

Case No. D26/09

Salaries tax – appeal out of time – absence from Hong Kong – whether to consider the appeal – section 66 of the Inland Revenue Ordinance (‘IRO’).

Panel: Colin Cohen (chairman), Julia Pui G Lau and Edward Shen.

Date of hearing: 29 July 2009.

Date of decision: 24 August 2009.

The Taxpayer was late in filing a notice of appeal in respect of a salaries tax assessment (the ‘Determination’). The Determination had been sent by registered mail to the Taxpayer at an address which was the address of the Taxpayer’s previous employer whilst he was working in Hong Kong.

The Taxpayer sought an extension of time for the filing of his notice of appeal on the basis that he was currently working in North Africa and had just received the Determination. He provided no details as to how and when he received the Determination and gave no further explanation as to the reasons for his inability to comply with the provisions of section 66(1A) of the IRO.

Held:

1. The Taxpayer’s absence from Hong Kong does not confer an automatic right for an extension of time for filing the appeal. There was no evidence that the Taxpayer was prevented from lodging an appeal within the period prescribed, by his absence from Hong Kong. The Taxpayer had not provided the Board with any explanation as to why the Determination was sent to him late. Indeed, the Taxpayer has not yet shown to the Board as to how and when the Determination was received by him. (D11/89, IRBRD, vol 4, 230; D19/01, IRBRD, vol 16, 183 applied.)
2. The Taxpayer was not prevented by any means from lodging a notice of appeal within the one month period by his absence from Hong Kong. As to whether or not there was any ‘other reasonable cause’ which he was prevented from filing the notice of appeal within time, there was no evidence put before the Board to show that there were any other circumstances for the Board to consider. (Chow Kwong Fai v CIR CACV 20/2005 considered.)

Application refused.

Cases referred to:

D11/89, IRBRD, vol 4, 230
D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5, 537
D86/03, IRBRD, vol 18, 843
D146/01, IRBRD, vol 17, 88
D19/01, IRBRD, vol 16, 183
Chow Kwong Fai v CIR CACV 20/2005

Taxpayer in absentia.

Chan Wai Yee and Lai Wing Man for the Commissioner of Inland Revenue.

Decision:

1. The Taxpayer did not appear before the Board. However, he had previously written on 13 July 2009 requesting that this appeal be heard in his absence. We were satisfied that the reasons given by him were sufficient to hear this appeal in his absence pursuant to section 68(2D) of the Inland Revenue Ordinance ('IRO').

Introduction

2. The Taxpayer has appealed against the Determination dated 4 February 2009 ('the Determination') by the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner'). By that Determination, the Deputy Commissioner upheld a salaries tax assessment for the year 2005/06 showing a net chargeable income of \$1,509,507 with tax payable thereon in the sum of \$291,101.

3. However, it was not until 4 May 2009 that the Clerk to the Board of Review received the Taxpayer's notice of appeal which in turn was dated 28 April 2009.

4. Therefore, we need to consider whether or not the Taxpayer's late appeal should be entertained.

5. Ms Chan Wai-yee on behalf of the Deputy Commissioner submits that the Taxpayer was in no way prevented from appealing within the relevant time limits prescribed under section

66(1)(a) of the IRO. She submits that his failure to file the appeal in time was not a result of having been prevented by illness or absence from Hong Kong or other reasonable cause and therefore, urges the Board to reject the Taxpayer's application for extension of time to pursue his appeal.

The facts

6. The relevant facts for us to consider are as follows:

- (a) On 4 February 2009, the Determination with the relevant covering letter was sent by registered mail to the Taxpayer c/o Company A at Address B. Company A was the Taxpayer's previous employer whilst he was working here in Hong Kong. In a covering letter, the Taxpayer's rights, procedures and time limits in lodging an appeal were clearly set out. The relevant details including the address, telephone, fax line and email of the Clerk to the Board were also set out.
- (b) On 5 February 2009, the Determination was delivered to the addressee and there was no record that the Determination was undelivered.
- (c) On 4 May 2009, the Clerk to the Board received the Taxpayer's notice of appeal dated 28 April 2009. In his notice of appeal, the Taxpayer asked for an extension of time. He states as follows:

'.....

According to the Hong Kong regulation I request an extension of the appeal period due to the late transmission of the writen [sic] determination: As the IRO knows I left Hong Kong in early 2006. I am currently working in North Africa and just have received the above document.

.....'

The relevant statutory provisions

7. Section 66 of the IRO reads 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-*

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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.

