on or after the second business day after the date of posting. It might have taken longer in this case because the Inland Revenue Department routinely posted a large number of returns in early April each year.

18. The notice of appeal was received by the Board on 9 May 2000 which was just a few days after one calendar month from the date of the determination, 31 March 2000. As Mr Chow was objecting to the application for time, he should have placed before us the records of the date of posting and the date of receipt of the registered postal packet.

19. Under section 64(4), the Commissioner had one month to transmit her determination. This is not a case where we are prepared to assume that the determination was actually posted on 31 March 2000. But for the fact that the Taxpayer accepted that he received the determination within a week, we would not have been in a position to decide that the Taxpayer was out of time and that an extension of time was required. We proceed on the basis that the determination was transmitted to the Taxpayer by 7 April 2000 and that the Taxpayer was out of time by one day, 7 May 2000 being a Sunday.

20. We deprecated Mr Chow' s reliance on the Taxpayer' s ' presence' in Hong Kong on 12 April 2000 because according to the immigration records which he produced, the Taxpayer was cleared by immigration for landing at Hong Kong International Airport on that day at 21:11 hours and was cleared for departure at Lo Wu terminal at 22:17 hours.

21. Of the 21 days' ' presence' in April 2000 relied on by Mr Chow, Mr Chow counted three days when the Taxpayer was cleared for departure at about nine o' clock in the morning and two days when the Taxpayer was cleared for landing after four o' clock in the afternoon. The Taxpayer was cleared for landing on 2 April 2000 at 16:23 hours, for departure on 10 April 2000 at 09:13 hours, for departure on 22 April 2000 at 08:48 hours, for departure on 25 April 2000 at 08:59 hours, and for landing on 30 April 2000 at 16:34 hours.

22. Including these five days and 12 April 2000 in his computation, Mr Chow felt able to tell us that the Taxpayer was ' present' in Hong Kong on 21 days in April. Mr Chow felt able to tell us that the Taxpayer was ' present' in Hong Kong on all nine days of the first nine days in May, despite the fact that the Taxpayer completed two trips out of Hong Kong during that period.

23. In our decision, the proper approach is to consider the periods of ' the Taxpayer' s absence from Hong Kong' . They are:

From (departure date and time)			To (arrival date and time)		
27-3	Monday	17:50	2-4	Sunday	16:23
5-4	Wednesday	17:19	6-4	Thursday	10:48
10-4	Monday	09:13	12-4	Wednesday	21:11
12-4	Wednesday	22:17	13-4	Thursday	15:54
17-4	Monday	18:06	20-4	Thursday	11:33
22-4	Saturday	08:48	24-4	Monday	15:18
25-4	Tuesday	08:59	30-4	Sunday	16:34
4-5	Thursday	17:41	5-5	Friday	11:14
6-5	Saturday	11:37	7-5	Sunday	16:25
9-5	Tuesday	17:01	No information		

24. It is clear from the above that his periods of absence must have materially and adversely affected his ability to lodge his appeal within the one month limit. The Taxpayer is out of time by only one day. We exercise our discretion in his favour and extend time for him to appeal.

25. Mr Chow has made no submission that the Taxpayer has to show merits in the appeal in order to persuade the Board to exercise the discretion in his favour and we do not take that question into our consideration.

26. We should add that there is a similar provision in the Stamp Duty Ordinance, Chapter 117, that is, section 14(5B), added by Clause 3(d) of the Stamp Duty (Amendment)(No 2) Bill 1998. Clause 17 of the Inland Revenue (Amendment) Bill 2000 proposes to confer on the Board a similar discretion in respect of appeals from additional or penalty tax assessments. According to the Explanatory Memorandum, that Clause:

> *' empowers the Board of Review to extend the time for lodging notices of appeal under section 82B(1) of the Ordinance'* .

Merits of the appeal

The agreed facts

27. The following facts are agreed and we find them as facts.

28. On 27 November 1989, the Taxpayer and his wife purchased their residence as joint tenants at a consideration of $2,760,000.

29. To finance the acquisition of their residence, they borrowed from the first bank a ten year home loan of $1,800,000 (' the First Bank Loan') which was repayable by 120 monthly instalments of $24,542.

30. On 22 January 1990, the purchase of the residence was completed. At the request of the first bank, they executed a mortgage on their residence in favour of the first bank as security for the First Bank Loan.

