

**Case No. D28/10**

**Salaries tax** – extension of time to give notice of appeal – sections 66(1) and 66(1A) of the Inland Revenue Ordinance (‘IRO’).

Panel: Kenneth Kwok Hing Wai SC (chairman), Chyvette Ip and Emmanuel C C Kao.

Date of hearing: 25 October 2010.

Date of decision: 8 November 2010.

The taxpayer filed his notice of appeal 4 days after the 1-month time limit expired. He conceded that it was not a case of illness or absence from Hong Kong but asserted that it was a case of rescuing the business and employees from a larger failure that would have affected the entire business group, given the potentially significant losses that his businesses were facing.

**Held:**

1. On the taxpayer’s version, he was able to give notice of appeal on time, by delivering, or causing to be delivered, the required appeal documents by hand to the Clerk’s Office. It was not a case of inability and on Woo VP’s test, he has failed to make out the basis for time extension.
2. We turn now to Cheung JA’s test. He did not appeal within time, not because of what he asserted had happened, but because he did not take the deadline with the seriousness it deserved and took no or no reasonable step to ensure compliance.

**Application refused.**

Cases referred to:

D41/05, (2005-06) IRBRD, vol 20, 590  
Chow Kwong Fai v CIR [2005] 4 HKLRD 687

Taxpayer in person.

Leung Wing Chi and Fong Wai Hang for the Commissioner of Inland Revenue.

**Decision:**

**Issue**

1. The issue in this case is whether time for appeal should be extended under section 66(1A) of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance').

**The facts**

2. We make the following findings of fact.

3. By a Determination dated 3 November 2009, the Deputy Commissioner of Inland Revenue determined the appellant's objections to salaries tax assessments for the years of assessment 2004/05 and 2005/06.

4. The Determination was posted on 3 November 2009 under cover of a letter which informed the appellant of his right to appeal within 1 month after the transmission to the appellant of the written determination and listed the Board of Review's address, opening hours, telephone and fax numbers and email address.

5. The Determination and the covering letter were delivered by post to the appellant's address on 4 November 2009, Wednesday.

6. The appellant left Hong Kong SAR on 29 October 2009 and returned on 3 November 2009. He stayed in Hong Kong throughout the period from 4 November 2009, Wednesday, to 8 December 2009, Tuesday.

7. His notice of appeal was dated 2 December 2009, Wednesday.

8. He posted or caused his notice of appeal to be posted. The envelope was postmarked 7 December 2009, Monday.

9. The notice of appeal was received by the Clerk's Office on 8 December 2009, Tuesday.

10. The appellant stated in the opening paragraph of his notice of appeal that:

'I refer to the letter from the Commissioner dated 3 November 2009 a copy of which is attached. I apologise for the delay in submitting this appeal but I am running a number of small businesses and it was been (sic) an exceptionally busy period.'

11. On 22 October 2010, Friday, he delivered, or caused to be delivered, by hand one set of documents to the Clerk's Office under cover of his letter dated 22 November 2010 (*sic*).

**Authorities on extension of time for appeal**

12. Section 66(1) & (1A) provide 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-*

*(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).'*

13. In D41/05, (2005-06) IRBRD, vol 20, 590 at paragraphs 11 – 17, the Board held that giving notice of appeal to the Board meant actual service of the notice on the Clerk.

14. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687 at paragraph 20, Woo VP stated that the word 'prevented' should best be understood to bear the meaning of the term '未能' ('unable to') in the Chinese version.

*'In my opinion, while a liberal interpretation must be given to the word 'prevented' used in s 66(1A), it should best be understood to bear the meaning of the term "未能" in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means "unable to". The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher*

*threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:*

*“It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community.”*

It should be noted that the citation from Case U175 was made in the context of the ‘rationale for the stringent time limit for raising tax objections and appeals’.

Both Cheung JA<sup>1</sup> and Barma J<sup>2</sup> agreed with the judgment of Woo VP.

15. Cheung JA formulated the following test:

*‘If there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement. It is not necessary to put a gloss on the word ‘prevent’ in its interpretation. If an appellant does not file the notice of appeal within time because of that reasonable cause, then it must be the reasonable cause which has ‘prevented’ him from complying with the time requirement’<sup>3</sup>.*

Barma J<sup>4</sup> agreed with the Cheung JA’s additional observation.

### **The Board’s Decision**

16. The Determination was transmitted to the appellant on 4 November 2009. The 1-month time limit expired on 4 December 2009. The notice of appeal arrived at the Clerk’s Office on 8 December 2009. It was out of time by 4 days.

17. The appellant conceded that this was not a case of illness or absence from Hong Kong. There is no allegation of illness and the appellant remained in Hong Kong throughout the relevant period.

18. What remains to be considered is whether the appellant ‘was prevented by ... other reasonable cause from giving notice of appeal in accordance with subsection (1)(a)’.

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<sup>1</sup> At paragraph 38.

<sup>2</sup> At paragraph 47.

<sup>3</sup> At paragraph 46.

<sup>4</sup> At paragraph 47.

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19. The appellant confirmed on oath the truth of his First Witness Statement. He asserted in paragraphs 8 and 9 that (written exactly as it stands in the original):

‘ 8. ... As you will see, urgent actions required to rescue the other business and undertake the damage limitation continued relentlessly throughout November 2009 to the end of the month.

9. At end of November 2009, I read the Commissioner’s determination and on 2nd December (Wednesday). I finalised my objection notice. I left the letter giving notice to my in-house accountant, on the understanding that it would be sent forthwith in accordance with his usual practice. He normally did the post every day. However, I assume he did not post it on Thursday, as intended, but rather sent it at start of the following week as it seems to have it arrived the Board of Review on 8th December (Tuesday). I accept I had not drafted the letter to give notice of my appeal until close to the end of the one month period, however, this was a case of rescuing the businesses and employees from a larger failure that would have affected the entire business group, given the potentially significant losses that my businesses were facing as a result of the closure of the ...’

20. On the appellant’s version, he finalised his notice of appeal on 2 December 2009. He had been informed by the Deputy Commissioner of the deadline for appeal. Plainly, he was able to give notice of appeal on time, by delivering the required appeal documents by hand to the Clerk’s Office on 3 or 4 December 2009 or causing those documents to be delivered by hand to the Clerk’s Office. It was not a case of inability and on Woo VP’s test, he has failed to make out the basis for time extension.

21. We turn now to Cheung JA’s test. He did not appeal within time, not because of what he asserted had happened in November 2009, but because he did not take the deadline with the seriousness it deserved and took no or no reasonable step to ensure compliance between 2 and 4 December 2009.

22. Thus, the appellant also fails under the test propounded by Cheung JA.

**Conclusion and disposition**

23. The appellant has failed to make out a case for extension of time. We decline to extend time and that is the end of the appellant’s intended appeal.