Case No. D15/12

Salaries tax – appeal out of time – sections 66(1) and 66(1A) of the Inland Revenue Ordinance ('the IRO').

Panel: Albert T da Rosa, Jr (chairman), Hui Cheuk Lun Lawrence and Marianna Tsang Wai Chun.

Date of hearing: 3 May 2012.
Date of decision: 10 July 2012.

The Appellant claims that he should be granted dependent parent allowance for the years of assessment 2005/06 to 2009/10.

On 9 May 2012 the Appellant knew that an item of mail was awaiting his collection and he requested to transfer the same to the post office where he worked.

On 11 May 2011 the Appellant collected the item from the post office.

The item turned out to be the determination together with the covering letter dated 4 May 2011 ('the Covering Letter').

Initially the Appellant did not intend to appeal the determination but only decided to do so after his friends shared his concerns about the issues raised in the substantive appeal.

The notice of appeal dated 10 June 2011 was sent by post and received by the Board on 15 June 2011.

The Appellant contends that had he been informed by the Clerk's office, he would have sent the notice of appeal by electronic means and would not have been out of time.

The issue is whether the Board could and should exercise its discretion under section 66(1A) of the IRO.

Held:

1. Section 66(1A) of the IRO stipulates that the burden of proof is on the taxpayer that he was prevented to lodge an appeal in time because of illness, absence from Hong Kong or other reasonable cause.

2. The Appellant's right, as well as the procedures and time limit, in appealing to the Board were clearly set out in details in the Covering Letter with contact details of the Clerk to the Board by fax and email.

3. The Board has no power to extend the time for the Appellant's appeal as the Appellant has not demonstrated that the provisions of section 66(1A) are met.

4. There is hence no necessity for the Board to deal with the substantive appeal.

Application refused.

Cases referred to:

D2/04, IRBRD, vol 19, 76
D41/05, IRBRD (2005-06), vol 20, 590
D20/06, IRBRD (2006-07), vol 21, 442
Chan Chun Chuen v The Commissioner of Inland Revenue [CACV 113/2011]
D11/89, IRBRD, vol 4, 230
D9/79, IRBRD, vol 1, 354
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687

Taxpayer in person.
Ng Lai Ying Vivian, Yip Chi Chuen and Yu Wai Lim for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A (the 'Appellant') objects to the additional salaries tax assessments for the years of assessment 2005/06 to 2008/09 and the salaries tax assessment for the year of assessment 2009/10 raised on him as contained in the determination by the Deputy Commissioner of Inland Revenue dated 4 May 2011.

2. The Appellant claims that he should be granted dependent parent allowance ('DPA') in respect of his parents Mr B ('the Father') and Mrs B ('the Mother').

3. The notice of appeal dated 10 June 2011 was received by the Board on 15 June 2011.

4. The Revenue submits that the Appellant's appeal is out of time and no extension of time should be granted to the Appellant to validate the appeal. The preliminary issue for the Board to consider is whether or not the Appellant's late appeal should be entertained.

5. The Appellant gave evidence by affirmation in respect of the preliminary issue at the hearing in Cantonese and was subject to cross-examination by the Respondent's representative.

Language

6. All documents submitted to the Board including all previous correspondence between the Appellant and the Respondent were in English.

7. The parties wished to use the Cantonese dialect of the Chinese language for all oral proceedings before the Board but to continue to use English for all written elements without translation into Chinese.

8. By consent, the hearing was therefore conducted on the following basis:

8.1. oral evidence and submissions were in the Cantonese dialect of the Chinese language without English interpretation;

8.2. written submissions were in English;

8.3. there was no translation of documents in one of the official languages to the other; and

8.4. The Board delivers this decision in English.

Was the notice of appeal out of time?

