Case No. D34/11

Salaries tax – applicant applying to state a case on a question of law for the opinion of the Court of First Instance – whether question or questions of law – whether question or questions of law proper for the Court of First Instance to consider – principles to be observed in applying to state a case on question of law – sections 51(8), 58(2), 58(3), 62(1), 64(4), 69(1) and 80(1)(c) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung and Marianna Tsang Wai Chun.

Date of hearing: No hearing.
Date of decision: 14 November 2011.

The applicant sought to appeal against the Commissioner's determination ('Determination'). The appeal was made almost three years out of time. In the course of the intended appeal, the applicant applied for a postponement of the hearing and for permission to appeal outside the statutory period on the ground that she only received the Determination almost three years after the Determination was dated and she needed time to obtain evidence in support of such allegation.

The applicant's application for, inter alia, leave to appeal out of time and appeal on merits was heard by the Board of Review ('Board'). By its decision ('Decision'), the Board, inter alia, declined to extend time without expressing any view on merits. The applicant subsequently made an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance regarding the Decision.

Out of the applicant's email correspondences, the Board discerned a question from the applicant's letter, namely, 'as a question of law, if the Inland Revenue did not "properly" serve the Determination on the taxpayer on 22 February 2010 for the reasons outlined above, can the taxpayer be liable for the consequences of it?' ('first question')

There was also a contention by the applicant that '… [the Decision] … is not consistent with the intent of the Ordinance Section 64(4) and the above relevant case law ...' ('second question')

Held:

1. Section 51(8) of the IRO imposed a duty on taxpayer to notify the Commissioner of a change in address. Further, personal service and service by post were both permitted under the IRO. Postal service was deemed to

have been effected on the day succeeding the day on which it would have been received in the ordinary course by post.

2. It was trite law that: (a) an applicant for a case stated must identify a question of law which was proper for the Court of First Instance to consider; (b) the Board was under a statutory duty to state a case in respect of that question of law; (c) the Board had a power to scrutinize the question of law to ensure that it was one which was proper for the court to consider; (d) if the Board was of the view that the point of law was not proper, it might decline to state a case. (Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKLR 40, Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223 and Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 considered)

3. It was incumbent on an applicant for a case stated to identify a question of law which was proper for the Court of First Instance to consider. It was not for the Board to frame questions for an applicant. The questions 'should be stated clearly and concisely and care should be taken to ensure that the questions were not wider than was warranted by the facts'. An applicant for a case stated might not rely on a question of law which was imprecise or ambiguous. It was wholly impermissible to go beating about the evidential undergrowth in the hope of flushing out some useful pieces of evidence that supported an applicant's view, in total disregard of settled law that the Board's findings of primary fact, in so far as there was any evidence to support them, were sacrosanct. (Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKLR 40 considered)

4. The Board was required to apply a qualitative assessment to the proposed questions of law and was duty bound to decline to state a case if the question of law proposed to be stated was not a proper one, such as a question which was plainly and obviously unarguable. If the Board was satisfied that the argument had no prospect of success, it was not bound to include it amongst the questions that it posed for the consideration of the Court. (Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378 and Tungtex Trading Co Ltd v Commissioner of Inland Revenue HCIA 7/2009 considered)

5. Where a conclusion of the Board was challenged, the correct question was whether it was open to the Board to so conclude or whether the true and only reasonable conclusion contradicted the Board's decision appealed against. (Lee Yee Shing and Kim Eng Securities (Hong Kong) Ltd v CIR [2007] 2 HKLRD 117 considered)

6. The Commissioner must establish actual notice, but could do so by relying on the presumption of actual notice. There was no separate obligation on her

to consider which of the modes of service was the most appropriate . Once the presumption came into play, it fell upon the taxpayer to rebut the presumption and establish the absence of actual notice. (Chan Chun Chuen v Commissioner of Inland Revenue HCAL 76/2010 considered)

7. Instead of posing a question or questions, the applicant put forward arguments which were wordy, opaque, prolix and were not easy to understand. Some conclusions or statements did not logically follow from the previous argument or statement. (Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321 considered)

8. The first question was not a proper question: (a) it was hypothetical, and the hypothesis was not premised upon any finding by the Board; (b) there was no question on the properness of the service; (c) the fact that the question was premised upon was contrary to the Board's finding; (d) the contention that Inland Revenue Department did not 'properly' serve the Determination on the applicant was a new contention. The question did not arise from the Decision; (e) the contention that service was not proper was plainly and obviously unarguable.

9. The second question was not proper for submission to the Court of First Instance: (a) it was a proposition or contention, not a question; (b) the Commissioner chose postal service, as he was entitled to under section 58(1). The applicant made no attempt to rebut the presumption under section 58(3) and was therefore deemed to have actual notice of the contents of the Determination; (c) the applicant made no allegation at the hearing of any illness, absence from Hong Kong or other reasonable cause which prevented her from giving notice of appeal within the statutory period; (d) fresh evidence was not admissible in an appeal by way of case stated. In the premises, the contention was plainly and obviously untenable.

Application dismissed.

Cases referred to:

Commissioner of Inland Revenue v Inland Revenue Board of Review and another, [1989] 2 HKLR 40

Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223

Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409

Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378

Tungtex Trading Co Ltd v Commissioner of Inland Revenue HCIA 7/2009

Lee Yee Shing and Kim Eng Securities (Hong Kong) Ltd v CIR [2007] 2 HKLRD 117
Chan Chun Chuen v Commissioner of Inland Revenue HCAL 76/2010
Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321

Stated case, no hearing.

