**Case No. D32/99**

**Penalty Tax –** extension of time – notice of appeal filed out of time – sections 66(1A) and 82A of the Inland Revenue Ordinance.

Panel: Anna Chow Suk Han (chairman), Robin M Bridge and Albert Yau Kai Cheong.

Date of hearing: 7 May 1999.
Date of decision: 8 July 1999.

By a notice of determination dated 15 July 1998, the taxpayer was notified that she had been assessed to additional profits tax for the years of assessment 1988/89 to 1990/91 and profits tax for the year of assessment 1991/92. The notice of determination was in English. Copies of the notice of determination were also sent to the taxpayer's representatives. No appeal was lodged by the taxpayer within the statutory one month period. On 19 October 1998, the Commissioner gave notice to the taxpayer of his intention to assess additional tax for the years of assessment 1988/89 to 1991/92. By a letter dated 9 November 1998, one of the taxpayer's representatives submitted written representations to the Commissioner. On 30 November 1998, the Commissioner issued notices of assessment and demand for additional tax. By a letter dated 28 December 1998, the taxpayer's representative served a notice on the Board of Review, objection to the final assessment made by the Commissioner. The ground of appeal was that 'the notice of appeal could not be submitted to the Clerk to the Board of Review on 15 August 1998 because the taxpayer was in Country F at that time'.

A Ms G gave evidence to the effect that she and the taxpayer left for Country F around 29 July 1998. A record from the Immigration Department showed that the taxpayer was in Hong Kong for 13 days during the statutory one month period after the notice of determination of 15 July 1998. Ms G asserted that the taxpayer did not understand English and did not know the document and therefore failed to lodge an appeal. Even if the taxpayer returned to Hong Kong earlier, she could not have taken care of the case because it was Ms G all along, who contacted the lawyers and the accountants. The taxpayer would not know whom to contact.

**Held:**

(1) Ms G's absence from Hong Kong during the statutory one month period was irrelevant to the issue. There was evidence that the taxpayer was in Hong Kong for at least 13 days during the statutory one month period. There was no evidence that the taxpayer was ill at the relevant time. Thus, she could not be

said to have been prevented by illness or absence from Hong Kong from giving the notice of appeal.

(2) The fact that the taxpayer could not read English and that Ms G who assisted her in this case was away most of the time during the statutory one month period does not constitute a reasonable cause for non-compliance with the time limits under the Inland Revenue Ordinance. The taxpayer's ignorance of her position was not a ground for the Board to extend the time limit, more so, when copies of the notice of determination were sent to her two representatives who were handling the case on her behalf.

**Appeal dismissed.**

Cases referred to:

D9/79, IRBRD, vol 1, 354
D28/88, IRBRD vol 3, 312

Tang Yiu Fai for the Commissioner of Inland Revenue.
Berfield (Executive) Consultants Limited for the taxpayer.

**Decision:**

**The appeal**

1. This is an appeal by Ms A ('the Taxpayer') the widow and the administratrix of the estate of Mr B ('the Deceased') against the Commissioner's determination dated 15 July 1998 ('the Determination') in respect of the additional profits tax assessments for the years of assessment 1988/89 to 1990/91 and the profits tax assessment for the year of assessment 1991/92 raised on her in the capacity of the administratrix of the estate of the Deceased formerly trading as Company C ('the Business').

**The preliminary issue**

2. Whether this Board should exercise its discretion under section 66(1A) of the Inland Revenue Ordinance ('the IRO') and extend time in favour of the Taxpayer for the lodgement of her notice of appeal.

**The substantive issue**

3. If extension of time is granted to the Taxpayer, whether the additional profits tax assessments for the years of assessment 1988/89 to 1990/91 and the profit tax assessment for the year of assessment 1991/92 raised on the Taxpayer is excessive or incorrect.

**Our decision**

4. The relevant statutory provision on the preliminary issue is section 66(1A) of the IRO which reads as follows:

> *'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 (1)(a), the Board may extend for such period as it thinks fit within which notice of appeal may be given under sub-section (1) ...'*

5. By a notice of determination dated 15 July 1998, the Taxpayer was notified that she had been assessed to additional profits tax for the years of assessment 1988/89 to 1990/91 and profits tax for the year of assessment 1991/92. The notice of determination was sent to her at her home address at District D. The notice was in English, informing her of the determination and her right of appeal and setting out the procedure for such an appeal and the time within which the appeal should be given and to whom such notice of appeal should be sent. Copies of the notice of determination were also respectively sent to Messrs S H Chan & Co and Berfield (Executive) Consultants Limited ('Berfield'), the representatives of the Taxpayer.

6. No appeal was lodged by the Taxpayer within the statutory one month period.

7. On 19 October 1998, the Commissioner gave notice to the Taxpayer of his intention to assess additional tax under section 82A of the IRO in respect of the incorrect tax returns made by the Deceased for the years of assessment 1988/89 to 1991/92.

8. By a letter dated 9 November 1998, the Taxpayer, through Berfield, submitted written representations to the Commissioner. After having considered the Taxpayer's representations, on 30 November 1998, the Commissioner issued notices of assessment and demand for additional tax under section 82A of the IRO.

