

Case No. D32/11

Hearing and disposal of appeals – non-attendance of Taxpayer – absence of notice in writing to withdraw the appeal – sections 68(1A) and 68(2B) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Leung Lit On and Marianna Tsang Wai Chun.

Date of hearing: 5 July 2011.

Date of decision: 25 October 2011.

The Taxpayer was concerned over the Board's normal directions for his lodging and filing of the relevant documents earlier than the Commissioner of Inland Revenue.

The Board then directed that both parties should file such documents as they thought fit at the same time.

The Taxpayer made no application to withdraw the appeal before the hearing but indicated that he would not attend the hearing.

The hearing took place as directed and the Taxpayer did not appear.

Held:

1. The Taxpayer has provided no evidence that his failure to attend was due to sickness or other reasonable cause.
2. The Taxpayer made no application to have his appeal heard in his absence under section 68(2D).
3. The Board has no alternative but to dismiss the appeal pursuant to section 68(2B)(c).

Appeal dismissed

Taxpayer in absentia.

Yau Yuen Chun and Chan Siu Ying for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by the Taxpayer in respect of a Determination dated 14 December 2010 by the Deputy Commissioner of Inland Revenue.
2. On 11 January 2011, the Taxpayer filed a notice of appeal.
3. The Clerk to the Board of Review ('the Clerk') on 2 June 2011 notified the parties that the appeal would be heard on 5 July 2011 and the normal directions were given with regard to lodging and filing of the relevant documents, witness statements, etc.
4. On 10 June 2011, the Taxpayer wrote to the Clerk indicating his concerns over the arrangements for submitting the relevant documents. He was concerned that he had to submit documents at a date earlier than the Commissioner of Inland Revenue ('the Commissioner'). He took the view that he may be deprived of a right to a fair trial.
5. The Board upon considering his letter of 10 June 2011 decided in the circumstances of this case to make a direction that both parties should file such documents as they thought fit at the same time. This was communicated to the Taxpayer on 13 June 2011.
6. On 23 June 2011, the Inland Revenue Department ('IRD') filed their relevant papers – R1 and R2 – with the Board.
7. On 23 June 2011, the Taxpayer sent an email to the Clerk which stated as follows:

‘I won’t attend the coming hearing because I still consider it unfair. I don’t think I have the right to a fair trial only your “having regard to the particular circumstances”. All citizens should be given this right generally!’
8. Hence, it can be seen from this email that he was not withdrawing his appeal but indicated that he would not attend the hearing.
9. As a result of his email, a direction was given that the hearing would take place on 5 July 2011.
10. On 4 July 2011, the Clerk received a copy email addressed to the Chief Executive of the Hong Kong SAR. In that email, he stated:

‘.....

I reiterate that I will not attend hearing because it is prominently unfair. Every Hong Kong citizen has the right to a fair trial UNCONDITIONALLY. The BOR’s “**having regard to particular circumstances**” is obviously

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unnecessary, if not absurd, in Hong Kong where the rule of law is respected. Most importantly, I can't see how particular the circumstances are. It makes me feel oppressed!

What's more, I cast doubt on the validity of the presiding chairman's decision to direct the hearing to proceed despite the appellant's withdrawal. As far as I understand, he and the panel members may get paid for every hearing. If my understanding is correct, his decision appears tantamount to an unchecked power to decide the amount of paycheck the panel can received.
.....'

11. The Board notes that this email was not addressed to the Board but was copied to the Clerk. The Board also notes that despite the Taxpayer's assertion that he had agreed to withdraw the appeal, this indeed was not the case.

12. The Board therefore directed that the hearing on 5 July 2011 would remain effective.

13. The hearing took place on 5 July 2011 and the Taxpayer did not appear.

14. At the hearing, Ms Yau on behalf of the IRD drew to the Board's attention the relevant provisions contained in section 68 of the Inland Revenue Ordinance ('IRO'). In particular, it is clear that pursuant to section 68(1A) of the IRO at any time before the hearing of an appeal, the appellant may withdraw the appeal by notice in writing addressed to the clerk to the Board. This was not done.

15. Section 68(2B) of the IRO provides as follows:

'If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board may-

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal under subsection (2D); or

(c) dismiss the appeal.'

16. Therefore the Taxpayer has provided no evidence that his failure to attend was due to sickness or other reasonable cause. Nor had he applied to make an application to have this matter heard in his absence under section 68(2D) which provides that:

'The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong

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within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.'

17. Since the Taxpayer did not appear, the Board has no alternative but to dismiss the appeal pursuant to section 68(2B)(c).

18. We would note that the Taxpayer at no time had made any application to withdraw the appeal before the hearing.

19. Hence, for the above reasons, this appeal is dismissed.