

**Case No. D13/11**

**Salaries tax** – notice of appeal – whether there was a valid notice of appeal – whether the appellant should be allowed to file notice of appeal out of time – whether the appellant was prevented by reasonable cause from lodging a timely appeal – sections 58(3) and 66 of the Inland Revenue Ordinance (Chapter 112) ('IRO').

Panel: Colin Cohen (chairman), Wilson K S Chan and Kelly Wong Yuen Hang.

Date of hearing: 17 June 2011.

Date of decision: 19 July 2011.

By a letter dated 21 February 2011, the appellant purported to appeal against the Deputy Commissioner's determination on his salaries tax assessment on 3 January 2011. The appellant further wrote on 26 March 2011 setting out some reasons for his appeal. According to evidence: (i) the appellant received the determination on about 26 January 2011; (ii) the appellant expressly stated in his letter of 21 February 2011 that it was 'not yet a notice of appeal for ... [the appellant] will apply under Section 66(1A) in future for the extension of time as appropriate after the Commissioner amend his statement of facts, the objections in issue and provide necessary clarifications'; (iii) the appellant's letter of 26 March 2011 was only received on 28 March 2011; (iv) the reason for the appellant not filing a timely notice of appeal was because he had not received a document being an agreement to claim allowance/deduction for the year of assessment 2005/06 which was to be signed by both parties. The appellant was however fully aware that he was permitted to rely on grounds of appeal other than those contained in the notice of appeal at the hearing if the Board so consented to under section 66(3). There was no allegation from the appellant that he was sick or absent from Hong Kong.

In the premises, the issues before the Board are: (a) whether the appellant has given a valid notice of appeal; (b) if the notice of appeal was filed out of time, whether an extension of time for appeal should be allowed.

**Held:**

1. The appellant's letter of 21 February 2011 could not be considered as a notice of appeal. Indeed, it was unequivocal that the appellant did not wish to appeal and he would, at the appropriate time, consider applying for an extension of time to appeal under section 66(1A) after he obtained clarification of what he felt necessary to deal with the issues in dispute.

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2. The appellant's letter of 26 March 2011 constituted a valid notice of appeal since it identified certain grounds which the appellant would wish to raise. However, since the said letter was only received on 28 March 2011 (that is 28 days after the statutory time limit), the notice of appeal was clearly out of time under section 66(1A) of IRO.
3. The provision of section 66(1A) was clear and restrictive. In order for the appellant to obtain leave for an extension of time to file the notice of appeal, it was not sufficient for the appellant merely to show that his failure to appeal in time was due to illness, absence from Hong Kong or other reasonable cause, but that he was prevented by these factors from lodging an appeal within the time prescribed. (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687; D3/91, IRBRD, vol 5, 537; D11/89, IRBRD, vol 4, 230; D14/06, (2006-07) IRBRD, vol 21, 371; D55/09, (2009-10) IRBRD, vol 24, 993 considered)
4. The appellant could very well lodge a notice of appeal within the one-month period. There was no evidence of any reasonable cause that prevented the appellant from lodging his appeal within time. The appellant took a calculated decision that he was not in a position to proceed with an appeal until he had received the document from the Commissioner. Indeed, his assertion that he required clarification in respect of a document was without foundation, lacked sense and never prevented him from filing an appeal within the stipulated time period.

**Application refused.**

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687  
D3/91, IRBRD, vol 5, 537  
D11/89, IRBRD, vol 4, 230  
D14/06, (2006-07) IRBRD, vol 21, 371  
D55/09, (2009-10) IRBRD, vol 24, 993

Taxpayer in person.

To Yee Man and Chan Wai Yee for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

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1. By a Determination dated 3 January 2011 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') confirmed the following salaries tax assessments:

- (a) Salaries tax assessment for the year of assessment 2007/08 under charge number X-XXXXXXXX-XX-X, dated 12 December 2008, showing net chargeable income of \$512,418 with tax payable thereon of \$51,611 (after tax reduction).
- (b) Additional salaries tax assessment for the year of assessment 2008/09 under charge number X-XXXXXXXX-XX-X, dated 13 April 2010, showing additional net chargeable income of \$90,000 with tax payable thereon of \$15,300 (after tax reduction).

