Case No. D146/01

Salaries tax – whether reasonable excuse preventing the appellant from lodging a valid appeal within one-month period – section 66(1A) of the Inland Revenue Ordinance ('IRO').

Panel: Andrew Halkyard (chairman), Michael Littlewood and Alexander Woo Chung Ho.

Date of hearing: 8 January 2002.
Date of decision: 29 January 2002.

The appellant claimed that he had a non-Hong Kong employment and thus should only be subject to salaries tax on his income derived from services performed in Hong Kong and not overseas. The Commissioner rejected the appellant's objection on 7 August 2001 and the copy of the determination was sent to the tax representatives of the appellant on 8 August 2001. On 10 August 2001, the determination addressed to the appellant's latest correspondence address was returned to the Inland Revenue Department ('IRD') with a note stating 'no such person'. The appellant left Hong Kong in June 2001 and when the determination was issued on 7 August 2001 he was living in Singapore. However, on 9 August 2001, the tax representatives informed the appellant's personal assistant in Hong Kong with details of the determination.

The tax representatives wrote to the IRD on 6 September 2001 and to the Clerk to the Board of Review on 7 September 2001 seeking an extension to 12 November 2001 for filing a notice of appeal against the determination. On 13 September 2001, a notice of appeal to the determination dated 7 August 2001 was delivered by hand to the Board of Review on 14 September 2001.

The appellant argued that his late appeal was due to the incorrect addressing of the 6 September 2001 communication to the IRD, the difficulty of the tax representatives contacting him because of his travel commitments, and the complexity of his affairs by virtue of his having documents both in Hong Kong and in Australia.

Held:

1. The Board found that there was no evidence of any blockage or breakdown in communication between the appellant and his personal assistant. The Board could not see how the subsequent difficulties faced by the tax representatives in contacting the appellant, and the appellant's seeming difficulty in focusing upon his taxation

affairs due to his business travels and the 'complexity' of his tax affairs could be said to 'prevent' a timely appeal being lodged within the normal one-month period.

2. In conclusion, the Board found that there was simply no reasonable excuse preventing the appellant from lodging a valid appeal within the time limit of one month specified in section 66(1). Besides, the Board had no hesitation in concluding on the totality of facts that the appellant's employment was located in Hong Kong and he was thus liable to salaries tax in accordance with section 8(1).

Appeal dismissed.

Cases referred to:

D3/91, IRBRD, vol 5, 537
D11/89, IRBRD, vol 4, 230
D9/79, IRBRD, vol 1, 354
D12/97, IRBRD, vol 13, 78
CIR v Goepfert (1987) 2 HKTC 210

Leung Wing Chi for the Commissioner of Inland Revenue.
Taxpayer represented by his representative.

Decision:

1. This is an appeal against the salaries tax assessments raised on the Appellant for the years of assessment 1997/98, 1998/99 and 1999/2000. The Appellant claims that he had a non-Hong Kong employment and thus should only be subject to salaries tax on his income derived from services performed in Hong Kong and not overseas.

Preliminary issue: late appeal

2. On the basis of the documents before us, the evidence adduced by the Appellant and the statements of Ms A (his representative at the hearing before us), we find the following facts.

(a) The determination of the Commissioner rejecting the Appellant's objection to the assessments in dispute was dated 7 August 2001.

(b) The determination was addressed to the Appellant at the latest correspondence address given by him to the IRD. A copy of the determination was sent to the

Appellant's authorised tax representatives, Company B ('the Representatives').

(c) On 8 August 2001 the Representatives received the copy of the determination.

(d) On 10 August 2001 the determination addressed to the Appellant's latest correspondence address was returned to the IRD with a note stating 'no such person'.

(e) On 13 August 2001 the determination was redirected to the Appellant care of the Representatives and was delivered on 14 August 2001.

(f) On 6 September 2001 the Representatives wrote to the IRD seeking an extension to 12 November 2001 for filing a notice of appeal against the determination.