9. Section 66(1) of the Inland Revenue Ordinance (Chapter 112) ('the IRO') provides that:

> ' *(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.*'

10. The one-month period prescribed under section 66(1)(a) of the IRO starts to run after 'transmission' of the Commissioner's determination. In D2/04, IRBRD, vol 19, 76, the Board held that 'transmission' meant the end of the process of transmission and observed at page 80 that:

> '*… the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.*'

11. The Appellant frankly admitted

11.1. that on 11 May 2011 he collected the determination together with the covering letter dated 4 May 2011 ('the Covering Letter') from the Deputy Commissioner to the Appellant from the post office; which admission was made after he noted the date of delivery receipt supplied by the Hongkong Post; and

11.2. that he only posted out his letter dated 10 June 2011 ('Notice of Appeal'), on the same day after office hours to give notice of appeal to the Board.

12. In D41/05, IRBRD (2005-06), vol 20, 590, the taxpayer asserted that he took out the determination, which was served to him by registered mail, on 8 March 2005. The taxpayer's notice of appeal dated 7 April 2005 was received by the Clerk to the Board on 13 April 2005. The taxpayer insisted that his appeal was within time and that he was not asking for an extension of time. The Board rejected the taxpayer's allegation and held at page 592 that:

> '*11. … in the context of section 66, giving notice of appeal to the Board means actual service of the notice on the Clerk.*
>
> *12. The wording of the phrase which follows the phrase "give notice to the Board" is:*
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> *"no such notice shall be entertained unless it is given in writing to the clerk to the Board".*

> *13. This phrase excludes oral notice. It also excludes notice which has not been received. The reason is simple. A notice which has not been received cannot be "entertained".'*

13. The Appellant did not dispute the fact that the notice of appeal was only received by the Clerk to the Board on 15 June 2011.

14. Thus, there was no question that his appeal was out of time and we so find.

15. In merely finding the Appellant's appeal out of time, it is not necessary for us in the determination of this issue to also determine whether 'transmission' of determination to the Appellant ended at any time earlier than 11 May 2011 when he collected the item from the Post Office (for example by the delivery of the card). This latter question may however be relevant in the context of whether we should exercise our discretion under section 66(1A).

Exercise of discretion?

16. The remaining question is therefore whether we could and should exercise our discretion under section 66(1A) of the IRO.

17. In D2/04, IRBRD, vol 19, 76 the board decided that under section 66(1) the phrase '1 month after the **transmission** to him' meant 'he has the 1 month period after the process of transmission has been completed' but 'transmission would normally end when the determination reaches the address that it was sent to' and not dependent on whether the determination has physically reached the recipient. At page 80 the board said:

> *' Thus, by virtue of section 10B(2) of the Interpretation and General Clauses Ordinance, the words "1 month after the transmission to him under section 64(4) of the Commissioner's written determination" in the English text are presumed to mean the same as "送交其本人後". The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins (i.e. when Commissioner dispatched his determination), or whether he has the 1 month period after the process of transmission has been completed. In our view, the latter meaning is more consonant with the legislative intention. … We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.'*

18. The D2/04 decision has been followed in D20/06, IRBRD (2006-07), vol 21, 442.

19. A similar approach was taken by the Court of Appeal in Chan Chun Chuen v The Commissioner of Inland Revenue [CACV 113/2011] regarding the question of service of assessments under section 58(2) and the 1 month time limit under section 51(8). At paragraph 27.2 of the Judgment Hon Cheung JA said:

> *' I am unable to accept the taxpayer's argument advanced by Mr Dykes SC and Mr Parker that the "giving" of notice implies "receipt" by the taxpayer, in the sense that he must have actual knowledge of the notice. Section 58(2) is the governing provision for giving notice by way of postal service. Once it is invoked the Commissioner does not need to show further that the notice had "actually" come to the knowledge of the taxpayer. This is because, first, the very fact that a mode of service other than personal service is permitted, is by itself an indication that service will be completed when the requirements stipulated for service have been fulfilled. Although section 58(2) does not use words that postal service "shall be deemed to be service", the wording in that section clearly carries that meaning. See Deputy Commissioner of Taxation v Taylor [1983] 2 NSWLR 139 at 143. Second, there is nothing in section 58(2) either alone or taken together with any other sections of IRO which requires that the notice of assessment must have come to the actual knowledge of the taxpayer before the time starts to run for the purpose of lodging objection. In my view, once the document was properly served under section 58(2), actual notice was treated to have been given to the taxpayer. It is then up to the taxpayer to ensure that the document which he had chosen to be sent to a specified address would be brought to his attention.'*

20. In the Appellant's bundle and in the Appellant's oral evidence, he admitted that on 9 May 2011 he knew that the item of mail (which turned out to contain the determination) was awaiting his collection and he requested to transfer the item of mail to the post office where he worked.