Decision:

Introduction

1. All references to sections and subsections are to those of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

2. By a Determination dated 26 July 2007 ('the 2007 Determination'), the Acting Deputy Commissioner determined the Taxpayer's objection to two additional salaries tax assessments by:

(1) increasing the additional salaries tax assessment for the 2002/03 year of assessment; and

(2) annulling the additional salaries tax assessment for the year 2003/04.

3. By fax dated '15 April 2010' and received by the Office of the Clerk ('the Clerk') to the Board of Review ('the Board') on 14 April 2010, the Taxpayer sought to appeal against the 2007 Determination.

4. In the course of the Taxpayer's intended appeal to the Board, she applied for a postponement of the hearing and also for permission to appeal outside the statutory one month time limit.

5. The ground given by the Taxpayer for a postponement was that she needed time to obtain evidence of the sale of the overseas residential unit at the overseas address in order to support her allegation that she had not received the 2007 Determination sent to the overseas address.

6. The Taxpayer's case for permission to appeal out of time was that she had not received the 2007 Determination sent in 2007 and she was adamant that she only received a copy of the 2007 Determination on or around 16 April 2010.

Board's decision on application for adjournment and extension of time for appeal

7. The Taxpayer's:

(1) application for postponement of the hearing;

(2) application for permission to appeal outside the statutory one month time limit; and

(3) appeal on the merits;

were heard by the Board on 24 September 2010.

8. By its Decision, D3/11, dated 3 May 2011 ('the Decision'), the Board:

(1) assumed in favour of the Taxpayer that she did not receive the 2007 Determination sent to the overseas address;

(2) rejected the Taxpayer's allegation that she did not receive a copy of the 2007 Determination until on or about 16 April 2010;

(3) found as a fact that the 22 February 2010 postal packet ('the 22 February 2010 packet') from the Assessor to the Taxpayer was delivered to the Hong Kong address by 25 February 2010, at the latest;

(4) noted that it was plain and obvious from the Taxpayer's letter dated 22 March 2010 and that it was clear from the Taxpayer's notice of appeal that she had received a copy of the Determination sent with the Assessor's letter of 22 February 2010;

(5) found as a fact that the copy 2007 Determination was served on the Taxpayer by 26 February 2010 at the latest;

(6) held that the Taxpayer was out of time when her notice of appeal was transmitted to the Clerk on 14 April 2010 and that she had not made good any of the grounds under section 66(1A) for extension of time;

(7) held that the date of sale of the property at the overseas address was irrelevant by reason of the Board's assumption that the Taxpayer had not received the 2007 Determination;

(8) refused to postpone the hearing;

(9) declined to extend time; and

(10) expressed no views on the merits or otherwise of the Taxpayer's intended appeal as they did not arise for the Board's decision because the Board had declined to extend time for appeal.

A copy of the Decision is annexed and marked 'Annexure A' which the Board incorporates by reference.

The Taxpayer's application for a case stated

9. By letter dated 23 May 2011 which was delivered by hand to the Clerk's Office on 24 May 2011, the Taxpayer stated (written exactly as it stands in the original):

> ' According to section 69(1) of the IRO, I wish to make an application requiring the Board to state a case on **a question of law** for the opinion of the Court of First Instance regarding the written decision in question.'

10. By letter dated 25 May 2011, the Clerk wrote to the Taxpayer as follows:

> ' I refer to your letter dated 23 May 2011 which was delivered to the Clerk's office by hand on 24 May 2011.
>
> Please identify the question or questions which you contend are question or questions of law, with your submission on why it is proper for the Court of First Instance to consider such question or questions.
>
> Please let me have your reply by **4:00 p.m. on 22 June 2011 (Wednesday)**. Your letter should be copied to the respondent, i.e. the Commissioner of Inland Revenue.
>
> The Commissioner has 4 weeks from the date of service of your submission to comment on the question(s) identified in your letter.
>
> You have 4 weeks from the date of service of the Commissioner's comments to send me your written submission in reply.'

11. The Taxpayer sent an email to the Clerk on 21 June 2011 enclosing a soft copy of the files:

(1) 'Board of Review_06212011(final).doc'

(2) 'Attachment A – Inland Letter 22-2-2010.pdf';

(3) 'Attachment B – appendices to Letter of 22-22010.pdf';

(4) 'Attachment C – Inland Letter 16-4-2010.pdf'.

12. In 'Board of Review_06212011(final).doc', the Taxpayer wrote as follows (written exactly as it stands in the original):

‘ Below I state my case for what I believe are questions of law for the Court of First Instance to review. I refer to various Ordinance Sections below and the Hong Kong legal system of the rule of law that allows for the protection of individual’s rights, including the intrinsic right as a taxpayer to be properly informed of his/her rights and obligations and to be fairly treated before the law.

The following is taken from the Hong Kong Government’s Department of Justice website under the section, “the rule of law” (http://www.doj.gov.hk/eng/legal/index.htm)

“Legality and equality before the law are two fundamental facets of the rule of law. But the principle demands something more, otherwise it would be satisfied by giving the government unrestricted discretionary powers. A further meaning of the rule of law, therefore, is to be found in a system of rules which restrict discretionary power. To this end the courts have developed a set of guidelines aimed at ensuring that statutory powers are not used in ways which the legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power. An example of the former is where a court concludes that a decision which purports to be authorised by a statutory power is plainly unreasonable and cannot have been envisaged by the legislature. An example of the latter is where a decision has been made without according the party affected the opportunity of being heard in circumstances where the legislature must have envisaged that such an opportunity would have been given. In both cases a court would hold that the decisions were legally invalid.”

