

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D18/92

Extension of time – extension of time within which grounds of appeal may be filed – whether extension can be granted – reasonable cause – section 66 of the Inland Revenue Ordinance.

Panel: Mr T J Gregory (chairman), Joseph S Brooker and Michael Choy Wah-ying.

Date of hearing: 2 June 1992.

Date of decision: 28 July 1992.

The taxpayer was a firm carrying on business in Hong Kong. The firm has objected to the assessment and the matter was referred to the Commissioner for his determination. The taxpayer gave notice of intention to appeal against the determination of the Commissioner but did not file the grounds of appeal within the time specified. The taxpayer maintained that it was unable to file the grounds of appeal because it did not have sufficient information.

Held:

The Board of Review is constituted under the Inland Revenue Ordinance and only has such powers as are conferred on it by that Ordinance. The Board has no inherent jurisdiction to extend time limits. Section 66(3) confers a discretion to allow additional grounds of appeal to be filed but does not confer upon the Board of Review any power to extend the time limit within which the grounds of appeal themselves are to be filed. Accordingly the Board does not have any power to grant an extension of time to file the statement of the grounds of appeal.

Even if the Board had such power it could only do so if there was reasonable cause. On the facts of the present case the Board indicated that it would not have considered that the taxpayer had reasonable cause.

Appeal dismissed.

Cases referred to:

D11/89, IRBRD, vol 4, 230

D19/71, IRBRD, vol 1, 58

Maria Tsui for the Commissioner of Inland Revenue.

Precedent partner of the Taxpayer company for the Taxpayer.

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Decision:

1. THE SUBJECT MATTER OF THE APPLICATION

The Taxpayer, a firm, filed a notice of appeal against the determination of the Commissioner together with the determination within the time prescribed by section 66(1) of the Inland Revenue Ordinance (IRO) but did not file the grounds of appeal. A letter seeking approval to the filing of the grounds of appeal at a later date was treated as an application under section 66(1A) for leave to file the grounds of appeal subsequent to the expiration of the period prescribed by section 66(1).

2. THE FACTS

- 2.1 At a date unknown to the Board subsequent to the year of assessment 1989/90, probably in early 1991, an assessment was raised under section 59(3) on the Taxpayer which had not furnished a profits tax return for that year of assessment within the stipulated time.
- 2.2 By letter dated 20 February 1991 the Taxpayer objected to this assessment and, at the same time, furnished a profits tax return showing a loss.
- 2.3 Correspondence ensued with respect to the returned loss and proposals to resolve the differences between the Taxpayer and the assessor were put to the Taxpayer, none of which were accepted. The differences were limited to the deductibility, or otherwise, of salaries or other remuneration paid to the partners of the Taxpayer and the deductibility of certain claimed expenditure.
- 2.4 The matter was referred to the Commissioner and the determination ('the determination') was dated 15 April 1992.
- 2.5 Pursuant to section 64(4) of the Ordinance the determination was sent to the Taxpayer under cover of a letter dated 15 April 1992 which, in accordance with standard practice, drew the Taxpayer's attention to section 66, sub-sections (1), (1A) and (2), all of which were quoted in full. This letter and the determination were mailed to the Taxpayer by recorded delivery, but the packet containing them was only delivered by the Inland Revenue Department ('the IRD') to the Post Office on 21 April 1992. The Taxpayer stated that delivery was effected on 24 April 1992.
- 2.6 Letter dated 27 April 1992, the Taxpayer to the Clerk to the Board, a copy of which was before the Board:

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2.6.1 In this letter the Taxpayer stated that the firm disagreed with the determination and intended to appeal but that step could not be taken until the Taxpayer received certain information.

2.6.2 This letter included the following four paragraphs:

‘Enclosed please find our recent requisition of relevant information/documentation/investigation from related parties concerned for your reference/notification purposes.

Our formal submission of our notice of appeal to the Board of Review shall be made after some time upon receipt of relevant information/documentation/investigation from related parties concerned for our determination and preparation of the grounds of appeal.

Please kindly notify our company if our tactics, strategies and process of notice of appeal to the Board are inappropriate or incorrect.

Your attention and appropriate actions on the captioned subject are much appreciated.’

2.6.3 Enclosed with this letter were copies of letters of the same date addressed to the IRD, the Complaints officer of the IRD, the Office of the Commissioner for Administrative Complaints, the Honor SZETO Wah and the Honor H Y WONG, copies of which were before the Board. The letter to the IRD included thirteen requests for ‘information/documentation/investigation’.