21. The item must have been delivered to his address earlier. Thus we also find that the delivery process ended when the card was left at the address. That is on 9 May 2011 at the latest.

22. Section 66(1A) of the IRO provides that:

> *'(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).'*

23. The burden of proof is on the taxpayer that he was prevented to lodge an appeal in time because of illness, absence from Hong Kong or other reasonable cause.

24. The Appellant's case is not that he was ill or that he was absent from Hong Kong.

25. In his oral evidence, the Appellant gave evidence to the effect as follows:

25.1. Initially he did not intend to appeal the determination but only decided to do so after a number of his friends who are professionals shared his concerns about the issues raised in the substantive appeal.

25.2. By the time his notice was ready it was already 10 June 2011, a Friday.

25.3. He made enquiry of someone in the Office of the Clerk to the Board on the following and was given the following answers:

(a) Whether the office would be open on Saturday 11 June 2011 and the answer was in the negative;

(b) Whether it would be late if the notice should reach the office after the holidays and was told that it would be out of time but, even so, he should still send in his notice.

25.4. He did not know of any other means whereby he could have delivered the notice of appeal in time but expect that if there were any, he should have been informed.

25.5. Had he been informed, he would have sent the Notice by electronic means and would not have been out of time.

25.6. On being cross-examined, he confirmed that he did not ask the Clerk's office whether there existed other available modes of giving notice of his appeal.

26. The Board in D11/89, IRBRD, vol 4, 230 made the following comments at page 234:

'*… 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. 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.'

27. The word 'prevented' cannot appropriately be used in a situation where an appellant is able to give notice, but has failed to do so. In D9/79, IRBRD, vol 1, 354, the Board said the following at page 355 in relation to the applicability of the word:

> *' … 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.'*

28. In Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687, the taxpayer contended that he was late in filing an appeal to the Board because he misunderstood the requirements for a valid appeal under section 66(1) of the IRO. In dismissing the appeal, the Court of Appeal held that:

> 28.1. *The word 'prevented' used in section 66(1A) should best be understood to bear the meaning of the term '未能' (meant 'unable to') in the Chinese language version of the subsection. The term, although providing a less stringent test than the word 'prevent', imposed a higher threshold than a mere excuse.*
>
> 28.2. *'Reasonable cause' could not possibly be extended to cover unilateral mistakes made by the taxpayer.*
>
> 28.3. *If there was a reasonable cause and because of that reason a taxpayer did not file the notice of appeal within time, then he had satisfied the requirement of section 66(1A).*

29. Respondent submitted that the Appellant could have sent in the notice by fax or email.

30. The Appellant submitted that we should take into consideration that when he made the enquiry with the clerk, he was not advised to use electronics means.

31. In the present case, those at the Clerk's office supplied the correct information as asked of them. The Clerk's office is not an office to advise taxpayers of the best way to go about the appeal --- that would have been the role of the taxpayers' professional advisers.

32. The Appellant's right, as well as the procedures and time limit, in appealing to the Board were clearly set out in details in the Covering Letter. In the Board's bundle, the contact details of the Clerk to the Board by fax and email are also given. The web-site particulars of the Board were also given.

33. There was no necessity for him to further enquire from the Office of the Clerk to the Board.

34. The web-site also directs a reader to '… see the format, manner and procedure (PDF file) for the submission of electronic information under law by virtue of the Electronic Transaction Ordinance (Cap. 553).' The format, manner and procedure is available from http://www.info.gov.hk/bor/eng/pdf/contact/layman_e.pdf.

Conclusion

35. We have no power to extend the time for the Appellant's appeal as the Appellant has not demonstrated that the provisions of section 66(1A) are met.

36. There is no necessity for us to deal with the substantive appeal.