In an article from the Department of Justice website (http://www.doj.gov.hk/eng/archive/pdf/sj110203e.pdf) from a Speech by the Hon Elsie Leung, Secretary for Justice, at the Luncheon of the Rotary Club of Hong Kong on 11 February 2003, The Role of the Secretary for Justice in Promoting the Rule of Law, she writes:

“The rule of law has a number of meanings and corollaries. In brief, it means that everything must be done in accordance with the law – the principle of legality. It means nobody is above the law. In the context of the Government, its powers must derive from the law

- 2 -and be exercised in accordance with the law. Therefore, even where the Government is vested with certain discretionary powers, its discretion must be exercised rationally and without procedural impropriety, and the courts are in a position to prevent abuse.”

“The law should be even-handed between government and citizens, striking a balance between the needs of fair and efficient administration and the rights of

the individual. The observance of the rule of law makes a government one of laws, and not one of men."

In quoting the above, I assert that materials placed on the Department of Justice website are accurate interpretations of the rule of law and the spirit of the rule of law.

I present my case as follows:

In paragraph 32 of the Board's Decision of 3 May 2011, the Board grants that I did not receive the Determination mailed in 2007.

But the Board then assumed the Determination was served as part of a 22 February 2010 letter mailing per paragraph 29 of the Board's Decision. Although the Determination was included in the package as an appendix, the 22 February 2010 cover letter fails to advise the taxpayer the significance of the Determination, taxpayer's rights and obligations arising from the Determination, and in fact, the cover letter 'misleads' the taxpayer on his/her possible recourse. Furthermore, it is clear from the cover letter, that the purpose of the correspondence was not to serve the Determination. (refer to Attachment A: Inland Revenue letter of 22 February 2010, Attachment B: Appendix to Inland Revenue letter of 22 February 2010)

1. The 22 February 2010 letter was a reply to my inquiry of why the bank had deducted money from my account without my knowledge. The Letter is followed by a series of appendices including: Salaries Tax Assessment and Payment Vouchers, copies of earlier Inland Revenue letters, followed by a copy of the Determination.

   The Determination is stuck in the last part of the appendices of nearly 50 pages and is stamped "COPY". Inland Revenue treated the Determination as mere reference material to explain how taxes were calculated (quote below from Inland Revenue cover letter of 22 February 2010).

   "…… (I) can refer to the attachments of the reply letter copy ….. that written determination had been issued on 26 July 2007 by Ag. Deputy Commissioner of Inland Revenue …. and it was based on that determination (they) revised (my) tax payable……").

   And in closing the Inland Revenue writes:

   "If (I) have further enquiries, please contact (the undersign assessor) during office hours at telephone number 2594 2215 for assessment matter or Miss WONG Ka-man at telephone number 2594 3090 for tax collection."

2. In the letter of 22 February 2010, Inland Revenue makes no mention of taxpayer's obligations and rights to appeal in regards to the Determination. Not until a letter dated 16 April 2010 from the Inland Revenue is there mention that I should lodge my appeal directly to the Board of Review, per section 8 of letter. (Refer to Attachment C: Inland Revenue Letter of 16 April 2010)

Questions of Law (part 1):

Under Hong Kong's legal system, the rule of law implies the government has certain responsibilities such as to communicate what are the obligations and rights for the individual arising from "needs for … efficient government and rights of individuals" (above quote from Hon. Elsie Leung's speech of February 2003). Inland Revenue failed to meet those standards in this case with the mailing on 22 February 2010, therefore to consider that mailing as Inland Revenue officially serving the Determination on the taxpayer would be to deny the taxpayer his/her individual rights derived from the rule of law.

Inland Revenue in the cover letter of 22 February 2010 did not state my rights and obligations, arising from the Determination, and under such situation, it is impossible for me to be fairly treated before the law. In fact, the closing remark to refer back to the assessor at Inland Revenue is mis-leading and inappropriate, as there was nothing the assessor could do at that point, which I was to learn only afterwards, resulting in further delay in my appeal process to the Board of Review.

Not until the Inland Revenue letter of 16 April 2010 did Inland Revenue point out taxpayer's rights to lodge an appeal to the Board of Review. Therefore, to assume I was properly served the Determination on 22 February 2010 violates the spirit of the rule of law. The government must be accountable for its own responsibilities under the law.

In addition, under rule of law, the government has an implied duty to advise the individual what he/she is being served arising from what Elsie Leung explains in the above 2003 speech that the government should exercise its power "without procedural improprietary". It is unfair and misleading for Inland Revenue not to make clear its intention to serve the Determination in the 22 February 2010 correspondence by pointing out its significance (rather it referred to the Determination as an appedix as to how taxes were calculated) , yet the Board's Decision of May 2011 ruled that it was served in completion. Under the rule of law, the government must be fair in exercising its powers.

And quoting from the Department of Justice introduction on rule of law from above: "Legality and equality before the law are two fundamental facets of the

rule of law. But the principle demands something more, otherwise it would be satisfied by giving the government unrestricted discretionary powers."

Furthermore, as a question of law, if the Inland Revenue did not "properly" serve the Determination on the taxpayer on 22 February 2010 for the reasons outlined above, can the taxpayer be liable for the consequences of it? It is "unfair" to burden the taxpayer with the extra taxation because as a consequence of Inland Revenue's omission to advise him/her of the obligations and rights, he/she cannot properly appeal in time.

In addition, might it be possible for the Board to acknowledge it was an oversight "not" to have noted the meaning and intention of Inland Revenue's letter dated 22 February 2010 as summarized in its closing remarks quoted above. I kindly request the Board to consider the possibility of correcting the error as permitted under Section 68(A) of the Ordinance.

