

Case No. D12/13

Salaries tax – power to extend time to cure invalidity of notice of appeal – sections 66 and 68(2D) of the Inland Revenue Ordinance.

Panel: Huen Wong (chairman), Fong Sui Yi Andrea and Elaine Liu Yuk Ling.

Date of hearing: 14 November 2012.

Date of decision: 9 July 2013.

The Appellant sent a letter with the heading ‘Subject: Notice of Appeal – Salaries Tax – ...’ to the Board within one month of the receipt by him of the Determination. There was no statement of grounds of appeal or a copy of the Determination filed together with the said letter. By a subsequent letter more than a month of the receipt by him of the Determination, the Appellant informed the Board that the postal delay, the significant amount of work related with the appeal and the medical condition he was in, had ‘impaired his ability to come back with the appeal’. By two further subsequent letters, the Appellant provided to the Board his grounds of appeal and a copy of the determination respectively. The Board had to decide whether or not the notice of appeal was invalid and, if so, did the Board have the power to cure the invalidity.

Held:

Whilst members of the Board find that there are merits in both lines of arguments relating to the Board’s power or the lack of it in extending time for a taxpayer to ‘validate’ a notice of appeal, the Board does not consider it necessary to proffer its views in this regard in the instant appeal because the Appellant had provided no reasonable excuse for not lodging a proper and valid notice of appeal within the one-month statutory limit.

Appeal dismissed.

Cases referred to:

- D2/07, (2007-08) IRBRD, vol 22, 219
- D18/92, IRBRD, vol 7, 144
- D19/71, IRBRD, vol 1, 58
- Chow Kwong Fai v CIR [2005] 4 HKLRD 687
- D16/07, (2007-08) IRBRD, vol 22, 454

Taxpayer in absentia.

Paul Leung Counsel instructed by Leslie Shay, Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by the Taxpayer, Mr A ('the Taxpayer') against the Determination of the Deputy Commissioner of Inland Revenue dated 18 May 2012 ('the Determination') under section 66 of the Inland Revenue Ordinance, Chapter 112. ('the Ordinance')

2. The tax assessments in question were the Taxpayer's salaries tax assessments for 2003/04, 2005/06 and 2006/07, and his additional salaries tax assessments for 2004/05 and 2005/06.

3. At the material time, the Taxpayer was a director of Company B, a City C company and indirect subsidiary of Company D, a Country E company. He was also a director of Company D.

4. The Taxpayer claimed that a portion of his director's fee, the whole of his bonus income and the gain realised by the exercise of his right under a share option scheme granted in 2004 should not be chargeable to salaries tax.

5. Other than making some adjustments to the assessments in question, the Deputy CIR disagreed with the Taxpayer's contentions.

Was the notice of appeal out of time?

6. As a preliminary issue, the Respondent submitted that the notice of appeal filed by the Taxpayer was out of time. The Board therefore proceeded to hearing submissions in this regard.

7. At the material time, the Taxpayer's contact address was in City F. The records show that he is still living in City F at present. According to his letter dated 28 May 2012 to the Respondent and copied the Board, the Taxpayer received the Determination in City F on 23 May 2012. The Taxpayer claimed that he 'had to earn a decent living'; hence, he sought more time to look into the Determination before he would give a full response to the Respondent's 'tilted claims' by the end of July 2012.

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8. On 7 June 2012, the Clerk to the Board wrote to the Taxpayer reminding him of his right to lodge an appeal within one month after the transmission of the Determination by giving notice of appeal in writing. The content of that letter was substantially the same as that of the Respondent's standard recitation of the appeal procedure pursuant to section 66 of the Ordinance attached to the Determination. It also echoed the Respondent's letter to the Taxpayer dated 14 June 2012 reminding him of the one-month period for appeal.