(g) As a matter of urgency the assessor by telephone advised the Representatives on 7 September 2001 that the IRD was not empowered to grant any extension for filing a notice of appeal. The assessor was of course under no obligation to do this.

(h) On 7 September 2001 the Representatives wrote to the Clerk to the Board of Review seeking an extension to 12 November 2001 for filing a notice of appeal against the determination. The Clerk has no power to grant any such extension. This letter did not itself purport to be a notice of appeal, nor did it meet the requirements of such a notice under section 66(1) of the IRO.

(i) On 13 September 2001 the Representatives executed a notice of appeal to the determination dated 7 August 2001. This was delivered by hand to the Board of Review on 14 September 2001.

(j) The Appellant left Hong Kong in June 2001. When the determination was issued on 7 August 2001 he was living in Singapore.

(k) During August and September 2001 the Appellant was travelling extensively on business. The Appellant stated that this made it difficult for the Representatives to contact him in relation to the preparation of the appeal.

(l) On 5 November 2001 Company C (as the Appellant's employer) filed with the IRD a notice stating that the Appellant had ceased employment (with Company C) and had left Hong Kong on 31 May 2001. This notice was filed more than five months late.

(m) The Appellant states that he did not remember whether the Representatives had advised him that they had received the determination. However, Ms A (an employee of the Representatives, who was called by the Appellant to give evidence) stated that on 9 August 2001 she faxed a copy of the determination to Ms D (the Appellant's personal assistant in Company C) to forward to him. The covering letter stated: 'We are in the process of reviewing the letter [of determination] and would contact you shortly on the contents of the letter.'

(n) The Appellant did not remember what happened next but when the Representatives sent the letter dated 6 September 2001 to the IRD (fact (f) refers) he stated that he had certainly spoken with Ms A concerning his appeal.

3. The Appellant argued that his late appeal was due to the incorrect addressing of the 6 September 2001 communication to the IRD (instead of to this Board), the difficulty of the Representatives contacting him because of his travel commitments, and the complexity of his affairs by virtue of his having documents both in Hong Kong and in Australia.

4. The Commissioner's representative, Ms Leung Wing-chi, argued that there is no doubt that the appeal was late and that in terms of section 66(1A) of the IRO the Appellant was not 'prevented' from filing a timely notice of appeal. Ms Leung drew our attention to the statements in the following decisions:

(a) *'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.'* [D3/91, IRBRD, vol 5, 537]

(b) *'The provisions of section 66(1A) are very clear and restrictive. … [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.'* [D11/89, IRBRD, vol 4, 230]

(c) *'The word "prevented", as we see it, is opposed to a situation where an appellant is able to give notice but has failed to do so. In our view, therefore, neither laches nor ignorance of one's rights or of the steps to be taken is a ground upon which an extension may be granted.'* [D9/79, IRBRD, vol 1, 354]

(d) *'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).'* [D12/97, IRBRD, vol 13, 78]

5. There is no dispute that the letter dated 6 September 2001 was sent to the wrong party and, in any event, did not comply with the requirements of section 66(1). Similarly, the letter of 7 September 2001 did not comply with the requirements of section 66(1) and was not a proper notice of appeal. There was thus no dispute at the hearing before us that the notice of appeal dated 13 September 2001 was out of time.

6. We also note that the Appellant, having vacated his Hong Kong residence and having left Hong Kong by 1 June 2001, was by virtue of section 51(8) and (7) under an obligation to notify the Commissioner of these facts within one month of the change of address and one month before departing Hong Kong. He admits that he did not do so. The Commissioner became aware of these facts on 5 November 2001 when Company C filed the notification concerning an employee about to depart Hong Kong (fact (l) refers).

7. In the event, the Commissioner's determination was sent to the Appellant's authorised tax representatives on 7 August 2001 and received by them on 8 August 2001. On 9 August 2001 the Representatives acted expeditiously and informed the Appellant's personal assistant in Hong Kong with details of the determination. There is no evidence before us of any blockage or breakdown in communication between the Appellant and his personal assistant. In these circumstances, we cannot see how the **subsequent** difficulties faced by the Representatives in contacting the Appellant, and the Appellant's seeming difficulty in focusing upon his taxation affairs due to his business travels and the 'complexity' of his tax affairs can be said to 'prevent' a timely appeal being lodged within the normal one-month period.