Under Section 68(A) of the Ordinance, The Board of Review may correct-

(a) any clerical mistake in any decision of the Board made in relation to an appeal; or

(b) any error in any decision of the Board arising from any accidental slip or omission.

On a second test, setting aside the legal issues I call into question above, there is the issue of interpretation of intention of the law of when the 30 days should start (reference section 64(4) and relevant case law D2/04, 19 IRBRD 76 (R2/18-25).

"… The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins…., or whether he has the one month period after the process of transmission has been completed. In our view, the latter meaning is more consonant with the legislative intention…. These words appear to us to be more consistent with requirement that the process of transmission has ended, not merely begun. ***Furthermore, it seems to us that, unless the intention is clear, we should not impute to the legislative an intention that time begins to run even before the determination could have reached the taxpayer for him to have any chance of dealing with it.***"

Given that the mail was sent to my in law's address in Hong Kong as I live in China, and during that period in 2010--- when my father in law was extremely ill and in and out of the hospital, it is a highly probable situation that my in laws were more preoccupied with my father in law's health than getting my mail timely to me.

Question of Law (part 2)

For the reasons stated above, I believe that the Decision of 3 May 2011 (per paragraphs 30 and 31) is not consistent with the intent of the Ordinance Section 64(4) and the above relevant case law, and I wish for the Court of First Instance to review the matter as a question of law.

Conclusion

I have separated the 'questions of law' into two parts, part 1 relating to the protection of my basic rights under Hong Kong rule of law, and part 2, questioning an inconsistent application of ordinance 64(4) based on relevant case law D2/04, 19 IRBRD 76 (R2/18-25).

I thank you and the Board of Review in advance for looking into the matter.'

13. 'Attachment B – appendices to Letter of 22-22010.pdf' includes a copy of the 2007 Determination and a copy of the cover letter from the Acting Deputy Commissioner of Inland Revenue to the Taxpayer dated 26 July 2007 ('the cover letter'). In the cover letter, the Acting Deputy Commissioner informed the Taxpayer of her right of appeal in the following terms:

' I am writing to you following your objection to the above assessments.

I am unable to agree with your objection to the assessments, and enclose my formal decision to this effect (the "written determination"), the reasons for my decision and a statement of the facts upon which the written determination was arrived at.

The law allows you to appeal against my decision to the Board of Review ("BOR"), an independent tribunal. The relevant legislation is contained in section 66 of the Inland Revenue Ordinance, which broadly provides that:

- You or your authorized representative may give notice of appeal to the Clerk to the BOR. This notice must be given within one month after the transmission to you of the written determination.

- The BOR may extend the one month appeal period if it is satisfied there was a reasonable cause, including sickness or absence from Hong Kong, which prevented the person from giving notice of appeal within that period.

- The notice of appeal must be in writing and must be accompanied by a statement of the grounds of appeal. It is also necessary to send with the notice a copy of each of the following : the written determination; the reasons for my decision; and the statement of facts.

- At the same time, a copy of the notice of appeal and of the statement of the grounds of appeal must also be sent to the Commissioner.

The full text of section 66 can be found in the sheet enclosed.

The address, opening hours and contact details of the Clerk to the Board of Review are as follows –

[details omitted from this Decision]
You may also wish to visit the web-site of the Board of Review at http://www.info.gov.hk/bor.
Copies of all the Appendices are also enclosed.'

14. A copy document setting out the full text of section 66 was included in Attachment B sent by the Taxpayer to the Clerk under cover of the 21 June 2011 email.

15. By letter dated 21 July 2011, the Assessor commented on the Taxpayer's letter dated 21 June 2011.

16. The Taxpayer sent the Clerk an email on 18 August 2011 enclosing a file called 'Board of Review_08212011.doc' as her response to the Assessor's comments dated 21 July 2011. The Taxpayer wrote as follows in 'Board of Review_08212011.doc' (written exactly as it stands in the original):

'I respond below to the Inland Revenue's letter dated 21 July 2011.

The Inland Revenue writes that … "the Appellant's question was that whether the Board (had) failed to find the above as primary facts in concluding that the copy of the 2007 Determination was served on her "properly" through the 22 February 2010 packet."

The Inland Revenue is mistaken on interpreting the point of my case. The key thesis to my argument is that the Board's decision cannot violate my rights under the principle of rule of law. The government agency has a responsibility to properly explain what it is serving on its citizen as well as to spelling out the rights of the citizen. This is essential to fair government, and in the 22 February 2010 correspondence, Inland Revenue did not fulfill its obligations to fair government.

I include below the interpretation of rule of law which are included in my letter dated 21 June 2011 which underpins the obligations of government power.

HK Government's Department of Justice website
(http://www.doj.gov.hk/eng/legal/index.htm)

"Legality and equality before the law are two fundamental facets of the rule of law. But the principle demands something more, otherwise it would be satisfied by giving the government unrestricted discretionary powers. A further meaning of the rule of law, therefore, is to be found in a system of rules which restrict discretionary power. To this end the courts have developed a set of guidelines aimed at ensuring that statutory powers are not used in ways which the legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power. An example of the former is where a court concludes that a decision which purports to be authorised by a statutory power is plainly unreasonable and cannot have been envisaged by the legislature. An example of the latter is where a decision has been made without according the party affected the opportunity of being heard in circumstances where the legislature must have envisaged that such an opportunity would have been given. In both cases a court would hold that the decisions were legally invalid."