9. On 17 June 2012, the Taxpayer sent a reply to the Board's letter mentioned above. The heading of the letter read: 'Subject: Notice of Appeal – Salaries Tax - ...' The Taxpayer reiterated his stance that he needed to make a living while trying to deal with the Determination which contained all the 'legalistic jargons'. He also complained about the time it had taken the Determination to reach him in City F.

10. There was no mention in either of the two Taxpayer's letters about any medical condition inhibiting his ability to make a timely appeal.

11. On 28 June 2012, the Clerk to the Board wrote to the Taxpayer in reply to the latter's 17 June 2012 letter reminding him to comply with section 66(1) that is filing a written notice of appeal together with a copy of the Commissioner's Determination and a statement of grounds of appeal within one month from the date of the Determination should he intend to lodge an appeal with the Board.

12. By a reply letter dated 28 June 2012, the Taxpayer expressed his 'excruciatingly aggrieved feeling' of having no room for him to appeal. He remarked that the fact that he had received a letter each from the Clerk to the Board and the Respondent as mentioned in paragraph 8 above demonstrated that 'the ball is being kicked around'. Again, no mention was made about any medical condition preventing him from lodging an appeal.

13. Meanwhile, by 23 June 2012, the Determination had already reached the Taxpayer in City F for one month.

14. By a letter dated 6 July 2012, the Taxpayer informed the Board that he was in the process of sorting out the appeal. According to him, the postal delay, the significant amount of work related with the appeal and the medical condition he was in, had 'impaired his ability to come back with the appeal'.

15. Regarding his 'medical condition', the Taxpayer had submitted to the Board what appeared to be copy extracts of insurance claim forms and some outpatient medical consultation receipts dated 28 May 2012, 6 June 2012 and 13 June 2012. There was otherwise no sick leave certificate produced. The claim forms mentioned that the Taxpayer was suffering from 'neck disease' and 'discomfort in the neck and back'.

16. By a letter of 16 July 2012, the Taxpayer provided his grounds of appeal without a copy of the Determination. He gave two explanations for the late submission of his grounds of appeal, namely: (i) the late receipt of the Determination and (ii) his stiff neck

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(cervical spondylosis), which he had to attend to over the previous three months. The grounds of appeal also set out the history of the formation of Company B and Company D and the roles played by the Taxpayer in these two companies.

17. On 24 July 2012, the Clerk to the Board wrote to the Taxpayer pointing out that no copy of the Determination was included in the grounds of appeal. By a letter dated 28 July 2012 and received by the Board on 6 August 2012, the Taxpayer sent a copy of the Determination explaining that he had not done so as he was being environmentally friendly trying to save some trees for the future generation. He sent the copy because the Clerk to the Board was adamant about having it.

18. On 23 August 2012, the Taxpayer wrote to the Board to explain the reasons for his late appeal. He repeated the reasons he had given before. He confirmed that he would return to Hong Kong to attend the appeal hearing. A hearing date was subsequently fixed at 14 November 2012.

19. Pausing here, the Respondent submitted that if the Board accepted that the letter dated 17 June 2012 was a notice of appeal, it would have been given in time. However, such a notice would be invalid. This point would be addressed in full below.

20. On 10 October 2012, the Taxpayer sent a letter to the Board stating that he would not be able to attend the appeal hearing on 14 November 2012. He had a prior engagement in City G. The most likely date he could attend a hearing was sometime in December 2012. On 20 October 2012, the Taxpayer sent another letter saying that he would have his appeal to be heard in his absence pursuant to section 68(2D). The reasons being that the Taxpayer was based in City F, his schedule for the next few months was extremely tight and it would save the time of members of this Board.

21. Section 68(2D) provides that the Board may, if satisfied that an Appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter (as the Board considers reasonable) on the application of the Appellant made by notice in writing addressed to the Clerk to the Board (and received at least 7 days prior to the hearing date), proceed to hear the appeal in the absence of the Appellant or his authorized representative.

