Case No. D30/12

Procedure – appeal – filing notice of appeal out of time – extension of time – whether the Appellant was prevented from giving notice within time by being absent in Hong Kong – whether the Appellant exercised due diligence to be notified by correspondence – the Inland Revenue Ordinance ('the IRO') sections 58 and 66.

Salaries tax – gratuity – whether assessable – whether gratuity could be regarded as statutory long service payment – whether Appellant terminated employment contract being permanently unfit for work – Employment Ordinance ('the EO') sections 10(aa) and 31R.

Panel: Cissy K S Lam (chairman), Leung Wai Keung Richard and Ng Man Sang Alan.

Date of hearing: 18 June 2012.
Date of decision: 5 October 2012.

The Appellant retired from work at 54 years old. According to his employment contract, pre-retirement funds could be paid at his employer's discretion. His employer paid him gratuity equal to two-thirds of his salary multiplied by the number of years of his service, plus another month of salary. His employer reported the gratuity as partly long service payment and partly ex-gratia payment upon retirement. The assessor assessed the entire gratuity (less MPF contribution) to be assessable for salaries tax over the 3 years prior to the payment of the gratuity. The Deputy Commissioner confirmed the assessment in his Determination ('the Determination'). The Appellant appealed against the Determination, arguing that $390,000 of the gratuity should be treated as long service payment and should not be assessable according to practice.

The Appellant was absent from Hong Kong for long period since retirement, and used the address of his wife's relative as his correspondence address since then. He would only return to Hong Kong periodically for medical treatment. The Determination was sent by registered mail to that address and receipt was acknowledged on 4 August 2011. But the Appellant only filed a complete notice of appeal by 26 September 2011. The Appellant argued that he did not know the Determination was sent to him until he came back to Hong Kong for medical treatment, and thus he was late in filing the notice of appeal.

Held:

1. Time for appeal started to run since 4 August 2011 when the Determination was sent to the Appellant in compliance with section 58(2) of the IRO. Whether or when the Appellant had actual knowledge of the Determination

was irrelevant (Chan Chun Chuen v CIR CACV 113/2011 applied).

2. Absence from Hong Kong does not confer an automatic right for extension of time to file the notice of appeal under section 66(1A) of the IRO. The Appellant would need to show that his absence from Hong Kong 'prevented' him from giving proper notice of appeal (D19/01, IRBRD, vol 16, 183 applied).

3. The word 'prevented' imposes a higher threshold than a mere excuse. Neither laches, ignorance of one's rights or lack of actual knowledge would be sufficient grounds for granting an extension (Chow Kwong Fai v CIR [2005] 4 HKLRD 687; D9/79, IRBRD, vol 1, 354 at 355; Chan Chun Chuen CACV 113/2011 applied).

4. (By a majority) Since the Appellant knew that he would be out of Hong Kong for lengthy periods of time, he should exercise due diligence to ensure that he would be notified of his correspondence. As the Appellant failed to show he did exercise due diligence, extension of time would not be granted.

5. Any retirement payment made as a reward for past services pursuant to an employment contract is subject to salaries tax (Fuchs v CIR [2011] 2 HKC 422). Statutory long service payments are arguably paid in accordance with section 31R of the EO and fall outside the ambit of contractual payments.

6. The gratuity does not satisfy section 31R(1)(b) of the EO, because he was not older than 65 when he retired. The Appellant did not retire because he was permanently unfit for work, and therefore he could not rely on section 10(aa) of the EO to show that he satisfied section 31R(1)(a)(ii). Therefore, the gratuity was assessable for salaries tax.

Appeal dismissed.

Cases referred to:

Chan Chun Chuen v CIR CACV 113/2011
D19/01, IRBRD, vol 16, 183
Chow Kwong Fai v CIR [2005] 4 HKLRD 687
D9/79, IRBRD, vol 1, 354
Fuchs v CIR [2011] 2 HKC 422

Taxpayer in person.
Chan Siu Ying Shirley, Ong Wai man Michelle and Ng Sui Ling Lousia for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to his Salaries Tax Assessment for the years of assessment 2009/10 ('2009/10 Assessment'). He raised three objections which were rejected by the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') in his determination dated 3 August 2011 ('the Determination'). In the present appeal, two of the three objections are no longer in dispute. The only issue before this Board is whether the Appellant was entitled to long service payment ('LSP') under the Employment Ordinance, Chapter 57 ('EO').