In an article from the Department of Justice website (http://www.doj.gov.hk/eng/archive/pdf/sj110203e.pdf) from a Speech by the Hon Elsie Leung, Secretary for Justice, at the Luncheon of the Rotary Club of Hong Kong on 11 February 2003, The Role of the Secretary for Justice in Promoting the Rule of Law, she writes:

"The rule of law has a number of meanings and corollaries. In brief, it means that everything must be done in accordance with the law – the principle of legality. It means nobody is above the law. In the context of the Government, its powers must derive from the law

- 2 -and be exercised in accordance with the law. Therefore, even where the Government is vested with certain discretionary powers, its discretion must be exercised rationally and without procedural impropriety, and the courts are in a position to prevent abuse."

"The law should be even-handed between government and citizens, striking a balance between the needs of fair and efficient administration and the rights of the individual. The observance of the rule of law makes a government one of laws, and not one of men."

Under Hong Kong's legal system, the rule of law implies the government has certain responsibilities such as to communicate what are the obligations and rights for the individual arising from "needs for … efficient government and rights of individuals" (above quote from Hon. Elsie Leung's speech of February 2003). Inland Revenue failed to meet those standards in this case with the mailing on 22 February 2010, therefore to consider that mailing as Inland Revenue officially serving the Determination on the taxpayer would be to deny the taxpayer his/her individual rights derived from the rule of law.

> In reference to the Commissioner's argument that the Board cannot rule in my favor due to carelessness, it is not the issue anymore. The rule of law stands superior to all other laws which are derived from it.
>
> I thank you and the Board of Review in advance for looking into the matter, and to allow the CFI to consider my case.'

Relevant statutory provisions

17. Section 51(8) imposes a duty on taxpayer to notify the Commissioner of a change in address:

> '*Any person chargeable to tax under Part II, III, IV or VII who changes his address shall within 1 month inform the Commissioner in writing of the particulars of the change.'*

In the absence of reasonable excuse, a person who fails to comply commits an offence under section 80(1)(c):

> '*Any person who without reasonable excuse … fails to comply with the requirements of section … 51 … (8) …commits an offence and is liable on conviction to a fine at level 3, and the court may order the person convicted within a time specified in the order to do the act which he has failed to do.'*

18. Personal service is not the only mode of service permitted under the Ordinance. Section 58(2) permits service by post:

> '*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, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which he is chargeable to tax under Part II.'*

19. Section 58(3) is the provision on when postal service is deemed to have been effected:

> '*Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.'*

20. Section 62(1) requires the Commissioner to give a notice of assessment to each person who has been assessed:

> '*The Commissioner shall give a notice of assessment to each person who has been assessed stating the amount assessed, the amount of tax charged, and such due date for payment thereof as may be fixed by the Commissioner.'*

21. Section 64(4) requires the Commissioner to transmit the Commissioner's determination to the objecting taxpayer.

> '*In the event of the Commissioner failing to agree with any person assessed, who has validly objected to an assessment made upon him, as to the amount at which such person is liable to be assessed, the Commissioner shall, within 1 month after his determination of the objection, transmit in writing to the person objecting to the assessment his determination together with the reasons therefor and a statement of the facts upon which the determination was arrived at, and such person may appeal therefrom to the Board of Review as provided in section 66.'*

22. Section 69(1) provides that the Board's decision shall be final:

> '*The decision of the Board shall be final'*.

The finality of the Board's decision is subject to the proviso on appeals by way of case stated on a question or questions of law. The proviso reads as follows:

> 'Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part II of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.'

Relevant case law

23. It is trite law that:

(1) An applicant for a case stated must identify a question of law which is proper for the then High Court, now Court of First Instance, to consider;

(2) the Board is under a statutory duty to state a case in respect of that question of law;

(3) the Board has a power to scrutinize the question of law to ensure that it is one which is proper for the court to consider; and

(4) if the Board is of the view that the point of law is not proper, it may decline to state a case;

per Barnett J in Commissioner of Inland Revenue v Inland Revenue Board of Review and another, [1989] 2 HKLR 40 at p. 57 H – J ('the Aspiration case'). See also subsequent development of the case in the Court of Appeal in Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223 and before Kaplan J in Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 at p. 417 I.

24. It is clear from the Aspiration case that:

(a) It is incumbent on an applicant for a case stated to identify a question of law which is proper for the Court of First Instance to consider. It is not for the Board to frame questions for an applicant. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal (see the Aspiration case at p. 48 J). A satisfactory question has to be identified so as to trigger the preparation of the case (at p. 47 I).

(b) The questions the Court is asked to answer 'should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts' (at p. 48 E).

(c) An applicant for a case stated may not rely on a question of law which is imprecise or ambiguous (at p. 50 G).

(d) The Board is not to be treated as a mere cipher (at p. 54H).

(e) It is wholly impermissible to go beating about the evidential undergrowth in the hope of flushing out some useful pieces of evidence that support an applicant's view, in total disregard of settled law that the Board's findings of primary fact, in so far as there is any evidence to support them, are sacrosanct (at p. 58 F).

25. In Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378, Fok J (as he then was) held that the Board is required to apply a qualitative assessment to the proposed questions of law and is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, such as a question which is plainly and obviously unarguable:

(a) The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the

proposed questions of law were not proper ones for the opinion of the Court. (paragraph 34).

(b) In my judgment, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable. (paragraph 50)

(c) If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position. (paragraph 53)

26. In Tungtex Trading Co Ltd v Commissioner of Inland Revenue, HCIA 7/2009, Barma J in a judgment handed down on 26 August 2011 applied Hororcan and held at paragraph 31 that if the Board is satisfied that the argument has no prospect of success, it is not bound to include it amongst the questions that it poses for the consideration of the court.