22. On 30 October 2012 upon receipt of the substantial number of documents filed by the Respondent, the Board asked the Taxpayer to fix another hearing date so that he or his authorized representative might attend the hearing which would involve complicated laws and facts. On the same day, the Taxpayer replied saying that 'he was totally at a loss.' He said he had been told that his appeal could be heard in his absence and he had by a letter dated 20 October 2012 asked that the hearing would be heard under section 68(2D). The Board took note of the request and proceeded with the appeal hearing on this basis.

Was the notice of appeal invalid? If so, does this Board have the power to cure the invalidity?

23. The Respondent submitted that quite apart from deciding whether the notice of appeal was out of time, the Board should decide whether or not it had the power to cure any invalidity of the notice.

24. The Respondent argued that the Taxpayer's notice of appeal was invalidly given for the following reasons:

- (1) It was not accompanied by the requisite documents that is a copy of the Determination and a statement of facts and a statement of the Taxpayer's grounds of appeal as specified in section 66(1); and
- (2) Neither were these documents included in the Taxpayer's subsequent letters to the Board dated 28 June 2012 and 6 July 2012 even though they were all headed 'Notice of Appeal'.

25. The Respondent further pointed out that even when the statement of grounds of appeal was provided by the Taxpayer on 16 July 2012, it was still not accompanied by a copy of the Determination.

26. The Respondent submitted that the Board's power to extend time pursuant to section 66(1A), the provision of which is stated below, is confined to cases where there is no notice of appeal given within the prescribed one month period. There are authorities for the proposition that the power is not applicable to cases where there is a notice of appeal given within time but the notice is invalid by reason of the absence of the requisite documents.

27. Section 66(1) states that 'any person...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.'

28. The Respondent argued that the mandatory terms of section 66(1) were such that a notice of appeal should not be entertained if it was not at the time it was given accompanied by the requisite documents. In the Board's previous decision in D2/07, (2007-08) IRBRD, vol 22, 219, it was held that since the supply of a copy of the Determination was 'essential to enable an appeal to be properly processed'; without such a copy any notice of appeal given was invalid. The Board gave a detailed analysis of the legal effects of section 66(1) and section 66(1A) together with a number of previous decisions and concluded that the Board had no power to cure the invalidity.

29. The Respondent also referred the Board's previous decision in D18/92, IRBRD, vol 7, 144, where it was held that it had no power to grant an extension of time to file the statement of grounds of appeal, even though the notice of intention to appeal was lodged within time. Similarly in D19/71, IRBRD, vol 1, 58, the Board held that it did not have any power to extend the time limit for filing the grounds of appeal.

30. In the circumstances, the Respondent's contention was that the Taxpayer failed to supply the requisite documents when he sent the letter on 17 June 2012. If that letter constituted a notice of appeal, the notice would be invalid. As such, this Board had no power to cure the invalidity in question nor to entertain the Taxpayer's appeal.

What if there had been no notice of appeal?

31. The Respondent put forward an alternative submission. That is to say if the Board harbours a sufficient doubt that the 17 June 2012 letter was intended to be a notice of appeal of the Taxpayer, then it needs to examine section 66(1A) in greater detail and apply the ratio in Chow Kwong Fai v CIR [2005] 4 HKLRD 687 ('the Chow Kwong Fai case') to the Taxpayer's case, as supported by the evidence the Taxpayer had adduced in support of his application to appeal out of time.

32. Section 66(1A) provides:

*'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)'*

33. The word 'prevented' bears the meaning of 'unable to'. It imposes a higher threshold than a mere excuse. The Respondent referred the Board to the relevant test stated in the Chow Kwong Fai case.

34. The Respondent pointed out that in this appeal, the statutory one-month appeal period started to run on 24 May 2012 and expired on 25 June 2012. It was only on 6 August 2012 that the Board received a full set of the requisite appeal documents pursuant to section 66(1)(a), that is 42 days after the statutory time limit.

