

Case No. D2/07

Profits tax – notice of appeal filed within time yet without a copy of the determination – whether jurisdiction to grant extension of time – section 66(1) and 66(1A) of the Inland Revenue Ordinance ('IRO')

Panel: Anthony Chan Kin Keung SC (chairman), Patrick Ho Pak Tai and Albert To Tak Pui.

Date of hearing: 26 March 2007.

Date of decision: 17 April 2007.

The notice of appeal of the taxpayer was not accompanied by a copy of the determination. The determination was then filed by the Taxpayer yet it was out of time.

There is no dispute that such notice of appeal was 'invalid' and a preliminary issue for the Board was whether such invalidity can be cured.

Held:

1. Pursuant to the provisions of section 66(1), the notice of appeal cannot be entertained if it was not, at the time it was given, accompanied by a copy of the determination.
2. Section 66(1A) cannot be invoked and the invalidity cannot be cured:
 - 2.1 On a proper reading of section 66(1A), the power to enlarge time is confined to cases where there is no notice of appeal given within the prescribed one month period.
 - 2.2 The power is not applicable to cases where there is a notice of appeal given within time but the notice is not a valid one.
- 3 The Board has no power to cure the invalidity in question and would not entertain the taxpayer's appeal.

Appeal dismissed.

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Cases referred to:

D48/05, IRBRD, vol 20, 638
D62/06, IRBRD, vol 21, 1154

Ng Ka Ho of Maxforest Management Limited for the taxpayer.
Chan Wai Yee and Chan Sze Wai for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Taxpayer against a determination by the Deputy Commissioner of Inland Revenue dated 11 October 2006 ('the Determination') rejecting its contention that it has incurred a loss in the year of assessment 2000/01 and that such loss should be available for set-off against its profits for the assessment year 2003/04.

2. There is no dispute between the parties that the Notice of Appeal given by the Taxpayer to this Board ('the Notice of Appeal') is 'invalid' for the reason explained below and there is a preliminary issue in this appeal as to whether that invalidity can be cured ('the Preliminary Issue'). This Decision is of some importance because it may be seen to be inconsistent with two recent decisions of this Board as discussed below.

3. The determination of the Preliminary Issue involves a close examination of the provisions of section 66(1) and (1A) of the Inland Revenue Ordinance, Chapter 112 ('IRO'), the terms of which are 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

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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). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.'

4. For purpose of determining the Preliminary Issue, this Board has elicited from the parties a set of agreed facts as follows:

- (a) The Determination was dated 11 October 2006;
- (b) It was transmitted to the Taxpayer on 16 October 2006;
- (c) The one month period for giving notice of appeal pursuant to section 66(1) of the IRO expired on 15 November 2006;
- (d) The Notice of Appeal was delivered by hand to this Board on 10 November 2006;
- (e) The Notice of Appeal was not accompanied by a copy of the Determination;
- (f) By a letter from this Board to the Taxpayer dated 14 November 2006 [B1/22], it was pointed out, inter alia, that as the Notice of Appeal was not accompanied with a copy of the Determination it could not be entertained according to section 66(1);
- (g) A copy of the Determination was delivered by hand to this Board on 6 December 2006.

5. Pursuant to the provisions of section 66(1), it is quite clear that the Notice of Appeal cannot be entertained by reason of the fact that it was not, at the time it was given, accompanied by a copy of the Determination. This Board has so held in D48/05, IRBRD, vol 20, 638. The relevant parts of that Decision are as follows:

'19. The section provides that a taxpayer who wishes to appeal under the section must give notice of appeal to the Board, but "no such notice [of appeal] shall be entertained unless it is given in writing to the clerk to the

Board and is accompanied by” the requisite documents. The section draws a distinction between a notice of appeal and the documents which must accompany it; and the one month limit applies to the giving of the notice of appeal. It may therefore be argued that as long as the notice of appeal itself is given within one month, the appeal is lodged within time.

20. *On the other hand, the Board is enjoined by the section from “entertaining” – which we take to mean “admit for consideration” – any notice of appeal given unless it is accompanied by the requisite documents. In our view this points strongly to the requirement that the notice of appeal must have all the requisite documents enclosed in order to be valid. It makes no sense that a notice of appeal could be validly given despite the absence of the requisite documents, but the Board is not being able to entertain the appeal.*
21. *Further, the above interpretation is strengthened by the absence of any general discretion given to the Board to extend time to supply the requisite documents when the same do not accompany the notice of appeal. In this connection, it should be noted that the jurisdiction to extend time under section 82B(1A) only applies to the giving of the notice of appeal but not to any of the accompanying documents.*
22. *The Appellant contended that the failure to provide the section 82A(4) notice was only a technical failure. We cannot agree with that view. As pointed out in Case no D4/99, IRBRD, vol 14, 141, the statutory requirements are intended to be observed. Both the Inland Revenue and the taxpayer are entitled to have any disputes resolved as quickly as possible. For that reason, the time limit for appeal under section 66(1) is strictly construed. The same applies to the identically worded section 82B(1A). Non-compliance with the statutory requirements creates delay and may cause prejudice, and is not conducive to the efficient administration of the tax system.*
23. *For these reasons, it is our view that on the true construction of section 82B(1), a valid notice of appeal under the section must be accompanied by all the requisite documents (i) to (iv). Of course the grounds of appeal may appear in the notice itself; but the other documents, if they exist, must accompany the notice. A failure to comply with the section is not a mere irregularity but would render a notice of appeal ineffective.*

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24. *The result is that notice of appeal in this case, although delivered to the Board on 31 January 2005, is not validly given until 7 February 2005 and is therefore seven days late.'*

6. Although in D48/05 this Board was dealing with the additional tax regime under section 82B of the IRO, the relevant provisions are practically identical to those under section 66.