27. Where a conclusion of the Board is challenged, the correct question is whether it was open to the Board to so conclude or whether the true and only reasonable conclusion contradicts the Board's decision appealed against, see paragraphs 1 to 5 and 44 in the Court of Final Appeal's judgment in Lee Yee Shing and Kim Eng Securities (Hong Kong) Ltd v CIR [2007] 2 HKLRD 117 at paragraph 55, quoting Kwong Mile Services Ltd v CIR (2004) 7 HKCFAR 275 at pp. 288D-E and 291J-292B and Edwards (Inspector of Taxes) v Bairstow & Another [1956] AC 14 at p. 36.

28. Chan Chun Chuen v Commissioner of Inland Revenue, HCAL 76/2010, 1 June 2011, is a recent Court of First Instance judgment on service of documents on a taxpayer. The case itself was concerned with service of notice of assessments. The Board see no material difference between service of notice of an assessment and service of a determination or a copy of a determination. Reyes J held that all modes of service were open to the Commissioner and discussed how a taxpayer should rebut the presumption of actual notice:

> '*12. Under Inland Revenue Ordinance (Cap.112) (IRO) s.51(8) "[a] person chargeable to tax ... who changes his address shall within 1 month inform the Commissioner in writing of the particulars of the change". A person who fails to comply with s.51(8) commits an offence and becomes liable to a level 3 fine (IRO s.80(1)(c)).*

13. Over the relevant period, Mr Chan did not inform the Commissioner of any change in his address.

14. IRO s.62(1) requires the Commissioner to "give a notice of assessment to each person who has been assessed".

15. By s.58(2) such notice:-

"may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which he is chargeable to tax..."

16. IRO s.58(3) provides that a notice of assessment sent by post "shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course of post". To establish posting of the notice, it "shall be sufficient to prove that the letter containing the notice was duly addressed and posted" (s.58(4)).

…

30. IRO s.62(1) requires the Commissioner to give notice of an assessment to a taxpayer. I accept that, as a matter of principle, the requisite degree of notice must be actual (as opposed to constructive) notice.

31. IRO s.58(2) sets out the ways in which actual notice of assessment might be given. Where the Commissioner employs any of the methods so stipulated, then it will be presumed by reason of s.58(3) that the taxpayer has received actual notice of an assessment. The burden will shift to the taxpayer to show the contrary and rebut the presumption of actual notice.

32. However, on a plain reading of IRO ss.58 and 62, all modes of service listed in IRO s.58(2) are available to the Commissioner. I see nothing in ss.58 or 62 which imports some additional duty or burden on the Commissioner to consider in the case of every given taxpayer which mode of service is the more appropriate…

33. Under IRO s.51(8) a taxpayer is under a duty to inform the Commissioner of one's address whenever that changes. This ensures that, as much as possible, the Commissioner sends an assessment to an operative address.

> *34. Where (as here) the taxpayer fails to inform the Commissioner of a change of address, the taxpayer can only have one's self to blame if the Commissioner relies on the taxpayer's last return and sends an assessment to the postal address specified in that return. It lies ill on the taxpayer to argue that non-compliance with the duty to furnish a proper address means that the Commissioner comes under a heavier duty than she otherwise might have had, to assess which of the addresses specified in s.58(2) would be the most effective.*
>
> …
>
> *43. In summary, the Commissioner must establish actual notice. But she can do so by relying on the presumption of actual notice in s.58(3). There is no separate obligation on her to consider which of the modes of service listed in s.58(2) is the most appropriate. All modes are equally open and she may choose among them as she sees fit. Once the presumption in s.58(3) comes into play, it falls upon the taxpayer to rebut the presumption and establish the absence of actual notice. In the present case, the Commissioner cannot be faulted in choosing to send the assessments to the KLY address as Mr Chan's last known postal address.'*

General comments on the 'questions'

29. The word 'question' is a simple English word in everyday use. The Taxpayer was asked by the Board to identify a question or questions. Instead of posing a question or questions, the Taxpayer put forward arguments which are wordy, opaque, prolix and are not easy to understand[1]. Some conclusions or statements do not logically follow from the previous argument or statement.

The first 'question'

30. The following is the only question discerned by the Board[2]:

> ' Furthermore, as a question of law, if the Inland Revenue did not "properly" serve the Determination on the taxpayer on 22 February 2010 for the reasons outlined above, can the taxpayer be liable for the consequences of it?'

31. This is a hypothetical question. A hypothetical question is not a proper question.

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1 Cf. Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321 at paragraphs 6 and 9.

2 See paragraph 12 above.

32. The hypothesis is not premised upon any finding by the Board. Further, there is no question on the properness of the service. This is another reason why it is not a proper question.

33. The question is premised on service of 'the Determination on the taxpayer on 22 February 2010'. Such premise is contrary to the Board's finding of fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010 at the latest and the Board's further finding of fact that the copy 2007 Determination was served on the Taxpayer by 26 February 2010 at the latest, see paragraph 40 below. This is another reason why the question is not proper.

34. The contention that the Inland Revenue did not 'properly' serve the Determination on the Taxpayer is a new contention raised for the first time after the Board hearing and the Decision. It includes new factual allegations which were not raised at the hearing. Thus, the Commissioner has had no opportunity to consider putting forward factual evidence and submission to deal with the contention. As there was no such contention by the Taxpayer at the hearing, the Board did not deal with it in the Decision. The question does not arise from the Decision. These are further reasons why the question is not a proper question.