35. The Respondent further submitted that with the evidence before the Board, there was nothing to suggest that the Taxpayer had been ‘prevented’, as defined in the decided case, from giving notice of appeal. All the reasons the Taxpayer had given, namely, (i) postal delay, (ii) needs to make a living and (iii) stiff neck could not be construed as making the Taxpayer **unable** to lodge his appeal on time. Even on his own admission in the letter of 6 July 2012, the alleged postal delay, the amount of work in preparation for lodging the appeal and his medical condition merely ‘impaired’ the Taxpayer’s ability to get on with the appeal. The Respondent argued that ‘impair’ was not synonymous with ‘prevent’.

36. In view of the above, the Respondent submitted that this appeal ought to be dismissed by reason that the Board either had no power to extend time in the circumstances or even if it had, it should not do so because section 66(1A) had not been satisfied.

37. Counsel for the Respondent very professionally and helpfully drew the Board’s attention to D16/07, (2007-08) IRBRD, vol 22, 454, a case decided shortly after D2/07 cited above. In D16/07, a differently constituted Board did not follow D2/07. Instead it ruled that the Board **did** have jurisdiction to extend time for compliance with the requirements of giving notice of appeal in accordance with section 66(1)(a). Whether or not the Board would extend time in the circumstances of a particular case would be a matter of applying the Chow Kwong Fai test.

38. However, the Respondent contended that whether or not this Board adopted the reasoning in D16/07 or in D2/07, the Taxpayer in the present situation could not surmount the hurdle in the Chow Kwong Fai test. The end result would be the same.

39. In the circumstances, it was the Respondent’s submission that the Board need not go further and deal with the substantive issues raised in the statement of grounds of appeal.

Onus of proof

40. The Board was reminded that the onus of proving that the tax assessments in question was excessive or incorrect fell squarely on the Appellant in accordance with section 68(4) of the Ordinance.

41. The Respondent pointed out that in this appeal, the Taxpayer had adduced very little evidence despite having been given ample time to prepare. In fact, he chose to allow the hearing to proceed in **absentia**.

42. The Taxpayer included a number of documents as appendices to his statement of grounds of appeal, which the Respondent argued that none of them was particularly helpful to this appeal.

Conclusion

43. The Board was grateful to Counsel for the Respondent for his assistance in citing a host of relevant authorities for its consideration. Whilst members of the Board find that there are merits in both lines of arguments relating to the Board's power or the lack of it in extending time for an Appellant to 'validate' a notice of appeal, the Board does not consider it necessary to proffer its views in this regard in the instant appeal for reasons given below. Suffice to say that in view of the many decisions in which the legal meaning to section 66(1) has been discussed, it is hoped that a higher court will make an appropriate ruling in future.

44. In this appeal, the Board accepts the Respondent's submission that the Taxpayer had provided no reasonable excuse for not lodging a proper and valid notice of appeal within the one-month statutory limit. The Board further finds that none of the reasons given by the Taxpayer including postal delay, needs to make a living and the stiff neck and back sufficiently prevented the Taxpayer from giving a valid notice that is one accompanied by all the requisite documents in time. Applying the test stated in the Chow Kwong Fai case, the Board holds that even if it had power to extend time for the filing of the grounds of appeal and a copy of the Determination, it would not do so. The appeal must therefore be dismissed and the Determination is confirmed.

45. It is very obvious that the Respondent has put in a lot of effort in preparing for the hearing including compiling the trial bundles and a list of authorities. At the hearing, Counsel for the Respondent very helpfully assisted the Board by making a submission on the tax liability of the directors of a company, both executive and non-executive. Counsel also addressed the Board on the legal issues relating to the locality of a company. Important as they may be, in view of the Board's finding in the preliminary issue and in the absence of the Taxpayer at the hearing to testify to the factual matrix in this case, the Board has refrained from making any finding on the substantial issues. Any such exercise would be at best for academic purposes only.