2. By a letter dated 21 February 2011, the Taxpayer purported to file a notice of appeal.

3. By a letter dated 26 March 2011 received on 28 March 2011, the Taxpayer wrote a further letter addressed to the Commissioner of Inland Revenue ('the Commissioner') and copied this to the Clerk to the Board. In that letter, the Taxpayer confirmed his appeal against the Determination and in turn, made a supplementary submission to the Board.

4. On 29 March 2011, the Taxpayer wrote a further letter addressed to the Clerk to the Board (copied to the Commissioner) making further submissions.

**The issues**

5. The issues which the Board needs to address and deal with are as follows:

- (a) whether the Taxpayer has indeed given a valid notice of appeal;
- (b) whether an extension of time for appeal should be allowed to the Taxpayer if the appeal he has filed is out of time.

6. The Board gave directions to the parties requesting written submissions in respect of the above issues. The parties complied with these directions.

**The relevant statutory provisions**

7. The relevant sections of the Inland Revenue Ordinance ('IRO') are as follows:

- (a) Section 58(3) of the IRO provides as follows:

*‘Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.’*

(b) Section 66 of the IRO provides as follows:

*‘(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).*

*(2) The appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.*

*(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).’*

### **The first purported notice of appeal**

8. It was clear from the evidence before us and from the written submissions that the Taxpayer had received the Determination on or about 26 January 2011.

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9. On 21 February 2011, he wrote a letter to the Clerk to the Board of Review, this was copied to the Inland Revenue Department ('IRD'). That letter was received on the same date. In that letter, he states as follows:

‘ Dears Sirs,

- (A) This serves as my response to Inland Revenue Department (IRD)’s letter ref. [...] sent to me on 25.1.2011 which requires me to serve you a copy of the Commissioner’s written determination with my statement of grounds within a month. I have been forced to give you this interim notification because my rights would be barred by time limit if I do not. **However, this is not yet a notice of appeal for the reasons I shall state below. I will apply under Section 66(1A) in future the extension of time as appropriate after the Commissioner amend his statement of facts, the objections in issue and provide necessary clarifications.**’

(our emphasis in bold)

10. The letter is a lengthy one and he attaches various documents and puts forward various comments. However, in our view, having regard to the contents of his letter and the way in which it is written and having regard to the written submissions by the Taxpayer, this letter cannot be considered to be a notice of appeal. Indeed, it is unequivocal that he did not wish to appeal and he made it very clear that at the appropriate time, he would consider applying for an extension of time to appeal under section 66(1A) after he obtains clarification of what he feels is needed to deal with the issues in dispute. We accept Ms To’s submissions that if the Taxpayer was wishing to treat this notice as a notice of appeal, he would not have made such a statement.

**Letter dated the 26 March 2011**

11. By a subsequent letter dated 26 March 2011, the Taxpayer then wrote a further lengthy letter to the IRD (for the attention of Ms To) whereby he again set out his concerns and drew to the IRD’s attention various issues. However, this letter was copied to the Clerk to the Board. After paragraph 17, he states as follows:

‘ By copy to the Clerk to Board of Review of this supplementary submission in response to IRD’s clarifications on the Determination sent to me on 25-1-2011, the following should be noted:

.....

Now that IRD has made the clarifications without providing a duly signed Agreement Form for the 2005/06 assessment (as requested in paragraph (G) in my last submission for Fact P2), and that I am allowed to include “My Facts –

P1 to P16” of the case to support my arguments, I confirm my disagreement to the Commissioner’s arguments and the appeal.’

12. He then sets out some reasons for his appeal in respect of the 2008/09 assessment and the 2007/08 assessment.

13. In Ms To’s written submission, she accepted that the Clerk to the Board did indeed receive a copy of this letter in which the Taxpayer expressed his disagreement of the Commissioner’s arguments and confirmed his appeal. She also took the view that it is open to the Board to consider whether this was a notice of appeal.