31. In June 1995, they repaid the First Bank Loan and the mortgage in favour of the first bank was discharged. They created on their residence a fresh mortgage in favour of the second bank as security for another loan of $2,000,000 (' the Second Bank Loan').

32. On 9 June 1995, the first bank was repaid $675,489.89, paying off the previous outstanding balance of $673,510.88 leaving a positive balance of $1,979.01, which was adjusted on 12 June 1995 to show a nil balance when the account was closed.

The Taxpayer' s contention on appeal

33. He claimed that he should be granted the maximum amount of the home loan interest deduction of $100,000. In this appeal, nothing turned on their joint ownership of their residence as the Taxpayer' s wife had nominated the Taxpayer to claim the deduction of her share of the home loan interest. By his notice of appeal, he invited the Board to grant home loan interest based on the amount of loan he obtained from the first bank or from the second bank.

Decision on the merits of the appeal

34. We start by turning to the meaning of a ' home loan' as defined in section 26E(9) of the IRO:

> ' *"home loan" ... in relation to a person claiming a deduction under this section for any year of assessment, means a loan of money which is ... applied wholly or partly for the acquisition of a dwelling ...'*

35. Section 26E(3)(a) provides that:

> ' *Where any home loan interest is paid by a person during any year of assessment for the purposes of a home loan obtained in respect of a dwelling which is used at any time in that year of assessment by that person exclusively or partly as his place of residence, but the loan was not applied wholly for the acquisition of the dwelling, the deduction allowable to the person under subsection (1) for that year of assessment in respect of the home loan interest*

paid shall be such part of the amount of the home loan interest paid as is reasonable in the circumstances of the case.'

36. The Commissioner took the view as the Taxpayer and his wife purchased their residence in late 1989 and borrowed the Second Bank Loan in June 1995, they could not have applied the Second Bank Loan, whether wholly or in part, for acquiring their residence; that no part of the Second Bank Loan was in fact applied for acquiring their residence; and that the Second Bank Loan was not a ' home loan' within the meaning of section 26E(9). She did not disturb the concession of the assessor granting a deduction for interest on that portion of the Second Bank Loan applied to repay the outstanding principal of $675,489 and issued her determination to give effect to the concession. The assessor' s computation was as follows:

Interest paid x Outstanding principal of the First Loan/the amount of the Second Bank Loan

= $163,847 x 675,489/2,000,000

= $55,338

37. We assume, without deciding, that applying or using a second loan to pay off the outstanding principal under the first loan which had been applied wholly in paying the vendor part of the purchase price is a ' home loan' within the meaning of section 26E(9).

38. On the facts of this case, only $675,489.89 from the Second Bank Loan was applied in paying off the First Bank Loan. Strictly speaking, it should have been $673,510.88, but the difference is probably too small to be material.

39. The balance of the Second Bank Load had been applied for other purposes, none of which could arguably be said to be for the ' acquisition' of their residence. We invited the Taxpayer to address us on the question of ' acquisition' but he advanced no argument on this point.

40. On this basis, as only part of the Second Bank Loan had been applied in paying off the outstanding principal under the First Bank Loan, apportionment under section 26E(3)(a) was necessary. The Taxpayer advanced no argument on the reasonableness of the assessor' s computation.

Disposition

41. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. The Taxpayer has not discharged this onus. We dismiss the appeal and confirm the assessment as reduced by the Commissioner.

Cost order

42. The Taxpayer had no answer to the ' acquisition' point. He brought this clearly unarguable appeal and abused the process of appeals to the Board. Pursuant to section 68(9) of the IRO, we order the Taxpayer to pay the sum of $1,000 as costs of the Board, which $1,000 shall be added to the tax charged and recovered therewith.

Postscript

43. Mr Chow argued against our assumption in paragraph 37 above. If he is correct then question and answer 11(ii) of ' A guide to deduction of home loan interest and elderly residential care expenses' issued by the Commissioner in October 1998 for ' general information' should be rewritten. The answer reads as follows:

> ' ... if the re-mortgaged loan was used to repay the original loan which was executed for acquisition of his dwelling so as to enjoy a lower interest rate, the portion of loan interest paid, pro-rata to the outstanding balance of the original loan is tax deductible' .