

Case No. D33/07

Salaries tax – practice & procedure – appeal out of time – whether prevented by illness, absence Hong Kong or other reasonable cause from giving notice of appeal – Inland Revenue Ordinance ('IRO') section 66(1A)

Panel: Colin Cohen (chairman), Emmanuel Kao Chu Chee and Lee Lai Lan.

Date of hearing: 11 September 2007.

Date of decision: 13 November 2007.

The taxpayer gave his notice of appeal against the determination made against him only by 28 May 2007 and was thus being late.

The taxpayer contended that he was travelling to country B during the months of February and March 2007; he was travelling to country B in April 2007 for his wife's operation and treatment; and his household and personal effects were in storage from 9 February 2007.

Held:

1. Section 66(1A) imposes a high threshold which is more than an excuse (Chow Kwong Fai v CIR considered). The mere fact that one is travelling or one's tax affairs are complex cannot be said to prevent a timely appeal being lodged within the normal one-month period. Again, the mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one-month period as particularized by the section.
2. There is no evidence that the taxpayer was ill or was prevented by such illness to file the appeal timely. Nor was there evidence it was due to his travelling to country B in February and March 2007 or other reasonable cause.

Appeal dismissed.

Cases referred to:

D11/89, IRBRD, vol 4, 230

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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
D26/04, IRBRD, vol 19, 214
D1/00, IRBRD, vol 15, 159
D98/00, IRBRD, vol 15, 863
Chow Kwong Fai v CIR CACV 20/2005

Taxpayer in absentia.

Tsui Siu Fong and Yip Chi Yuen for the Commissioner of Inland Revenue.

Decision:

1. By a determination dated 1 February 2007, the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') made the following assessment:

'Salaries Tax assessment for the year of assessment 1996/97 under Charge Number 9-2581360-97-A, dated 24 June 2002, showing Assessable Income of \$2,264,441 with Tax Payable thereon of \$339,666 is hereby confirmed.'

2. The determination was sent under cover of a letter dated 1 February 2007 from the Deputy Commissioner to the Taxpayer drawing his attention to sections 66(1), (1A) and (2) of the Inland Revenue Ordinance (Chapter 112) ('IRO') ('the Letter'). The Letter quoted the sub-section in full and gave the address of the Clerk to the Board of Review ('the Clerk'). The Letter was sent by registered mail.

3. Evidence was adduced before the Board that the Country A Post Office had confirmed that the Letter was delivered on 6 February 2007. Therefore, the normal one-month period for lodging an appeal under section 66(1A) expired on the 6 March 2007.

4. The Taxpayer sent a letter dated 15 February 2007. In that letter, he stated as follows:

'....

I wish to appeal Dy. Commissioner's decision to Board of Review.

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However, I will be travelling out of [Country A] from 18 Feb 2007 to end of March 2007.

In addition, all my personal effects are in temporary storage and will have access to my files only by 15 April 2007.

.....’

5. We accept the submissions by Miss Tsui on behalf of the Inland Revenue Department (‘IRD’) that this letter is clearly not a valid notice of appeal. Although it was sent to the Board within the statutory one-month period, it was not accompanied by any of the documentation under section 66(1)(a). The Taxpayer thereafter submitted to the Board his grounds of appeal and a copy of the determination by virtue of his letter dated 18 May 2007 which was received by the Clerk on 28 May 2007. It was only by 28 May 2007 that the Taxpayer had submitted all the documentation required pursuant to section 66(1)(a) for a properly constituted notice of appeal. Hence, the Taxpayer was thus late for approximately 12 weeks.

6. On 22 February 2007, the Clerk wrote to the Taxpayer and stated as follows:

‘.....

Section 66(1) of the Inland Revenue Ordinance (Cap.112) (IRO) stipulates that any person who wishes to appeal to the Board should file a written notice of appeal, together with **a copy of the Commissioner’s determination and a statement of grounds of appeal, within one month from the date of the Commissioner’s determination.** As a matter of practice, any appeal filed beyond the one-month period would be treated as a late appeal and that an application for an extension of time under section 66(1A) of the IRO will be considered by the Board at the hearing. If the Board accepts the appellant’s reasons for being late in lodging an appeal, it will proceed to hear the merits of his appeal in the usual way either on the same day as appropriate, or on the other date(s) to be fixed later on.

As such, please forthwith ensure compliance with section 66(1) of the IRO should you intend to lodge an appeal with this Board.

.....’

7. On 2 August 2007, the Clerk again wrote to the Taxpayer advising him as to the date of this hearing and drew to his attention that the Board will at the beginning of the hearing hear his reasons for being late in lodging the appeal.

8. Further correspondence subsequently passed between the Clerk and the Taxpayer.

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The Taxpayer requested that his appeal be heard in his absence pursuant to section 68(2D) of the IRO and in turn, he would be providing written submissions in support. The Board having considered his application indicated that they were prepared to agree to such a course of action being adopted.