35. The contention that service was not proper is plainly and obviously unarguable and this is yet another reason why the question is not a proper question:

(1) There is no requirement in law to give notice to a party to a decision about the provisions on appeal.

(2) There is no such requirement under the Ordinance. Section 64(4) merely requires the Commissioner to transmit the Commissioner's determination to the objecting taxpayer. There is no requirement to inform the objecting taxpayer of the appeal provisions.

(3) The Judiciary, including courts and tribunals, pronounce or hand down judgments, decisions or rulings day in and day out. It is not the Judiciary's practice to accompany such judgments, decisions or rulings by information on appeal. This reinforces the Board's view that there is no requirement in law to give notice to a party to a decision about the provisions on appeal.

36. (1) The 22 February 2010 packet included the cover letter[3] which gave full and detail information on an appeal to the Board. It lies ill in her mouth to complain about lack of information.

(2) Indeed, the Taxpayer's case at the hearing was that she gave notice of appeal even before receiving the 22 February 2010 packet[4]. On the

[3] See paragraphs 13 and 14 above.

Taxpayer's case before the Board, there was no question about any prejudice to the Taxpayer. The Court of First Instance should not be vexed by an academic question.

The second 'question'

37. The contention (written exactly as it stands in the original) put forward by the Taxpayer was that[5]:

> 'I believe that the Decision of 3 May 2011 (per paragraphs 30 and 31) is not consistent with the intent of the Ordinance Section 64(4) and the above relevant case law, and I wish for the Court of First Instance to review the matter as a question of law.'

38. To start with, this is a proposition or contention, not a question.

39. Paragraphs 30 and 31 of the Decision read as follows:

> '30. Thus, the appellant was out of time by the time when her notice of appeal was transmitted to the Clerk on 14 April 2010.
>
> 31. She has not made good any of the grounds under section 66(1A) for extension of time.'

40. These two paragraphs follow paragraphs 27 to 29 of the Decision:

> '27. Significantly, she has made no allegation of the date when the 22 February 2010 packet was delivered to the Hong Kong address, in contrast with the date when she chose to read the contents.
>
> 28. Section 58(3) of the Ordinance provides that:
>
> > "Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post."
>
> 29. We find as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010, at the latest, and that the copy 2007 Determination was served on the appellant by 26 February 2010, at the latest.'

---

4 See paragraphs 3, 6 and 8(2) above.
5 See paragraph 12 above.

41. Section 58(1) permits personal or postal service. There is no mention about service being effective only when a taxpayer shall have read the document served on such taxpayer.

42. The Commissioner, as the Commissioner was entitled to, chose postal service.

43. The Taxpayer made no allegation on the date when the 22 February 2010 packet was delivered to the Hong Kong address, see paragraph 40 above. Thus, there was no attempt by the Taxpayer to rebut the presumption under section 58(3) that the packet was 'served on the day succeeding the day on which it would have been received in the ordinary course by post'. The Board found as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010, at the latest, and that the copy 2007 Determination was served on the Taxpayer by 26 February 2010, at the latest.

44. The Taxpayer had actual notice of the contents of the Determination.

45. The Taxpayer made no allegation at the hearing of any illness, absence from Hong Kong or other reasonable cause during the period from 26 February 2010 to 14 April 2010 which prevented her from giving notice of appeal within the statutory time limit.

46. Appeal by way of case stated is an appeal on law arising from the Board's decision. Fresh evidence is not admissible.

47. For reasons given above, the contention is plainly and obviously untenable. It is not a proper matter for submission to the Court of First Instance.

Conclusion

48. There is no proper question and no proper question of law. We decline to state a case and dismiss the Taxpayer's application for a case stated.

ANNEXURE A
D3/11

BOARD OF REVIEW

Appeal by the Appellant

(Date of Hearing: 24 September 2010)

****

DECISION

****

Case No. D3/11

Salaries tax – extension of time for appeal – sections 58(3), 66(1) & 66(1A) of Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung and Marianna Tsang Wai Chun.

Date of hearing: 24 September 2010.
Date of decision: 3 May 2011.

By a Determination dated 26 July 2007 ('the 2007 Determination'), the acting deputy commissioner determined the appellant's objection to 2 additional salaries tax assessments. The appellant sought to appeal against the 2007 Determination by a fax dated 15 April 2010 and received by the office of the Clerk to the Board of Review ('the Board') on 14 April 2010 in which she stated that she 'had just received an Inland Revenue Department Letter, dated February 22 as it was sent to [her] in-law's home in Hong Kong and [she] was [overseas]'.

A letter dated 22 February 2010, which contained a copy of the 2007 Determination ('the 22 February 2010 packet'), was sent by the Inland Revenue Department ('IRD') to the Hong Kong address of the appellant. According to the Immigration Department's movement records, the appellant was in Hong Kong between 25 February 2010 and 1 March 2010. But the appellant claimed that she only received the 2007 Determination on or around 16 April 2010.

Held:

1. The Board found as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010 at the latest, and that the copy 2007 Determination was served on the appellant by 26 February 2010 at the latest. (Section 58(3) of the IRO applied)

2. Accordingly, an extension of time was required for the appellant to appeal. However, the appellant had not made good any of the grounds under section 66(1A) of the IRO for extension of time. (Chow Kwong Fai v CIR [2005] 4 HKLRD 687 considered)

3. The Board declined to extend time and that was the end of the appellant's intended appeal.

Application refused.

