

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D142/99

Profits Tax – notice of appeal out of time – computation of time – extension of time – whether reasonable cause – section 66(1) of the Inland Revenue Ordinance (‘IRO’).

Panel: Anna Chow Suk Han (chairman), Herbert Liang Hin Ying and David Yip Sai On.

Date of hearing: 12 January 2000.

Date of decision: 16 March 2000.

The taxpayers appealed against the determination of the Commissioner of Inland Revenue dated 4 August 1999. The taxpayers claimed that the profits derived from the sale of a property (the Subject Property) should not be assessable to tax.

The preliminary issue is whether the Board should exercise its discretion under section 66(1A) of the IRO and extend time in favour of the taxpayers for filing their notice of appeal out of time.

The Commissioner’s determination was issued on 4 August 1999 and the same was sent by registered post, on the same day to the taxpayers’ address. It was collected over the post office on 6 August 1999. A notice of appeal dated 4 September 1999 was delivered by hand and was received by the Board on 8 September 1999. The taxpayers were not out of Hong Kong between this period.

The taxpayers explained that they only came across the determination in end of August 1999 as their post was re-directed to an address which they were not staying. Besides, they were very busy with the work at that time.

Held :

1. The Board may extend the time for filing the notice 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 time. The taxpayers’ failure to file the notice was not due to illness or absence from Hong Kong. As a result, the Board only had to consider if the reasons given by the taxpayers constitute a reasonable cause. The Board considered that the time for filing the notice should begin to run from the date when the written determination was sent by the Commissioner and not from the date

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when the same was received by the taxpayers and the time for filing the notice of appeal expired on 4 September 1999. The notice delivered by the taxpayer on 8 September 1999 was therefore out of time (D62/98 applied).

2. The Board did not accept that the redirection of mail which as alleged caused the late receipt of the determination, amounts to a reasonable cause for the delay in filing the notice of appeal. The taxpayers should bear the consequence of redirecting their mail to an address where they were not staying. The Board did not accept the claim that the heavy workloads and long office hours had prevented the taxpayers from preparing and filing the notice of appeal within time.
3. The Board decided not to extend the time of filing of the taxpayers' notice of appeal.
4. The Board observed that the short ownership of the Subject Property is a strong indicator that it was acquired not as the taxpayers' residence, but as a trading stock. The Board also found the taxpayers failed to satisfy the onus of proving that the Subject Property was acquired as their residence and the reason for the sale of the Subject Property was genuine (All Best Wishes Limited v CIR applied). Had it been necessary for the Board to decide on the substantive issue, it would have dismissed the appeal.

Appeal dismissed.

Cases referred to:

D9/79, IRBRD, vol 1, 354
D11/89, IRBRD, vol 4, 230
D3/91, IRBRD, vol 5, 537
D62/98, IRBRD, vol 13, 385
All Best Wishes Limited v CIR 3 HKTC 750

Fung Ka Leung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

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1. This is an appeal by Ms A and Mr B (as 'Ms A' and 'Mr B' individually and as 'the Taxpayers' collectively) against the determination of Commissioner of Inland Revenue dated 4 August 1999 in respect of profits tax assessment for the year of assessment 1996/97 raised on them, in the sum of \$304,137. The Taxpayers claim that the profits derived from the sale of a property in Private Housing Estate C in District D ('the Subject Property'), should not be assessable to tax.

The preliminary issue

2. Whether this Board should exercise its discretion under section 66(1A) of the Inland Revenue Ordinance ('the IRO') and should extend time in favour of the Taxpayers for filing their notice of appeal out of time.

The substantive issue

3. If the extension of time is granted to the Taxpayers, whether the profits derived by the Taxpayers from the purchase and sale of the Subject Property is assessable to profits tax under section 14(1) of the IRO.

Our decision on the preliminary issue

4. Mr B and Ms A are husband and wife. Mr B appeared in person at the hearing. He was authorized by Ms A to represent her. He chose to give evidence under oath.

5. The Respondent (the Revenue) objected to the appeal and submitted that the Taxpayers' notice of appeal was not filed within the specified time under section 66(1) of the IRO and should not be entertained.