14. After considering matters carefully and having looked at the contents of this letter, we are of the view that this letter could very well constitute a notice of appeal since it does identify certain grounds which the Taxpayer would wish to raise. Hence, we conclude that this notice is indeed a valid notice of appeal. However, it is quite clear that since this notice was only received on 28 March 2011, that is, some 28 days after the statutory time limit, therefore, this notice of appeal was clearly out of time pursuant to section 66(1)(a) of the IRO.

#### **Extension of time to appeal under Section 66(1A) of the IRO**

15. Therefore, the Board now needs to consider whether an extension of time should be granted.

16. Section 66(1A) of the IRO provides that if the Board is satisfied that the Taxpayer was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in time, it may extend for such period as it thinks fit the time within which notice of appeal may be given. However, these provisions are clear and indeed restrictive.

17. In order for the Taxpayer to obtain leave for an extension of time to file the appeal, it is not sufficient for the Taxpayer merely to prove that his failure to appeal in time was due to illness, absence from Hong Kong or other reasonable cause. The key issue is he must satisfy the Board he was prevented by such illness, absence or reasonable cause to lodge an appeal within the time prescribed. In Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687, the taxpayer alleged that he was late in filing an appeal to the Board because he misunderstood the meaning of section 66(1). In dismissing the taxpayer’s appeal from the Board’s refusal to grant an extension of time under section 66(1A), the Court of Appeal held that:

- (a) *The word ‘prevented’ used in section 66(1A) should best be understood to bear the meaning of the term ‘未能’ in the Chinese language version of the subsection. The term means ‘unable to’ and, although providing a less stringent test than the word ‘prevent’, imposed a higher threshold than a mere excuse. Such interpretation gives full effect to section 19 of*

*the Interpretation and General Clauses Ordinance (Chapter 1).*

- (b) *'Reasonable cause' cannot possibly be extended to cover unilateral mistakes made by a taxpayer. A unilateral mistake on the taxpayer's part cannot be properly described as a reasonable cause which prevented him from lodging a timely notice of appeal.*

18. Time limits are imposed and must be observed. In D3/91, IRBRD, vol 5, 537, the taxpayer was late in giving his notice of appeal for one day. There, the Board refused to allow delay for even one day and said at page 541 as follows:

*'The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time.'*

19. Indeed, we have no hesitation in accepting that the provisions of section 66(1A) are very clear and restrictive. The word 'prevented' cannot appropriately be used in a situation where a taxpayer is able to give notice but has failed to do so. Again, we would emphasize that there is a marked difference between preparing for an appeal and simply lodging an appeal.

20. In D11/89, IRBRD, vol 4, 230, the taxpayer said that he had not been able to file an appeal within the prescribed period of one month because extra time was required to gather information from the bank. There, the Board dismissed the application and made the following comments at page 234 as follows:

*'..... The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed within the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.'*

*Furthermore, even if he had been prevented, he had no reasonable excuse because he had had more than sufficient time to put his house in order. ....'*

21. In D14/06, (2006-07) IRBRD, vol 21, 371, the taxpayer sent letters to seek clarification from the IRD before deciding whether to appeal against the Commissioner's determination. After receiving the IRD's reply, the taxpayer, within the one-month period, wrote to the Board indicating that she wished to lodge an appeal. However, the grounds of appeal to the Board was late for approximately 6 months. There, the Board declined to extend the time for appeal and said at pages 376 and 377 as follows:

*..... We are of the view that the Appellant had every opportunity to file a notice of appeal and was able to do so within the relevant period of time. In our view, we accept the IRD's submissions that extra time required to gather information including researching and taking advice to substantiate an appeal cannot constitute a reasonable cause for lodging the appeal out of time. ....'*

22. In D55/09, (2009-10) IRBRD, vol 24, 993, the taxpayer explained the reason for filing his appeal late was, inter alia, that he was unfamiliar with the Hong Kong tax laws and he needed time to sort out certain issues with the IRD before he could provide a complete response to the Board. In dismissing the appeal, the Board held at page 998 that:

*'19. We are also of the view that his contention that he was not familiar with Hong Kong tax laws and he needed time to sort out certain issues is not a reason for us to allow further time for him to file an appeal.*

*20. .... there is indeed a difference between lodging an appeal and preparing for an appeal. It is also that the Taxpayer had been corresponding for some time with the IRD before the Determination was made and he was fully aware as to the various issues that were set out in the Determination.'*

23. In the case before us, there was no allegation that the Taxpayer was sick or absent from Hong Kong. It is clear that the Taxpayer's only point was that he was prevented by other reasonable cause from filing a timely appeal.