Late appeal

2. Before dealing with the substantive appeal, the Inland Revenue Department ('IRD') raised the preliminary issue that the notice of appeal was filed outside the 1 month period set down by section 66(1)(a) of the Inland Revenue Ordinance, Chapter 112 ('IRO').

3. The relevant chronology was as follows:

(1) The Appellant in his Tax Return for the year of assessment 2009/10 stated his new correspondence address as Address A.

(2) On 18 November 2010, the IRD issued the 2009/10 Assessment. It was sent to the Appellant at Address A by ordinary post.

(3) On 29 November 2010, the Appellant wrote to the IRD raising his three objections.

(4) On 29 March 2011 the IRD wrote to the Appellant at Address A asking for more information regarding his objections.

(5) On 18 April 2011 the IRD received the Appellant's reply thereto.

(6) On 3 August 2011 the Deputy Commissioner gave the Determination. On the same day the Determination together with a covering letter of the same date was sent to the Appellant at Address A by registered post. The covering letter detailed the Appellant's right to appeal and the appeal procedure and the full text of section 66 of the IRO was enclosed.

(7) The Determination was delivered to Address A on 4 August 2011 and the acknowledgment of receipt was duly signed.

(8) On 21 September 2011, the Board of Review ('BOR') received an email from the Appellant appealing against the Determination. This notice was, however, not in proper compliance with section 66(1) of the IRO because

the notice was not accompanied by the Determination.

(9) On 22 September 2011, the BOR replied by email to the Appellant pointing out that his appeal was late and that it was not accompanied by the Determination as a result of which his appeal could not be entertained.

(10) On 26 September 2011, proper notice of appeal with all the required documents were received by the BOR, likewise by email.

4. Section 58(2) of the IRO provides that '*Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address* ….' and section 58(4) provides that '*In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.*'

5. Both subsections have been properly complied with. The Determination was duly delivered to Address A, the correspondence address designated by the Appellant himself and his last known postal address. Time began to run on 4 August 2011. Whether or when the Appellant had actual knowledge of the Determination was irrelevant (see Chan Chun Chuen v CIR CACV 113/2011). He was required to give notice of appeal to the BOR within 1 month thereafter, namely on or before 5 September 2011.

6. Proper notice of appeal was received by the BOR on 26 September 2011. The appeal was out of time by about three weeks. What we have to decide next is whether to grant him extension under section 66(1A) of the IRO.

7. Under section 66(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)*'.

8. There is no dispute that the Appellant was not in Hong Kong at the time the Determination was given and sent to him at Address A and he remained absent from Hong Kong during the 1 month period thereafter. But absence from Hong Kong does not confer an automatic right for extension of time (see D19/01, IRBRD, vol 16, 183). There remains the question whether his absence from Hong Kong 'prevented' him from giving proper notice of appeal in accordance with section 66(1)(a).

9. This word 'prevented' imposes a higher threshold than a mere excuse (see Chow Kwong Fai v CIR [2005] 4 HKLRD 687, at page 696) and 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 (see D9/79, IRBRD, vol 1, 354 at page 355).

10. The Appellant's evidence was that since his retirement, he and his wife had moved to live in China. He would only return to Hong Kong for medical checkups and these were at intervals of three to five months. Address A was the address of a relative of his wife. This relative had to take care of two young children and so would more likely be home to receive mail. The Appellant had two grown up sons from his first marriage but he did not want to use his sons' addresses. It was not convenient to do so.

11. The relative that lived at Address A could not read English. The Appellant did not give her any instructions to contact him when she received his mail. The relative would merely keep the mail for him until his return. As a result the Appellant had no knowledge of the Determination until his return to Hong Kong on 11 September 2011.

12. The Appellant was cross-examined on the earlier correspondence he exchanged with the IRD. He was not in Hong Kong when the 2009/10 Assessment was sent to him on 18 November 2010 and when the IRD asked for further information on 29 March 2011. But in both cases he responded promptly. In answer the Appellant explained that although he was not in Hong Kong when those documents were sent to him, he was in Hong Kong shortly thereafter and so was able to respond promptly. This in fact showed, he argued, that he had no intention to delay matters and would try his best to respond as soon as he could.

13. The Appellant's explanation was borne out by his movement records obtained from the Immigration Department. These records do show that since the Appellant's retirement in January 2010 he was absent from Hong Kong most of the time. Of particular relevance is that he left Hong Kong on 13 April 2011 and did not return until 11 September 2011. He stayed for only a few days and left again on 16 September 2011.