6. Mr B applied for extension of time to file the Taxpayers' notice of appeal and gave evidence in this regard.

7. We find the following facts from the papers before us. The Commissioner's determination was issued on 4 August 1999 and the same was sent by registered post, on the same day to the Taxpayers' address at another unit in Private Housing Estate C in District D. According to the Postmaster General of the Post Office, this item was collected over the post office on 6 August 1999 and a receipt for the item was duly signed. A notice of appeal dated 4 September 1999 was delivered by hand and was received by the Board on 8 September 1999. Information obtained from the Immigration Department shows that the Taxpayers were not out of Hong Kong between 4 August 1999 and 8 September 1999.

8. Mr B explained to the Board that although the Taxpayers were living at the said address in District D, they had their mail re-directed to the address of his mother-in-law in District E. Their daughter and the maid were staying there. The determination was in fact picked up by

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their maid from the post office in District E and the signature on the receipt was that of their maid. The maid did not inform them of the letter picked up from the post office. They only came across the letter and opened it about the end of August 1999. Upon receipt of the letter, and not knowing what steps he should take on it, he telephoned the Inland Revenue Department for clarification. It was explained to him that the appeal should be filed within one month of the determination and he had also been warned of the time limit.

9. Mr B asserted that both he and his wife, Ms A were very busy with their work. They were both estate agents and kept very long office hours, from morning to as late as 9 or 10 o'clock in the evening. They could hardly find time to read their documents. Mr B even produced a record with a name on it, showing entries of the time recorded for 'in' and 'out' from the 1st day to 31st day of August. Mr B explained that the name on the record referred to him. The record produced, showed the time he arrived at and left his office during the month of August; but we observe, the year was not mentioned on the record. However, the absence of this piece of information does not affect our decision on the preliminary issue. The record shows that in August Mr B was off-duty for five days and he arrived at the office usually between 9:30 a.m. and 10:30 a.m. and left the office between 8 p.m. and 10 p.m..

10. When cross-examined by Mr Fung of the Respondent (the Revenue), Mr B explained that he had the draft notice of appeal ready on 4 September 1999 but did not finalize it until 8 September 1999, as he needed time to read it and the documents. He did not send the notice of appeal by post but he took time off from his office so that he could deliver it to the Board by hand.

11. The Respondent submitted that the determination was issued on 4 August 1999 and was delivered to the Taxpayers on the same day. The determination was received by the Taxpayers by the end of August 1999. The prescribed one month period expired on 4 September 1999. The Taxpayers gave the notice of appeal to the Board on 8 September 1999 and were late by four days.

12. It was further submitted that the Taxpayers were present in Hong Kong during the prescribed one month period and there was no evidence that their failure to lodge an appeal within time was due to illness or other reasonable cause.

13. The Respondent also made reference to the following Board of Review Decisions, D9/79, IRBRD, vol 1, 354, D11/89, IRBRD, vol 4, 230, D3/91, IRBRD, vol 5, 537 and D62/98, IRBRD, vol 13, 385.

14. Section 66(1) of the IRO provides that the Board may extend the time for filing the notice of appeal 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 time. It is clear from the evidence that the Taxpayers' failure to file the notice of appeal was not due to illness or absence from Hong Kong. Thus, we have only to consider whether the reason given by Mr B for the delay,

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constitutes to a reasonable cause which prevented the Taxpayers from giving the notice within the prescribed time.

15. Section 66(1) of the IRO provides '*Any person ... may within (a) one month after the transmission ... of the Commissioner's written determination ...*'. As in the Board decision D62/98, we consider that the specified time should begin to run from the date when the written determination was sent by the Commissioner and not from the date when the same was received by the Taxpayers. Thus, the prescribed period for filing the notice of appeal, in the present case, started to run on 4 August 1999, the date when the written determination was sent by registered post to the Taxpayers, and expired on 4 September 1999. The notice delivered by the Taxpayers on 8 September 1999 was therefore out of time.

16. The Taxpayers had their mail redirected to District E while they were living in District D and they did not know of the determination until the end of August 1999. The reason given for the redirection of mail was because many documents, such as bank statements were sent to the District E address in where Ms A was living three years ago. Despite the reason given, we still do not understand the purpose for which the mail was redirected to District E. Whether there was a purpose for the redirection or not, we do not accept that the redirection of mail which, as alleged, caused the late receipt of the determination, amounts to a reasonable cause for the delay in filing the notice of appeal. If the Taxpayers had the necessity to redirect their mail to an address where they were not staying, they should see to it that the redirected mail would be drawn to their attention or would reach them in good time. If not, they did it at their own risks and should bear the consequences thereof.