2.7 Letter dated 1 May 1992, from the Clerk to the Board to the Taxpayer, a copy of which was before the Board:

In this reply to the letter of 27 April 1992 the Clerk to the Board advised the Taxpayer:

‘A taxpayer who has validly objected to an assessment but with whom the Commissioner of Inland Revenue in considering the objection has failed to agree may lodge an appeal in accordance with section 66(1) of the Inland Revenue Ordinance (Cap 112) with the Board of Review within one month after the transmission of the Commissioner’s written determination. For an appeal to be valid, section 66(1) requires the notice of appeal to be made in writing addressed to the Clerk to the Board of Review and be accompanied by:

- (a) a copy of the Commissioner’s written determination, containing the statement of facts (with all relevant appendices as stated therein) as found by the Commissioner and the reasons for his determination; and
- (b) a statement of the grounds of appeal from the taxpayer.

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If you decide to appeal against the determination made by the Deputy Commissioner of Inland Revenue on 15 April 1992, please let me have the required documents as stated in paragraph 2(a) and (b) above on or before 14 May 1992.'

- 2.8 Letter dated 4 May 1992, from the Taxpayer to the IRD copied to the Clerk to the Board, a copy of which was before the Board:

In this letter the Taxpayer advised the IRD that:

'Recently, we received letter from Clerk to the Board of Review stating that our appeal is valid unless the Board is satisfied with other reasons/reasonable cause from giving notice of appeal within one month, the Board may extend for such period as it thinks fit the time within which notice of appeal may be given.'

- 2.9 Letter dated 8 May 1992, from the Clerk to the Board to the Taxpayer, a copy of which was before the Board:

In this letter the Clerk to the Board acknowledged receipt of the copy of the letter of 4 May 1992, refer paragraph 2.8 above, and replied as follows:

'Referring to what you mentioned in paragraph 3 of your letter under reply, I enclosed a copy of my letter dated 1 May 1992 for your reference. In the letter, you may find out that I gave no advice on the question of applying for extension of time for lodging a notice of appeal.

You may wish to know that the Board's authority to extend the period for lodging a notice of appeal is limited by section 66(1A) of the Inland Revenue Ordinance (Cap 112). In this connection, I enclosed D11/89, IRBRD, vol 4, 230 for your perusal.

At last, I wish to take this opportunity to remind you that if you decide to file your appeal, please let me have the required documents as stated in paragraph 2(a) and (b) of my letter dated 1 May 1992 on or before 14 May 1992.'

- 2.10 Two letters, letter A and B dated 8 May 1992, from the Taxpayer to the Clerk to the Board, copies of which were before the Board:

- 2.10.1 Letter A:

In this letter the Taxpayer gave notice of appeal and enclosed a copy of the determination and referred to a statement of the grounds of appeal which, in fact, were neither set out in this letter nor in an annexure thereto.

- 2.10.2 Letter B:

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In this letter, effectively, the Taxpayer sought leave to file the grounds of appeal subsequently and gave reasons for that request.

- 2.11 Letter dated 13 May 1992, from the Clerk to the Board to the Taxpayer, a copy of which was before the Board:

In this letter, in reply to the letters referred to in paragraph 2.10 above, the Clerk to the Board advised the Taxpayer:

‘In your letter under reply, you have not furnished a statement of grounds of appeal as required by section 66(1) of the Inland Revenue Ordinance (Cap 112). Accordingly, I shall arrange to convene a Board of review to determine whether your letter [letter A] dated 8 May 1992 can be accepted as a valid notice of appeal.

It is noted that you also wish to apply for an extension of time for filing a statement of grounds of appeal vide your letter [letter B] dated 8 May 1992. The matter will also be referred to the Board of Review for its determination in the same session when a date of hearing is set for this purpose.’

- 2.12 There followed a further correspondence between the Taxpayer and the Clerk to the Board which is not relevant for the purposes of this application.

3. SUBMISSIONS OF THE TAXPAYER

- 3.1 The Taxpayer was represented by its precedent partner, the person who had signed the Taxpayer’s correspondence.

- 3.2 He was reminded by the Board that this was an application for an extension of the time within which the grounds of appeal were to be filed whereby the merits of the appeal were not in issue. He was advised that it was for the Taxpayer to endeavour to satisfy the Board that it had power to grant the extension requested and, if it had such power, that there was reasonable cause for the Board to accede to the application.