14. We find the Appellant an honest witness and accept his evidence. But we are troubled by the fact that he left no instruction to the relative at Address A to notify him when mails were received; nor, it seems, did he ever take any step to regularly check with his relative whether he had received any mail. The Appellant admitted that he had access to phone and email. He sent in his notice of appeal on 21 and 26 September 2011 by email. On both occasions he was out of Hong Kong. If he did not receive the Determination in good time it was because of his own failure to make proper arrangements to be notified of its receipt. Indeed when cross-examined, the Appellant accepted that he was careless. According to him, he now realized how serious the consequences could be and had since given the relative instructions to open his mail and notify him if they were important.

15. In Chan Chun Chuen v CIR referred to above, the Appellant used the address of his solicitors KLY as his correspondence address but he claimed not to have received the relevant documents from the IRD. Hon Cheung JA at paragraph 27(2) considered that once a document was properly served, '*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.*' Although his Lordship was there considering when time should start to run and not whether time should be extended, these

words seem equally apt to apply to our present consideration.

16. In the last paragraph of that judgment, paragraph 46, Hon Lam J said in conclusion: '*Second, putting aside absence from Hong Kong and sickness (which are not relied upon by Mr Chan) the proviso refers to the taxpayer being prevented from giving notice of objection in time by reason of "other reasonable cause". Speaking for my part, the mere lack of actual knowledge of Mr Chan per se would not be a reasonable cause if he did not exercise due diligence in ensuring the effectiveness of the arrangement he had with KLY for transmission of letters to him.*'

17. The majority of this Board think it is likewise true for a taxpayer who knows that he will be out of Hong Kong for lengthy periods of time that he should exercise due diligence to ensure that he would be notified of his correspondence. The Appellant could have received the Determination in proper time if he had made proper arrangements to do so. He bears the burden of satisfying this Board that he was prevented from giving notice in time by his absence from Hong Kong within the meaning of section 66(1A) of the IRO. By a majority of this Board, we are not so satisfied and we are not prepared to grant him the extension he sought.

18. A member of this Board doubts whether the Appellant was required to exercise 'due diligence' or whether his own carelessness was relevant when it is proved as a fact that the taxpayer was absent from Hong Kong during the whole one month period within which notice should be given and that he had no notice of the Determination until his return to Hong Kong.

19. In any event, we have heard the Appellant on the substantive merits and we give our decision below. We are unanimous that this appeal should be dismissed on the substantive issue.

The undisputed facts

20. The Appellant commenced his employment with the Club on 2 May 1977. The term of his employment could be found in a written agreement dated 22 June 1982. Clause 11 thereof provided that 'Pre-retirement funds (if any) will be paid at the employer's discretion and will be based on consideration of past performance, loyalty and seniority'.

21. By letter dated 18 November 2008, the Appellant applied to the Club for early retirement. This was approved on 11 December 2008. In the same meeting, the Club resolved to pay him a gratuity ('the Gratuity') computed as follows:

Current Salary x 2/3 x years of service + one month's salary

22. This formula followed closely the formula stipulated for calculating LSP under the EO except that under the statutory provision, LSP was capped at a maximum of $390,000.

23. By letter of 14 August 2009 to the Club, the Appellant applied for the Gratuity to be paid as follows:

		HK$
The Gratuity	that is $30,800 x 2/3 x 32.75 years + 30,800 =	703,266
Less:	The Club's contributions to Mandatory Provident Fund ('MPF') scheme	- 109,000
Less:	Housing loan owed to the Club	-200,000
	Net Payment:	394,266

24. This was paid to him on 15 October 2009. He left the Club's employment on 27 January 2010. By the time he left, the Appellant had worked for the Club for a total of 32 years 9 months.

25. By Employer's Return dated 30 April 2010, the Club informed the IRD of the Appellant's remuneration for the period from 1 April 2007 to 27 January 2010 as follows:

	HK$
Salary	363,720
LSP	390,000
Ex-gratia payment upon retirement ('EGP')	313,266
	1,066,986

26. The LSP of $390,000 + the EGP of $313,266 = the Gratuity of $703,266.

27. So the Club regarded part of the Gratuity, namely $390,000, as fulfilling their duty under the EO to pay the statutory LSP.

The tax assessment

28. The assessor took the view that the Appellant was not entitled to any LSP under the EO and the whole of the Gratuity of $703,266 was paid to him pursuant to his employment agreement. The assessor accepted that the Club's MPF contribution of $109,000 was deductible and should be deducted, that is $703,266 - $109,000 = $594,266.