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

9. We are inclined to comment upon the very unsatisfactory state of affairs revealed by the facts before us. But we will keep these brief given that the Appellant is undoubtedly partly responsible for the rejection of this late appeal. Suffice to say that the Representatives should reflect upon the facts that the letters of 6 September 2001 (addressed to the wrong party; and not an appeal) and 7 September 2001 (also not a valid appeal) were, in the circumstances, not an appropriate response to the Commissioner's determination. They should need no reminding of the lessons to be learned from this late appeal.

The substantive issue: Hong Kong versus offshore employment

10. It is strictly not necessary for us to decide this issue given our rejection of the late appeal. However, given the Appellant's evidence and demeanour – and we appreciated his clear and straightforward manner before us – it may be helpful to briefly set out our view on this matter.

11. At the risk of oversimplification, we summarise the evidence and argument for the Appellant as follows. He had been employed within Group E (of which Company C was at all material times a member) for many years and, even prior to his move to Hong Kong on 1 March 1998, had been employed by its Australian subsidiary in a regional (or international) capacity. When he was seconded to move to Hong Kong he continued his employment with the Australian subsidiary. He reported to the Group's parent in London both before and after his move to Hong

Kong. The secondment involved opening and expanding the Group's offices within Asia. In this regard Hong Kong was used as a starting base and Hong Kong's advantages included being in the same time zone, ease of travel and labour support. The Appellant said that the contract he concluded with a Hong Kong company, Company F (now known as Company C: facts (l) to (m) above refer) was purely for immigration purposes and to apply for a work permit. It was issued to him in Australia and signed by the Group's executive chairman in London. The contract indicates the fact that he has a regional post. The contract covers the Group's responsibilities and not those of the Hong Kong subsidiary.

12. The Appellant also asked us to note that his remuneration was fixed in London, was denominated in Australian dollars and that his employment costs were all charged back (under a management fee arrangement) to the regional subsidiaries for whom he worked during his extensive travels outside Hong Kong.

13. In our view all these arguments can be easily answered. The facts that he was seconded to Hong Kong, that he had regional responsibilities, that he may not have severed his employment links with the Australian subsidiary, that he reported to London and that his costs of remuneration were charged back to the regional subsidiaries do not alter the facts that during the relevant period he had an employment contract with a Hong Kong company (namely Company C) for a post based in Hong Kong and was then paid by that company in Hong Kong. All filings with the IRD by the Hong Kong subsidiary (see, for example, fact (l) above) and by the Appellant himself in his tax returns showed the Hong Kong subsidiary as his employer.

14. That the Appellant was employed by Company C is clear from his own testimony and from the documentary evidence. Moreover, the Appellant did not suggest that his employment with Company C was anything other than genuine. We accordingly find that the contract of employment entered into by the Appellant with that company was genuine. That company had a regional role, as indicated by the Appellant in his evidence, and this precisely fitted the post for which he was employed. The terms of the contract were adhered to and acted upon by both parties. In this regard we particularly note clause 6 relating to payments made by the company into his personal superannuation or retirement fund. Finally, we note that if this contract were entered into purely for immigration purposes to facilitate living in Hong Kong and for ease of travel, and masked the true employment relationship (we reiterate that this is **not** our finding), this would entail an element of dishonesty and various offences may have been committed. We do not however understand the Appellant to have suggested that this was the case. Rather, he maintained that, whilst his employment with Company C was genuine, his reason for entering into it (rather than simply maintaining his employment with the Australian company) was to facilitate immigration procedures.

15. Source of income is a hard, practical matter of fact. Applying CIR v Goepfert (1987) 2 HKTC 210 we have no hesitation in concluding on the totality of facts that the Appellant's employment was located in Hong Kong and he was thus liable to salaries tax in accordance with section 8(1).

16. For all the above reasons we dismiss this appeal.