- 3.3 The representative referred the Board to the Taxpayer’s letter of 8 May 1992, letter B, refer paragraph 2.10.2 above, and added that it could well be that some of the information requested had been received since that letter had been written but did not provide any information as to this. He then proceeded to focus the Board on aspects of the letter particularly:

- 3.3.1 The reduction of the period within which notice of appeal was to be lodged occasioned by the fact that the determination although dated 15 April 1992 had not been delivered until 24 April 1992.

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- 3.3.2 The office of the Commissioner for Administrative Complaints had only taken two months to investigate the complaint lodged by the Taxpayer in 1991 whilst it had taken the assessor six months to investigate the Taxpayer's affairs and the Commissioner six months to issue the determination. It was unfair that the Taxpayer should only be permitted one month in which to prepare and lodge the documents required, a period considerably reduced by the delay in delivery of the Commissioner's notice and the determination. The Taxpayer needed and was entitled to as much time as it had been taken by the Revenue.
- 3.3.3 The Taxpayer had insufficient and inadequate 'information/documentation/investigation' to enable a decision on whether or not to appeal. The Board was referred to the various letters of 27 April 1992, refer paragraph 2.6.2 and paragraph 2.6.3 above.
- 3.4 The Board was then referred to the final page of the Taxpayer's letter of 8 May 1992, letter B, refer paragraph 2.10.2 above, where the previously requested 'information/documentation/investigation' was listed in eleven numbered paragraphs which, in the wording used in the letter, was essential if the Taxpayer was:
- 'to have a total understanding' and 'truly to understand the case'.
- 3.5 In answering questions from the Board the representative stated that the Taxpayer did not employ a certified public accountant and that whilst he, personally, had a financial/accounting qualification with knowledge of those matters he had no knowledge of tax law.

4. SUBMISSIONS OF THE REVENUE

The submissions on behalf of the Revenue is in writing and can be summarised as follows:

- 4.1 Section 66(1) of the Ordinance permitted the Board to grant an extension of time within grounds of appeal can be filed if the Taxpayer could show reasonable cause within section 66(1A).
- 4.2 The Taxpayer, as a firm, could not be 'ill' nor 'absent from Hong Kong' whereby the only basis on which the application could be made was 'other reasonable cause'.
- 4.3 Whilst the representative of the Taxpayer had submitted that certain information was required before the grounds of appeal could be formulated, the IRD's position was that none of this information was relevant to the preparation of grounds of appeal which could be easily formulated by reference to the determination as opposed to the determination together with other materials.

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- 4.4 It was submitted that the failure to file the grounds of appeal was not as a result of the Taxpayer having been prevented by reasonable cause but as a result of personal preference.

5. REPLY OF THE TAXPAYER

- 5.1 The representative stated that whilst the Taxpayer had the right to apply the Revenue had no right to oppose the application and that, in fact, the Revenue had no right to be present at the application.
- 5.2 He submitted that the Taxpayer required all the information previously requested whereafter it would be in a position to prepare the full grounds of appeal and that an intending taxpayer should afford the same time within which to formulate the grounds of appeal as it had taken the Commissioner to reach his determination.
- 5.3 The representative produced the envelope in which the Commissioner's notice and the determination had been mailed but there was no Post Office date stamp on that. At the request of the Board the IRD produced the certificate of posting for recorded delivery packets. This disclosed that this particular letter was one of ten listed on that particular certificate and that this envelope had been delivered by the Revenue to the Post Office on 21 April 1992.

6. REASONS FOR THE DECISION

- 6.1 Application for an extension of time within which to file the grounds of appeal:
- 6.1.1 For an appeal to be properly instituted section 66(1) obliges the taxpayer:
- 6.1.1.1 to give notice of appeal to the Board and provides that if the taxpayer does not give that notice in writing to the Clerk to the Board together with a copy of the Commissioner's determination (which includes two of the other required documents, namely a statement of the facts and the reasons for the determination) and a statement of the grounds of appeal the Board is prohibited from entertaining an appeal; and
- 6.1.1.2 to comply with the requirements set out in sub-paragraph 6.1.1.1 within one month of the transmission of the determination or such further period as the Board may allow under section 66(1A).
- 6.1.2 Section 66(1A) permits the grant of an extension of time for the giving of notice under limited conditions, namely if the Board is satisfied that a taxpayer has been 'prevented by illness or absence from Hong Kong or other reasonable cause' from complying with the requirements set out in sub-paragraph 6.1.1.1.