- (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).'*

The relevant case law

8. It is clear that pursuant to section 66(1)(a) of the IRO that the one month prescribed period starts to run after transmission of the Deputy Commissioner's Determination.

9. The provisions of section 66(1A) are very clear and restrictive. In particular, we refer to the following decisions:

- (a) D11/89, IRBRD, vol 4, 230;
- (b) D9/79, IRBRD, vol 1, 354;
- (c) D3/91, IRBRD, vol 5, 537;
- (d) D86/03, IRBRD, vol 18, 843;
- (e) D146/01, IRBRD, vol 17, 88;
- (f) D19/01, IRBRD, vol 16, 183.

10. In particular, we refer to the decision handed in the Board of Review decision D11/89, IRBRD, vol 4, 230 where it stated as follows:

'..... The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, 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

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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.'

11. It is clear also that the word 'prevented' cannot appropriately be used in a situation where a taxpayer is able to give notice but has failed to do so. It is also clear that the decision showed that the time limits that are imposed must be observed.

12. A mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one month period as specified under section 66(1A). In particular, we refer to D19/01, IRBRD, vol 16, 183, there, the Taxpayer had been away from Hong Kong for more than one month before the Determination was issued. There was no record indicating his return to Hong Kong. In that appeal, he was five months' late. The Board in rejecting that application for extension of time to file an appeal stated as follows:

'Absence from Hong Kong does not confer an automatic right for extension of time. It is for the Taxpayer to satisfy us that he was so prevented from giving the requisite notice No explanation was furnished to us as to why the determination escaped his attention. We are therefore not prepared to extend time in favour of the Taxpayer.'

13. We also have regard to the Court of Appeal decision in Chow Kwong Fai v CIR CACV 20/2005. It was held that the word 'prevented' which was utilized in section 66(1A) had the meaning of 'unable to' and in turn, although providing a less stringent test than the word 'prevent', it did indeed impose a higher threshold than a mere excuse. The 'reasonable cause' could not be extended to cover unilateral mistakes made by the taxpayer.

The Taxpayer's position

14. In the Taxpayer's arguments, as can be seen from the Taxpayer's notice letter dated 28 April 2009 (see paragraph 6(c) above). The Taxpayer provides us with a bland statement that he was currently working in North Africa and had just received the Determination. He provided no details as to how and when he received the Determination and gave no further explanation to us as to the reasons for his inability to comply with the provisions of section 66(1A).

Our analysis

15. It is clear that the Determination was dispatched by registered mail on 4 February 2009. This was delivered to the Taxpayer's last known correspondence address in Hong Kong on 5 February 2009. Hence, the normal one month period for lodging an appeal under section

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66(1)(a) would have expired on 5 March 2009. The Taxpayer was therefore some two months' late. There was no evidence before us that the Taxpayer was either ill or he was prevented by such illness to file a timely appeal. In short, the Taxpayer claims that his lateness was due to the late transmission of the Determination as he was working in North Africa. However, from the documents we have had sight of, it is clear that the Taxpayer had left Hong Kong when the Determination was delivered to his correspondence address in Hong Kong.

16. We accept that the Taxpayer's absence from Hong Kong does not confer an automatic right for an extension of time for filing the appeal. There was no evidence before us that the Taxpayer was prevented from lodging an appeal within the period prescribed, by his absence from Hong Kong. In short, the Determination was delivered to his correspondence address in Hong Kong. The Taxpayer had not provided us with any explanation as to why the Determination was sent to him late. Indeed, the Taxpayer has not yet shown to us as to how and when the Determination was received by him.

17. It is of interest to note that on 24 April 2009, the IRD issued the Taxpayer a further additional salaries tax assessment for 2006/07. This was sent to his Hong Kong address. The Taxpayer lodged a notice of objection against this assessment on 5 May 2009. Therefore, it is quite clear that the Taxpayer was able to file a notice of extension within two weeks.

Conclusion

18. Therefore, we have no hesitation in coming to the conclusion that the Taxpayer was not prevented by any means from lodging a notice of appeal within the one month period by his absence from Hong Kong. We have also considered whether or not there was any 'other reasonable cause' which he was prevented from filing the notice of appeal within the one month period. Again, there was no evidence put before us to show that there were any other circumstances for us to consider. It is also clear that the Taxpayer has always provided the IRD with a Hong Kong address as his correspondence address, and has not provided any overseas address to the IRD.

19. Therefore, having carefully considered all matters and having reviewed the documents we have had sight of and listened to the submissions put forward to us by Ms Chan Wai-ye, we reject the Taxpayer's application for an extension of time in respect of this matter. The appeal therefore is dismissed.