9. At the beginning of the hearing, we confirmed that in the Taxpayer's absence, we would rely on his written submissions in respect of this matter.

10. As a preliminary issue, the first matter we had to consider was whether or not the Taxpayer's late appeal should be entertained.

11. Miss Tsui on behalf of the IRO had provided us with written submissions. These written submissions were sent to us on 4 September 2007. At the same time, they were sent by speedpost to the Taxpayer's address in Country B. Section 66(1A) of the IRO provides that the Board may extend for such period as it thinks fit 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)'.

12. Therefore, the issue before us is to consider whether or not the Taxpayer's late appeal should be entertained. The IRD submits that the Taxpayer's appeal is out of time and no extension can be granted to validate his appeal.

13. The Taxpayer's notice of appeal was clearly out of time under section 66(1). The question for our decision whether the Taxpayer has made out the case for us to extend the time for appeal under section 66(1A).

14. The Taxpayer's submissions for his being late in lodging an appeal were:

- (a) He was travelling to Country B during the months of February and March 2007;
- (b) He was travelling to Country B in April 2007 for his wife's operation and treatment; and
- (c) His household and personal effects were in storage from 9 February 2007.

15. We have had the opportunity to consider and review 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;

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- (f) D19/01, IRBRD, vol 16, 183;
- (g) D26/04, IRBRD, vol 19, 214;
- (h) D1/00, IRBRD, vol 15, 159; and
- (i) D98/00, IRBRD, vol 15, 863.

16. We have also had the opportunity to consider the Court of Appeal decision in Chow Kwong Fai v CIR CACV 20/2005. The Court of Appeal held that section 66(1)(a) imposes a high threshold which is more than an excuse and as such the reasonable cause cannot possibly be extended to cover unilateral mistakes made by the Taxpayer. We are of the view that time limits that are imposed must be observed. The authorities are clear in that various principles that have been laid down, clearly show that the mere fact that one is travelling or one's tax affairs are complex cannot be said to prevent a timely appeal being lodged within the normal one-month period. Again, the mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one-month period as particularized by the Section.

17. We therefore accept the submission on behalf of the IRD that the application for an extension of time to file the appeal, it is not sufficient for the Taxpayer that he has proved that his failure in time was due to illness, absence from Hong Kong or other reasonable cause but he must also satisfy the Board that he was prevented by such illness, absence or reasonable cause to lodge an appeal within the time prescribed. It is quite clear that there is no evidence that the Taxpayer was ill or was prevented by such illness to file a timely appeal. The Taxpayer also relied upon his lateness due to his travel to Country B in April 2007 and his wife's operation and treatment. We were provided with copies of various air-tickets and boarding pass slips. However, these show that he left Country A at 1:45 p.m. and arrived in Country B at 5.55 p.m. on 31 March 2007 and that he left Country B on 16 April 2007 and arrived in Country A on 17 April 2007. In his other correspondence, he also attributed his lateness in respect of his travel out of Country A to Country B from 18 February to the end of March 2007. However, with regard to this, he had only submitted air-tickets which showed that he left Country B on 9 March 2007 and arrived in Country A on 10 March 2007 and again, he left Country A and arrived in Country B on 31 March 2007 (as mentioned above). There was no other evidence before us regarding his travel and in particular, in the months of February and March 2007. Indeed, the Taxpayer had not even tried to show how his travelling to Country B in February and March 2007 (which we accept is unparticularised) had prevented him from lodging a timely appeal.

18. It is accepted that the Taxpayer had left Hong Kong and had been residing in Country A. However, the Taxpayer's absence from Hong Kong in itself does not confirm an automatic right for an extension of time for filing an appeal. Again, we accept that there was no evidence that the Taxpayer was prevented from lodging the appeal within the period prescribed by his absence from Hong Kong or his absence from Country A whilst having travelled to Country B. Therefore, the only basis on which such an application can be made is some 'other reasonable cause'. However, again, no evidence has been put before the Board to show that the Taxpayer was prevented under this head from lodging an appeal within the prescribed time period. The mere assertion that his

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household possession and personal effects were put in storage does not assist him.

19. Having considered this matter very carefully and looked at all the facts, we take the view that the Taxpayer had every opportunity to file a notice of appeal within the statutory one-month period but chose not to do so. Indeed, he was fully aware as to the obligations imposed upon him by virtue of his letter dated 15 February 2007.

20. Hence, having considered all matters, we are not satisfied that the Taxpayer was prevented by any reasonable cause from giving a notice of appeal within the time limited laid down by section 66(1). We are not satisfied that the Taxpayer has made out any basis for an extension of time and we decline to extend the time for appealing. We reject his application.