

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D124/97

Profits tax – appeal against the Commissioner’s determination – late – sections 51(8), 66(1) and (1A) of the Inland Revenue Ordinance.

Panel: Andrew Halkyard (chairman), John Peter Victor Challen and Lester Kwok Chi Hang.

Date of hearing: 4 March 1998.

Date of decision: 20 March 1998.

On 24 March 1997, the Commissioner rejected the taxpayers’ objection to the profit tax assessment. Thereafter, the determination was addressed to the taxpayers at District A (Flat B). A copy of the determination was also sent to the taxpayers’ authorised tax representatives.

On 11 May 1997 the representatives, referred to the determination, sent an ‘objection’ to the Commissioner. On 17 June 1997 and 18 June 1997 the representatives sent both an ‘objection’ to the assessor and a notice of appeal against the Commissioner’s determination to the Clerk to the Board of Review. The said letters of ‘objection’ and notice of appeal were both signed by the taxpayers. There is no dispute that the notice of appeal was lodged nearly two months out of time.

The representatives, Ms D argued that Mr C, one of the taxpayers was ‘prevented’ from lodging an appeal within time because he moved his residence and he did not receive the Commissioner’s determination until he was contacted by Ms D.

Held:

In terms of section 66(1A) there was simply no reasonable excuse preventing the taxpayers from lodging a valid appeal within the time limit of one month specified in section 66(1) for the following reasons:

- (1) Mr C, being liable to profits tax as a result of his other business activities, was under an obligation to notify the Commissioner of his change of address within one month under section 51(8). This he did not do.
- (2) The Commissioner’s determination was sent to and received by the taxpayers’ authorised representatives in the ordinary course of mail. Therefore, in all the circumstances, any non-receipt by the taxpayers

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personally of the Commissioner's determination does not of itself provide any reasonable excuse within the terms of section 66(1A).

- (3) In any event, the taxpayers became aware of the determination in late-April 1997 and did not lodge an appeal to the Clerk to the Board of Review until 18 June 1997, which was nearly two months out of time.

Late appeal refused.

Chan Wai Mi for the Commissioner of Inland Revenue.
Messrs S F Mak & Co for the taxpayer.

Decision:

The facts relevant to this application for admitting a late appeal are as follows.

1. The determination of the Commissioner rejecting the Taxpayers' objection to the profits tax assessment for the year of assessment 1991/92 was dated 24 March 1997. It was addressed to the Taxpayers at District A (Flat B). A copy of the determination was sent to the Taxpayers' authorised tax representatives, Messrs S F Mak & Co ('the Representatives'). The following sequence of events then took place.
2. On 11 May 1997 the Representatives, referring to the determination, sent an 'objection' to the Commissioner. This letter was signed by the Taxpayers.
3. On 17 June 1997 the Representatives, referring to another document sent by the Inland Revenue Department (IR 678 dated 14 May 1997), sent an 'objection' to the assessor (appeals) against the Commissioner's determination. This letter was signed by the Taxpayers.
4. On 18 June 1997 the Representatives lodged a notice of appeal against the Commissioner's determination to the Clerk to the Board of Review. This notice was also signed by the Taxpayers.

Proceedings before the Board

At the Board hearing one of the Taxpayers, Mr C, was present together with Ms D, an employee of the Representatives. At the request of the Chairman, Ms D and Mr C provided certain information relating to the late appeal. On the basis of their statements to us, we find the following additional facts.

5. Mr C moved from Flat B (fact 1 refers) in October 1996. He claims that he did not personally receive the Commissioner's determination.

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6. The Commissioner's determination was, however, received by the Representatives in the ordinary course of mail.

7. From 26 March to 17 April 1997, Ms D was on vacation. She returned to work on 17 April 1997. Ms D handled Mr C's taxation affairs. She had done so for several years. Ms D was assisted by another employee of the Representatives, Ms E. Although Ms E was on duty while Ms D was on vacation, she had no authority to open Ms D's mail. In the result, all Ms D's mail sent to the Representatives' office remained unopened, in a pile, until her return from vacation. Ms D did not explain whether the Commissioner's determination, which was copied and sent to the Representatives and not directed to her personally, was opened before her return from vacation.

8. When Ms D returned from vacation, she became aware of the Commissioner's determination and tried to get in touch with Mr C. She eventually got in touch with him sometime in late-April 1997. What efforts she made in this regard, apart from obtaining his pager number (through which she made contact with him) was not made clear to us. Ms D did, however, tell us that Mr C had not told her of his change of residence (fact 1 refers). But she did have details of Mr C's other business interests in Hong Kong.

9. Ms D admitted that she had no prior experience in handling taxation appeals and thus, some time after receiving the determination, mistakenly sent her further 'objection' to the Inland Revenue Department (facts 2 and 3 refer). It was only after she contacted the assessor (appeals) that she realized that the Taxpayers' appeal should be lodged to the Clerk to the Board of Review (fact 4 refers).

10. Mr C did not inform the Inland Revenue Department that he had moved his residence from Flat B in October 1996.

Ms D's argument as to admitting the late appeal

After being directed by the Board to section 66(1) and (1A) of the Inland Revenue Ordinance. Ms D argued that Mr C was 'prevented' from lodging an appeal within time because he moved his residence and thus did not receive the Commissioner's determination until he was contacted by Ms D (fact 8 refers).

Reasons for our Decision

At the end of the Board hearing, we informed the parties that we would not admit the late appeal and that we would give our reasons in writing. This we now do.

Section 66(1) and (1A), in relevant part, state:

- (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-*

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- (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). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.'*

There is no dispute that the notice of appeal was lodged nearly two months out of time. We note that Mr C, being liable to profits tax as a result of his other business activities, was under an obligation to notify the Commissioner of his change of address within one month under section 51(8). He did not do so. In any event, the Commissioner's determination was sent to and received by the Taxpayers' authorised taxation representatives in the ordinary course of mail. Therefore, in all the circumstances before us, any non-receipt by the Taxpayers personally of the Commissioner's determination does not of itself provide any reasonable excuse within the terms of section 66(1A).

Furthermore, and also in any event, the subsequent difficulties faced by the Representatives, and Ms D in particular, in (1) becoming aware of the determination in a timely fashion, (2) contacting Mr C, and (3) in understanding the legal requirements necessary to support a valid appeal can hardly be said to 'prevent' an appeal being lodged within the normal one month period. In this regard, and even accepting everything said to us, the facts would remain that the Taxpayers became aware of the determination in late-April 1997 and did not lodge an appeal to the Clerk to the Board of Review until 18 June 1997, which was nearly two months out of time.

In the event, we refuse to admit this late appeal. Indeed, on the facts before us we have neither choice nor discretion: in terms of section 66(1A) there was simply no reasonable excuse preventing the Taxpayers from lodging a valid appeal within the time limit of one month specified in section 66(1).

We could say much more regarding the conduct of Mr C and the Representatives during the course of this appeals process. But we resist the temptation. We can only hope that both the Taxpayers and the Representatives will reflect clearly upon the

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highly unsatisfactory state of affairs shown by the facts before us. Suffice to say that the Taxpayers must clearly pay more attention to various compliance obligations placed upon them by the Inland Revenue Ordinance. In so far as the Representatives are concerned, they should need no reminding of lessons to be learned from this appeal.