9. By a letter dated 28 December 1998, Berfield on behalf of the Taxpayer served a notice on the Board, objecting to the final assessment made by the Commissioner in his notice of assessment dated 30 November 1998, which we take to mean, the notice of determination of 15 July 1998. The ground of appeal was that 'the notice of appeal could not be submitted to the Clerk to the Board of Review on 15 August 1998 because Ms A was in Country F at that time'.

10. At the hearing, the Taxpayer was represented by Berfield. She did not give evidence on her own behalf but called Ms G, her sister-in-law, as a witness.

11. Ms G gave evidence to the effect that she left for Country F around 20 July 1998 and did not return to Hong Kong until September 1998 and that the Taxpayer also left for Country F about the same time but they came back at different times. We were told that the Taxpayer did not understand English and did not know the document and therefore failed to lodge an appeal. The Respondent (the CIR) produced a record from the Immigration Department showing that during the statutory one month period after the notice of determination of 15 July 1998, the Taxpayer was in Hong Kong for 13 days, that was between 16 July 1998 and 18 July 1998 for 3 days and between 23 July 1998 and 1 August 1998 for 10 days. Ms G asserted that even if the Taxpayer returned to Hong Kong earlier, she could not have taken care of the case because it was her all along, who contacted the lawyers and the accountants. The Taxpayer would not know whom to contact.

12. The jurisdiction of this Board to extend time for lodging of appeal is closely defined by section 66(1A) of the IRO. This Board must be satisfied that the Taxpayer '*was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with sub-section (1)(a)'*. In reaching our decision, we should also consider the principle as stated by this Board in D9/79, IRBRD, vol 1, 354:

> *'The word "prevented" is opposed to a situation when an appellant is able to give notice but failed to do so. In our view, therefore, 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.'*

13. In this case, Ms G's absence from Hong Kong during the statutory one month period is irrelevant to the issue. We are only concerned with that of the Taxpayer. There was evidence that the Taxpayer was in Hong Kong for at least 13 days during the statutory one month period. There was no evidence that the Taxpayer was ill at the relevant time. Thus, she could not be said to have been prevented by illness or absence from Hong Kong from giving the notice of appeal. As to whether she had reasonable cause which prevented her from giving the notice of appeal, we are not satisfied that she has made out any ground for extension of time in her favour. We have given due consideration to the fact that the Taxpayer could not read English and that Ms G who assisted her in this case was away most of the time during the statutory one month period. But this factor does not constitute a reasonable cause for non-compliance with the time limits under the IRO. Time requirements laid down by the IRO are intended to be observed. Her ignorance of her position, is not a ground for us to extend the time limit, more so, when copies of the notice of determination were sent to her two representatives who were handling the case on her behalf. The notice of appeal was only served on this Board on 28 December 1998, some four months after the expiration of the statutory one month period and the Taxpayer was in Hong Kong most of the time during this period. No explanation has been given for this lengthy delay. Within the said four months, the Taxpayer through Berfield, also made

submission to the Commissioner but only after the notice and demand for additional tax under 82A of the IRO, the Taxpayer served the notice of appeal.

14. For these reasons, we dismiss the Taxpayer's application for extension of time. It follows that no appeal is properly before us and the assessments in question stand.

15. We had heard evidence of the substantive issue pending our decision on the preliminary issue on the procedural point.

16. Having given our decision on the procedural point, we will only briefly express our views on the substantive issue.

17. The Deceased died intestate leaving an estate which was administered by the Taxpayer. In 1994 the Inland Revenue Department ('the Department') commenced an investigation into the Deceased's tax affairs. On 24 August 1994 the Department raised protective assessments on the Taxpayer, pending the result of further enquiries. Valid objections against the assessments were received. As no accounting books and records of the Deceased's business could be produced for examination, the assessor had to resort to the use of assets betterment statement method in ascertaining the quantum of profits which would have been understated.

18. The ground of appeal as contained in Berfield's letter to this Board of 28 December 1998 is that the asset betterment statement ('ABS') only reflects the Deceased's interests in three of the thirteen companies in which the Deceased owned shares. The Taxpayer asserted that the profit derived by the Deceased from the remaining companies must have been converted into assets under the Deceased's own name but the same have not been taken into account in the ABS. The Taxpayer has not supported her contention with any evidence. Mere assertion is insufficient for the purpose. As stated in D28/88, IRBRD, vol 3, 312 of this Board, *'The onus is not discharged by the taxpayer simply appearing before the Board and saying that the assets betterment statement is wrong'*.

19. During the hearing, Ms G on behalf of the Taxpayer also asserted that the remittance of $854,590 to the brothers of the Deceased, was a repayment of a loan made by them to the Deceased in about 1988 or 1989. But Ms G could not say with certainty as to when the loan was made and how it was made. No documentary proof in any way could be produced.

20. As the Taxpayer has failed to provide acceptable or sufficient evidence to warrant a conclusion that the assessments are excessive or incorrect, had it been necessary for us to adjudicate on the issue, we would have dismissed the appeal and would have confirmed the assessment.