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- 6.1.3 In this appeal the Taxpayer has given notice of appeal, refer letter A in paragraph 2.10.1 above, within the period specified in section 66(1)(a) but failed to file any grounds of appeal, refer Letter B in paragraph 2.10.2 above, within that period.
- 6.1.4 Section 66(1A) does not expand or qualify the expression ‘notice of appeal’ by words such as ‘and/or any of the other documents referred to in section 66(1)’. The Board interprets this as limiting its power to extend time to cases in which no steps have been taken by the would-be taxpayer as opposed to cases in which the notice has been filed within the prescribed time but, as in this case, without the ‘statement of the grounds of appeal’. That this interpretation reflects the intent of the legislature is supported by the limited grounds open to an applicant:
- 6.1.4.1 The word ‘illness’ would require the applicant to satisfy the Board that a physical or mental disability precluded a would-be taxpayer from attending to his affairs.
- 6.1.4.2 The expression ‘absence from Hong Kong’ indicates that the Board would have to be satisfied that the would-be taxpayer was unaware of the delivery by the Commissioner of his determination for at least some reasonable time subsequent to transmission.
- 6.1.4.3 The expression ‘other reasonable cause’ is not one which is capable of exact definition but, nevertheless, it is not difficult to conceive of circumstances in which an individual may be prevented from acting promptly. An obvious illustration is the individual who is selected as a juror for a case which is set down for hearing for an extended period. The public is generally aware of the fact that in a recent criminal case which lasted some nine months the court was sitting from early in the morning until early afternoon, the early daily adjournment being to enable the members of the jury to return to their places of employment to fulfil their duties. These jurors were in the position of having to cram in a day’s work between the time they were able to get to their respective places of work until they closed for the evening. These circumstances could well prevent the conscientious individual from attending to his or her own personal affairs. Obviously, the Board would give sympathetic consideration to an application by an individual caught-up in that type of situation.
- 6.1.5 The question as to whether or not the Board has power to permit a taxpayer to file the grounds of appeal subsequent to the expiration of the prescribed period came before the Board in 1972 in D19/71, IRBRD, vol 1, 58. It is noted:
- 6.1.5.1 Sections 66(1) and (1A), as presently in effect, were enacted in section 42 of the Inland Revenue (Amendment) Ordinance No 2 of 1971 which came into effect on 21 January 1971. An inconsequential amendment to section 66(1A) was made by section 12 of the Inland Revenue (Amendment) Ordinance No 7

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of 1986 when the expression 'the Colony' was substituted by the expression 'Hong Kong'. The section 66 which was replaced by section 42 of Ordinance No 2 of 1971 contained no power on the part of the Board to extend the time within which the notice of appeal and/or any documents to be filed therewith was to be filed. Accordingly, when the Board heard D19/71 it was hearing the application in accordance with section 66(1A) as now in effect.

6.1.5.2 The decision in that appeal is dated 13 April 1972 and the Board was advised by the Revenue that the assessment appealed against in that particular case was an assessment made prior to 1 April 1971. However, the Board was applying section 66(1A) as it is in force and effect today.

6.1.6 In D19/71 the Board:

6.1.6.1 determined that as the Board is constituted under the Ordinance the Board only has such powers as are conferred by the Ordinance and that there was no inherent jurisdiction to extend time; and

6.1.6.2 the discretion conferred by section 66(3), which relates to additional grounds of appeal, did not confer upon the Board power to extend the time within which the grounds of appeal themselves were to be filed.

6.1.7 The Board is satisfied that its decision in D19/71 is the correct interpretation of its powers with respect to applications for extensions of time within which to file the statement of the grounds of appeal.

6.2 Posting of the Commissioner's notice and the determination:

6.2.1 The Board feels obliged to comment on the delay in the posting of these documents. These are both dated 15 April 1992 which was the Wednesday before the Easter holidays in 1992. The Board has little doubt that the Deputy Commissioner would have been aware that from the day following 15 April 1992 there would be four complete days without any mail deliveries and that there was the potential for subsequent delays attributable to the build-up of mail from the Thursday before Easter and throughout the Easter holidays. This is something which could have been consciously recognised by deferring signature until after the Easter holiday whereby, had the package been delivered to the Post Office on 15 or 16 April 1992, the Taxpayer would not have been deprived of almost one quarter of the period within which the notice of appeal and grounds of appeal had to be formulated and filed.