7. This Board agrees with the Decision in D48/05 as set out above. D48/05 was followed by a later decision of this Board in D62/06, IRBRD, vol 21, 1154. This Board wishes to point out that the supply of a copy of the Determination is essential to enable an appeal to be properly processed. As an illustration, simply by looking at the Notice of Appeal [B1/1], the reader would not be in a position to adequately understand what the appeal is about.

8. In accordance with the analysis in D48/05, the Notice of Appeal was not validly given until 6 December 2006, well outside the one month period prescribed under section 66(1). The question therefore is whether the invalidity can be cured.

9. In D48/05, after holding that the notice of appeal was not validly given within time the Board went on to consider, without going into the question whether it had the power to do so, an extension of time under section 66(1A). It was held that the appellant had failed to discharge the burden of proof and an extension was refused (paragraphs 25 to 27).

10. With great respect, this Board perceives certain tension between the proposition that there was no general discretion given to the Board to extend time to supply the requisite documents (see paragraph 21 of the Decision in D48/05) and an exercise of discretion under section 66(1A) which has precisely that effect.

11. Likewise in D62/06, the Board did not address the issue whether section 66(1A) can be invoked to cure an invalidity of the kind in question ('the Invalidity'). Nevertheless, the Board went on to consider the exercise of its discretion under section 66(1A). However, there is a part of the Decision (page 9, paragraph 22) which may be seen to highlight the tension identified above:

'We concur that the Taxpayer's purported notice of appeal without the Determination as required by law is not a valid notice of appeal and secondly the Board has no jurisdiction to extend the time for filing the required documents, because Section 66(1) of the Ordinance clearly states that a notice of appeal shall not be entertained unless it is given in writing and is accompanied by a copy of the Commissioner's determination and other specified documents and Section 66(1A) of the Ordinance provides only extension of time to file a notice of appeal and not the Commissioner's determination and other specified documents.'

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12. In fairness, although it may be said that it is implicit from D48/05 and D62/06 that it was accepted by the Board that section 66(1A) could be invoked to cure the Invalidity, it is reasonably clear that the point was not argued and ruled upon.

13. For the reasons explained below, this Board is of the respectful opinion that section 66(1A) cannot be so invoked and the Invalidity cannot be cured under the existing legislation.

14. The key to the determination of the Preliminary Issue is the proper construction of section 66(1A) which is the source of the only power given to this Board in the event of non-compliance with section 66(1). On a proper reading of section 66(1A), it is quite clear that the power to enlarge time is confined to cases whether there is no notice of appeal given within the prescribed one month period and that the power is not applicable to cases where there is a notice of appeal given within time but the notice is an invalid one by reason of the absence of the relevant determination.

15. This interpretation is clear because the enlargement power is only engaged when the appellant was prevented by illness, etc., from giving notice. In other words, no notice could have been given within time by reason of illness, etc. By definition, the Invalidity does not involve such a situation.

16. Can it be said that on a purposive construction of section 66(1A), either (i) 'giving notice' means giving a valid notice or (ii) there is nothing to stop an appellant from giving a fresh notice with an enlargement of time? This Board is not attracted by such propositions. Firstly, they would do violence to the clear wording of the sub-section. Secondly, it is apparent that an invalid notice is nevertheless recognized as a notice, because section 66(1) refers to 'no such notice shall be entertained ...'. Thirdly, there is no compelling reason to strain the meaning of section 66(1A).

17. Might it be said that if the construction set out in paragraph 14 above is correct, then an appellant who has given an invalid notice is in a worse position than one who has not given any notice within time (in the latter case section 66(1A) may be invoked)? On mature reflection, this 'unfairness' is more apparent than real. Two things must be remembered. Firstly, the discretion given to the Board under section 66(1A) is very narrow. It is confined to cases where an appellant is prevented from giving a notice by one of three (possibly a combination thereof) 'reasons', namely, illness, absence from Hong Kong and other reasonable cause. Secondly, pursuant to section 66(1)(a) the one month period would not begin to run until all the requisite documents have been supplied to the appellant.

18. In the premises, in a case where an appellant has given a notice within time which was not accompanied by the requisite document(s), he cannot in any event maintain that he was prevented by illness or absence from Hong Kong from giving a valid notice (one accompanied by the requisite documents). As regards other reasonable cause, it is not easy to envisage what reasonable cause there can be which would prevent an appellant from enclosing the requisite

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documents with his notice given that he, by definition, had them. It must be said that the law normally assumes that people know the law and observe the same.

19. Further, in an unusual event where, for example, the requisite documents have been stolen from the appellant, he would have the right not to give an invalid notice but to obtain replacement of the requisite documents and, if time has expired by then, apply for an enlargement of time under section 66(1A).

20. Finally and for completion, this Board has also considered the possible argument that no extension of time is required in respect of a notice which has been given within time but without the requisite documents. Once the documents are supplied, the notice becomes valid and can be entertained. This argument is rejected for two reasons. Firstly, the mandatory terms of section 66(1) is such that a notice of appeal 'shall [not] be entertained unless ... it is ... accompanied by [the requisite documents] ...'. The suggestion that an invalid notice can later be entertained (when the invalidity is cured) is inconsistent with such wording. Secondly, if that argument is right, the appeal process can be subjected to lengthy delay because there is no time limit in section 66 for the subsequent supply of the requisite documents.

21. By reason of what has been elaborated above, this Board has no power to cure the invalidity in question and entertain the Taxpayer's appeal. In the premises, this appeal must be dismissed and the Determination is confirmed.