

Case No. D11/11

Costs – lack of merits in appeal and lack of cooperation – neither Taxpayer nor its representative attended the hearing – sections 68(2B)(b), 68(2D), 68(8)(a) and (9) of the Inland Revenue Ordinance – power to hear appeal in the absence of the appellant – jurisdiction to award cost.

Panel: Colin Cohen (chairman), Simon Leung Wing Yin and Mark Richard Charlton Sutherland.

Date of hearing: 17 May 2011.

Date of decision: 15 July 2011.

The hearing of the appeal by the Taxpayer in respect of a Determination was fixed for 17 May 2011. On 16 May 2011, a representative of the Taxpayer telephoned the Clerk to the Board of Review indicating that they had no further instructions and neither from the Taxpayer nor its representative would be attending the hearing. The hearing commenced at 9:35 a.m. on 17 May 2011 and neither the Taxpayer nor its representative attended.

There was no evidence that the Taxpayer's failure to attend was due to sickness or other reasonable cause to empower the Board to postpone or adjourn the hearing to a future date in its discretion. The Board noted that neither the Taxpayer nor its representative had made any attempt to respond to the Inland Revenue Department in respect of the two letters dated 30 August 2007 and 11 September 2008.

The Board was minded to consider awarding costs of the appeal against the Taxpayer in the sum of HK\$5,000 given the lack of merits in the appeal and having regard to the way in which the Taxpayer had conducted themselves seemingly indicating a lack of cooperation.

Held:

Under section 68(2B)(b) and section 68(2D) of the Ordinance, the power to hear an appeal in the absence of the appellant may only be exercised on the application of the appellant and where he will not be in Hong Kong on the day of the hearing of the appeal. Further, the jurisdiction to award costs may only be exercised after the hearing of an appeal under section 68(8)(a) and (9) of the Ordinance. There was no power for this Board to hear this appeal in the absence of the Taxpayer or to make a costs order against him. The Board therefore dismiss the appeal pursuant to section

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68(2B)(c) of the Inland Revenue Ordinance and make no order as to costs.
(D26/09, (2009-10) IRBRD, vol 24, 546 followed)

Appeal dismissed.

Case referred to:

D26/09, (2009-10) IRBRD, vol 24, 546

Taxpayer in person.

Wong Ka Yee and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Company A ('the Taxpayer') in respect of a Determination dated 23 November 2010 by the Deputy of Commissioner of Inland Revenue ('the Determination').
2. The hearing of this appeal was fixed for 17 May 2011. On 16 May 2011, a representative of the Taxpayer telephoned the Clerk to the Board of Review indicating that they had no further instructions and neither anyone from the Taxpayer nor its representative would be attending the hearing.
3. The hearing commenced at 9:35 a.m. on 17 May 2011 and neither the Taxpayer nor its representative attended.
4. Furthermore, there was no evidence before the Board to enable the Board to be satisfied under section 68(2B)(a) of the Inland Revenue Ordinance that the Taxpayer's failure to attend was due to sickness or other reasonable cause to empower the Board to postpone or adjourn the hearing to a future date in its discretion.
5. The Board noted that neither the Taxpayer nor its representative had made any attempt to respond (and, indeed, had not responded) to the Inland Revenue Department in respect of two letters dated 30 August 2007 and 11 September 2008.
6. The Board was minded to consider awarding costs of the appeal against the Taxpayer in the sum of HK\$5,000 given the lack of merits in the appeal and having regard to the way in which the Taxpayer had conducted themselves seemingly indicating a lack of co-operation as evidenced by paragraph 5 above.

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7. However, our attention has been drawn to the Board of Review decision D26/09, (2009-10) IRBRD, vol 24, 546, where the following was said:

- ‘4. *On closer scrutiny of the provisions of section 68(2B)(b) and section 68(2D) of the Ordinance, it appears that the power to hear an appeal in the absence of the appellant may only be[sic] exercised on the application of the appellant and where he will not be in Hong Kong on the day of the hearing of the appeal. Further, the jurisdiction to award costs may only be exercised after the hearing of an appeal – see section 68(8)(a) and (9) of the Ordinance.*
5. *There was no power for this Board to hear this appeal in the absence of the Taxpayer or to make a costs order against him. Accordingly, the only decision of this Board which is of legal effect is the dismissal of this appeal under section 68(2B)(c).’*

8. We agree that there is no power for this Board to hear the appeal under section 68(2B)(b) and section 68(2D) or make a costs order. We see no reason to depart from the *dicta* in D26/09.

9. We therefore dismiss the appeal pursuant to section 68(2B)(c) of the Inland Revenue Ordinance and make no order as to costs.