6.2.2 Although the Board does not suggest that the Commissioner would have been aware of this, the simple fact is that the letter was not posted on the day of or day after signature but remained in the department throughout the Easter holiday. Although the IRD does dispatch a considerable number of recorded delivery packages during the course of each working day the Board does

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consider that some attempt ought to be made by the IRD to dispatch correspondence of this nature very promptly and that if internal procedures prevent this, some attempt should be made to ensure there is no undue delay between the time mail is collected from the out-tray of the person signing the documents to the time the package is delivered by the IRD to the Post Office.

6.2.3 In this appeal, as the Clerk to the Board was not made aware of the delay in the mailing of the package notwithstanding that this was one of the Taxpayer's tangible complaints, it was generally accepted time commenced to run from 15 April 1992. However, the date on which the Commissioner complied with section 64(4) was not the date on which the documents were signed but 21 April 1992, namely the date the package was 'transmitted' or sent out of the IRD. As there is no way in which the Clerk to the Board will know the day time began to run at the time a notice of appeal is lodged, it would seem appropriate for the IRD to notify the Clerk of the date of transmission immediately upon service upon the IRD of the notice and grounds of appeal in fulfilment of section 66(2). This will be of considerable assistance when a would-be taxpayer enquires as to the last date for compliance with section 66(1).

6.3 The merits of the application:

Although it is not necessary for the Board to address this issue, the Taxpayer may wish to know whether the application would have succeeded had it been an application which the Board is empowered to entertain.

6.3.1 D11/89, IRBRD, vol 4, 230.

This case illustrates one set of circumstances in which the Board will not exercise its discretion. In that case the Board declined an application based on the claim that the would-be taxpayer needed time to obtain evidence. The Board was satisfied that the need for the taxpayer to obtain evidence was not something which prevented the filing of a notice of appeal complying with the requirements set out in sub-paragraph 6.1.1.1. above.

6.3.2 Delay in transmission:

This was the only ground which the Board would have considered relevant to this application. Whilst there was a delay in the transmission by the IRD of the section 64(4) notice, and whilst everyone was labouring under the misapprehension that time commenced to run on 15 April 1992, in the circumstances of this appeal the Board would not have been minded to exercise its discretion under section 66(1A) for the following reasons:

6.3.2.1 The correspondence noted in paragraph 2.6.3 above demonstrates that the partners of the Taxpayer were disgruntled by the assessment as, within three days of the date on which the representative said the determination was

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delivered, they wrote lengthy letters to various parties raising complaints, refer paragraph 2.6.3 above, and framed a request to the IRD for a wide range of information almost all of which, if supplied in detail, would have been totally irrelevant to an appeal which would be or otherwise limited to the correctness of the determination. As an example; the seventh of the thirteen requests reads:

‘Reply on: Whether your determination had considered the fact that it seemed section 17(2) of the Inland Revenue Ordinance is obsolete and not in line with current practice and investigate whether amendments/revisions have to be made;’

This demonstrates that the Taxpayer was not directing its efforts towards mounting an appeal on the merits of the determination.

- 6.3.2.2 As to the disallowance of the claim with respect to remuneration paid to the Taxpayer’s partners: the determination did not require any construction of the Ordinance.
- 6.3.2.3 As to the disallowance of the claim for depreciation: the Taxpayer failed to respond to requests for information that this expenditure was incurred with respect to assets which qualify for this allowance.
- 6.3.2.4 The issues referred to in the two preceding sub-paragraphs were well-known to the Taxpayer for many months before the date of the determination and ought properly to have been anticipated.
- 6.3.2.5 It may well have been that the Taxpayer was under the misapprehension that the grounds of appeal were required to set out exhaustive submissions as to why the determination was wrong, hence leading to some of the questions. However, this is not the case and if the Taxpayer had taken professional advice the partners of the Taxpayer would have been disabused of that misunderstanding in short order and professional advisers would have been in no difficulty whatsoever in formulating appropriate grounds of appeal within the remaining part of the month commencing from the day of transmission of the determination. A misunderstanding as to the requirements for a ‘statement of the grounds of appeal’ does not amount to ‘reasonable cause’.
- 6.3.2.6 Although the Board accepts that delivery of the Commissioner’s notice and the determination was not effected until 24 April 1992, the Board would not have considered that, in the particular circumstances, that delay, and whether calculated from 15 April 1992 or 21 April 1992, ‘prevented’ the Taxpayer from complying with the requirements of section 66(1). Accordingly, there would not have been a ‘reasonable cause’ to merit favourable consideration of an application for an extension of time.

7. DECISION

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For the reasons given in section 6.1 above, this application is dismissed.