### **The evidence of the Taxpayer**

24. The Taxpayer gave evidence before us. He works for the Hong Kong Government. He had received the Determination and was fully aware as to the contents and read the letter dated 3 January 2011 from the Deputy Commissioner drawing to his attention the relevant legislation contained in section 66 of the IRO and was aware that he needed to file a notice of appeal within a one-month time period.

25. However, he made it clear to us that the reason for him not filing a notice of appeal was because he had not received a document being an agreement to claim allowance/deduction for the year of assessment 2005/06 which was to be signed by both parties.

26. Hence, in our view, it is quite clear that he took a calculated decision that he was not in a position to proceed with an appeal until he had received that particular document.

27. When asked by the Board whether there were other reasons, he confirmed that this was the only reason for him not filing the appeal on time.



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28. In cross-examination by Ms To, his attention was drawn to his letter dated 26 March 2011 which stated as follows:

‘ Since the Commissioner has already admitted that the use of “你們” in the Assessor’s Note 2 for the 2005/06 Additional Assessment was inappropriate (which was the reason to start off all the objections), the Board of Review therefore does not have to consider this issue. However, the Commissioner has not clarified the issues on (i) IRD’s roles and duties in the need of verifications of claimants’ eligibilities before jumping step to require agreement as to whom to claim and (ii) how one single Agreement Form IR 6074 or IR 6074A should be handled, coordinated and returned to IRD by one claimant within the specified deadlines amongst multiple claimants. As there appears no law governing the these matters to advance the arguments further without the Commissioner’s clarifications and it serves no purpose to annul any assessments, I would not need the Board of Review to determine these issues at this stage although I disagree with the Commissioner’s approach and arguments which are considered unreasonable. It would however not relieve IRD’s obligations to make clarifications on these fundamental issues and to issue necessary guidance notes or amendments of law for governing the same.’

29. He confirmed that this reflected his position.

**Discussion**

30. In our view, it is quite clear that the position taken by the Taxpayer was that he could very well lodge a notice of appeal if he wished to do so within the notice period.

31. By his letter dated 21 February 2011 when he wrote to the Clerk to the Board, he made it clear that he decided not to appeal within the one-month period. Indeed, he chose not to do so.

32. Hence, in no way can it be said that he was prevented from doing so. It is also clear that the Taxpayer had been fully aware that he was permitted to rely on the grounds of appeal other than those contained in the notice of appeal at the hearing if the Board so consented to under section 66(3).

33. On the various authorities that we have mentioned above, it is quite clear that there is a very marked difference between lodging an appeal and preparing for an appeal.

34. The Taxpayer’s clarifications which he sought in essence amounted to his submissions on his case.

35. It is also clear that the Taxpayer may have misunderstood that he was bound to provide complete facts and arguments in his notice of appeal. This clearly is not the case. At any hearing before the Board, he can call witnesses, he can submit documents and he can

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make written submissions. Indeed, he could also seek leave from the Board to submit his supplementary grounds of appeal if he thought that this was appropriate.

36. We have no hesitation in concluding that there is no evidence before us of any reasonable cause that prevented the Taxpayer from lodging his appeal within time. Indeed, his assertion to the Board that he required a clarification in respect of a specific document is without foundation, lacks sense and indeed it never prevented him from filing an appeal within the stipulated time period. He took a tactical position when he wrote to the Clerk to the Board on 21 February 2011 where he made it perfectly clear that he was not yet filing a notice of appeal and in due course, he would consider applying for an extension of time if appropriate. He therefore had totally disregarded the provisions of section 66(1)(a).

**Conclusions**

37. Therefore, we have no hesitation in concluding that we are not able to grant the necessary extension of time to allow him to proceed with his appeal.