29. Section 11D(b)(i) of the IRO allows any gratuity paid upon retirement to be deemed '*income accruing at a constant rate over the 3 years ending on the date on which the person became entitled to claim payment thereof or ending on the last day of employment, whichever is the earlier ...*'. Pursuant thereto, the assessor assessed the sum of $594,266 to salaries tax over 3 years ending on 15 October 2009 (the date the Gratuity was paid to him). Full particulars are set out in Appendix D of the Determination.

30. This assessment was confirmed in the Determination.

The Appellant's ground of appeal

31. The Appellant maintained before us that the $390,000 paid to him was his LSP and should be deducted from the assessment.

Long Service Payment (LSP)

32. Since the Court of Final Appeal's decision in Fuchs v CIR [2011] 2 HKC 422, it is clear that any retirement payment made as a reward for past services pursuant to an employment contract is income from an office or employment within the meaning of section 8(1)(a) of the IRO and is subject to salaries tax.

33. There is no provision in the IRO to exempt LSPs from salaries tax. However it is the established practice of the IRD not to assess LSP to salaries tax provided that the LSP is paid in accordance with the provisions of the EO. It is arguable that such payments are paid under a statutory duty imposed on the employers by the EO and thus payable irrespective of any contractual duty. The IRD is right to regard such payments as falling outside the ambit of contractual payments. But to qualify as a statutory LSP, the conditions of section 31R of the EO must apply. The IRD contends in the present case that section 31R of the EO did not apply to the Appellant and irrespective of how the Appellant or the Club labelled the $390,000, it was not LSP within the meaning of the EO.

34. Section 31R of the EO provides that:

> *(1) Where an employee who has been employed under a continuous contract-*
>
> *(a) for not less than 5 years of service at the relevant date-*
>
> *(i) is dismissed and his employer is not liable to pay him a severance payment by reason thereof; or*
>
> *(ii) subject to subsections (3) to (5), terminates his contract in the circumstances specified in section 10(aa); or*
>
> *(b) terminates his contract and, at the relevant date, he is not less than 65 years of age and has been employed under that contract for not less than 5 years,*
>
> *the employer shall, subject to this Part and Part VC, pay to the employee a long service payment calculated in accordance with section 31V(1).*

35. Section 31R(1)(a)(i) of the EO clearly did not apply – the Appellant was not dismissed by the Club, he applied for an early retirement.

36. Section 31R(1)(b) of the EO did not apply either – the Appellant was only 54 when he left the Club's employment.

37. Did section 31(1)(a)(ii) – termination on ground of ill health – apply? We think not. For this subsection to apply, we must look at section 10(aa) of the EO which provides as follows:

> '*An employee may terminate his contract of employment without notice or payment in lieu-*
>
> *(aa) if-*
>
> *(i) he has been employed under the contract for not less than 5 years; and*
>
> *(ii) by a certificate in the form specified by the Commissioner under section 49 and issued by a registered medical practitioner or registered Chinese medicine practitioner, he is certified as being permanently unfit for a particular type of work specified in the certificate for a reason or reasons stated therein; and*
>
> *(iii) he is engaged in that type of work under the contract;'*

38. First of all, no medical certificate in any form was ever produced by the Appellant.

39. Secondly there is no evidence that the Appellant was 'permanently unfit' for his job. On the Appellant's own admission when questioned by this Board and under cross-examination, he could have continued in his employment if he had wanted to. Indeed he applied for early retirement in November 2008 but accepted the Club's invitation to stay on until end of 2009.

40. The Appellant gave evidence that he had a heart operation back in 1995 and had since been on medication to control his blood pressure. His wife suffered from poor health as well. It was in consideration of both of their health condition that he decided to retire early. But this was far from the case of the Appellant being 'permanently unfit' for his job.

41. Section 31RA and 31S of the EO further provide for LSP where the employee dies in service or where an employment contract of a fixed term expires without being renewed. It is apparent that these provisions are inapplicable to the Appellant.

42. In conclusion we agree with the IRD that the Appellant was not entitled to any LSP under the EO. The Gratuity was a reward for past services paid to the Appellant pursuant to his employment contract and was income from an office or employment within the meaning of section 8(1)(a) of the IRO.

43. For the above reasons we dismiss the appeal and confirm the assessment made in the Determination. We adopt the calculations contained in Appendix D thereof.