17. As to their claim that their heavy workloads and long office hours had prevented them from preparing and filing the notice of appeal within time, again we cannot accept that this reason constitutes a reasonable cause. Every taxpayer has an obligation to observe the law and to meet time limits set by it. Otherwise, administration of our tax system will be undermined. Hong Kong is an industrious society. Heavy workloads and long office hours are experienced by many people from all walks of life. These people, estate agents not excepted, are still expected to keep their affairs in order and, most of all, to comply with their tax obligations. We do not accept that the Taxpayers' long hours at work constituted a reasonable cause which prevented them from filing their notice within time. Moreso, they were aware of the determination at the end of August 1999. They could have prepared and filed the notice within the remaining time. Under the circumstances, we are not prepared to extend the time for filing of the Taxpayers' notice of appeal. As there is no proper appeal before us, we cannot disturb the assessment.

18. We had heard evidence on the substantive issue pending our decision on the preliminary issue on the procedural point.

19. Having dismissed the appeal on the procedural point, we will only express our views briefly on the substantive issue.

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20. The Taxpayers have entered into the following property transactions since 1993:

Location	Owners	Date of agreement	Date of assignment	Purchase consideration \$	Date of agreement	Date of assignment	Selling price \$
Property 1	The Taxpayers and Ms F	22-11-1993* (6-12-1993)	31-3-1994	1,350,000	1-8-1996* (15-8-1996)	18-9-1996	1,550,000
The Leased Property		Date of the tenancy agreement : 30-8-1996 Term : from 10-9-1996 to 9-9-1998					
The Subject Property	The Taxpayers	19-10-1996* (5-11-1996)	20-1-1997	3,420,000	6-1-1997* (21-1-1997)	19-2-1997	3,900,000
Property 2	Ms A	7-3-1997* (18-3-1997)	(Note 1)	2,400,000	11-4-1997* (17-4-1997)	30-4-1997	2,590,000
Property 3	The Taxpayers	8-5-1997* (22-5-1997)	28-8-1997	4,600,000			

* refer to the dates of provisional agreements.

The dates in bracket are the dates of the formal agreements.

Note 1 : Ms A sold Property 2 in the capacity of a confirmor.

21. The short ownership of the Subject Property is a strong indicator that it was acquired not as the Taxpayers' residence, but it was a trading stock. We find that the explanations given by the Taxpayers for their property transactions unconvincing. The Taxpayers decided to sell Property 1 because they planned to buy a bigger flat but within the same month, they rented the Leased Property. They were unable to buy a replacement property because of the rising property market. However despite the market was still on the rise in October 1996, they decided to buy again. Mr B claimed they decided to buy because their income improved since October 1996. However, as we see it, when they purchased the Subject Property in October 1996, they would not have known that their income would continue to be good as to enable them to hold the Subject Property on a long term basis. It is inconceivable that the Taxpayers should change their minds on the basis of an increased income in only one month. As to the reason for the sale of the Subject Property, we also find it unconvincing. The Taxpayers claimed that the Subject Property was sold

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because they intended to start a family. The Taxpayers sold the Subject Property because they needed a bigger property for the baby. The size of the Subject Property is 679 square feet while that of Property 3 where the Taxpayers are now living, is 728 square feet. The difference is not significant. Although the Taxpayers claimed that they sold the Subject Property because they needed a three-bedroom flat, we were told by Mr B during the hearing that their third bedroom was only a spare room. The Taxpayers and the baby occupied one room and the maid the second. Furthermore, the purchase of Property 2 was at odds with the Taxpayers' stated intention of starting a family and changing to a three-bedroom flat. By purchasing Property 2, their entire funds were tied up and their stated intention could never be materialized. The renting of the Leased Property and the purchase of Property 2 are indicators that the Taxpayers had no intention of acquiring a property as their residence after they sold Property 1.

22. Section 68(4) of the IRO provides that '*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.*'

23. In All Best Wishes Limited v Commissioner of Inland Revenue 3 HKTC 750, Mortimer J stated:

'It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'

24. Had it been necessary for us to adjudicate on the substantive issue, we would have dismissed the appeal because we find that the Taxpayers have failed to discharge their duties to prove that the assessment is incorrect. The Taxpayers were unable to satisfy us that the Subject Property was acquired as their residence and that the reason for the sale of the Subject Property was genuine.