Case referred to:

Chow Kwong Fai v CIR [2005] 4 HKLRD 687

Taxpayer in person.
To Yee Man and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

Introduction

1. By a Determination dated 26 July 2007 ('the 2007 Determination'), the Acting Deputy Commissioner determined the Appellant's objection to two additional salaries tax assessments by:

(1) increasing the additional salaries tax assessment for the 2002/03 year of assessment; and

(2) annulling the additional salaries tax assessment for the year 2003/04.

2. By fax dated '15 April 2010' and received by the office of the Clerk ('the Clerk') to the Board of Review ('the Board') on 14 April 2010, the Appellant sought to appeal against the 2007 Determination and made, among other assertions and allegations, the following assertions and statements:

> 'I called to the HK Inland Revenue telephone number [number omitted here] around March 18 and spoke to [Ms A] to let her know that I had <u>just</u> received an Inland Revenue Department Letter, dated February 22 as it was sent to my in-law's home in Hong Kong and I was [overseas]. I explained I needed time to investigate the matter which dated back to 2002. She advised that [Ms B] was handling the case and agreed to note my request for an extension of deadline to look into the matter.
>
> Subsequently I hoped to schedule a meeting in person with Inland Revenue when I visited Hong Kong during Easter break; unfortunately, this year the holiday extended until April 9[1], at which time I had already returned [overseas]. On April 11[2], I called to the office of [Ms B] and she explained that at this point I had to bring my case to the Board of Review.

[1] The Easter and Ching Ming holidays were from 2 to 6 April 2010.
[2] 11 April 2010 was a Sunday.

> Accordingly, I appeal my case below to the Board of Review:
>
> …
>
> (Refer to Appendix D – "The EPP reflects a provisional allocation of [name omitted here] shares …")
>
> (Refer to Appendix E – The actual award was not made until 2004 with the award dated …)
>
> …
>
> Please mail correspondences (*sic*) to my in-law's Hong Kong address[3]. I will call you from [overseas], and look forward to resolving this issue very soon …
>
> In advance, thank you for taking time to hear my appeal, and I look forward to resolving the matter expediently (*sic*) ...'

However, she did not give her 'in-law's' address.

3. In the course of her intended appeal to the Board, she applied for a postponement of the hearing and also for permission to appeal outside the statutory one month time limit.

Application for postponement of hearing

4. By letter dated 20 April 2010, the Clerk acknowledged receipt of her notice of appeal and informed her that a hearing would be arranged for the Board to hear and decide whether to extend time for her to appeal.

5. By letter dated 5 August 2010, the Clerk gave notice to the Appellant and the Respondent that the Appellant's application to extend time for appeal would be heard on 24 September 2010.

6. More than a month after the Clerk's letter of 20 April 2010 and just 11 days before the date listed for hearing, the Appellant wrote to the Clerk by email sent on 13 September 2010 asking for a postponement of the hearing. No physical address was given in the email.

7. The Appellant wrote a further email to the Clerk on 14 September 2010. No physical address was given by the Appellant.

[3] Referred to as 'the Hong Kong address' in this Decision.

8. By letter dated 15 September 2010 sent to the Appellant at the Hong Kong address, the Clerk informed the Appellant that the chairman of the hearing panel was not persuaded to postpone the hearing date.

9. The Appellant wrote two more emails, one on 15 September 2010 and the other on 16 September 2010. No physical address was given by the Appellant in either email.

10. The Clerk replied by letter dated 16 September 2010 sent to the Appellant at the Hong Kong address informing the Appellant that she could make an application for postponement at the hearing on 24 September 2010.

11. The ground given by the Appellant for a postponement was that she needed time to obtain evidence of the sale of the overseas residential unit at the overseas address referred in paragraph 16 below in order to support her allegation that she had not received the 2007 Determination sent to the overseas address.

Application for permission to appeal outside the statutory one month time limit

12. The Appellant's case was that she had not received the 2007 Determination sent in 2007 and she was adamant that she only received a copy of the 2007 Determination on or around 16 April 2010. We quote from the transcript of the hearing:

> ' Chairman: So, you haven't received the determination?
>
> Appellant: Only afterwards.
>
> Chairman: As it was originally sent?
>
> Appellant: It was not, that's right. I did not.
>
> Chairman: When did you receive a copy?
>
> Appellant: This would have been when they replied to me, which was in this year, a couple of months-, let me see what date this letter is dated. This was in-, I would have received this one in April.
>
> Chairman: April?
>
> Appellant: April 16 2010.
>
> Chairman: It can't be. It can't be.
>
> Appellant: This is the, this is the …
>
> Chairman: It can't be. You couldn't have received it on April 16 when your notice of appeal was lodged on the 14th.

Appellant: Well, this is, I am looking at this. No, pardon me.

Chairman: You couldn't have presented the appeal before you received it.

Appellant: Let me see here. I have seen that but, let me see when this packet was-, this packet came together. This is the July 26 2007 …

Chairman: I am telling you that your notice of appeal sent here was received by this office on the 14th of April so …

Appellant: 14th of April?

Chairman: So, you must have received it before you appealed against it.

Appellant: Yes, so this was here on the 16th of April but this says 16th of April. This one I received. Maybe the dates, some of these dates got crossed or something but this is-, OK, this appeal was made on April 15th. I have this letter dated April 15th that I sent to the appeal, to the board of review. I sent a letter April 15th.

Chairman: Right, which this board received on the 14th.

Appellant: On the 14th? Well, maybe it was faxed to you guys. I apologise. I don't know why these dates are off by a few days. I apologise. I don't know but this Inland Revenue letter, because I simultaneously wrote to the board of appeal as well as to approach you guys in the Inland Revenue. It was through the Inland Revenue they told me that, since the determination had been made, I had to appeal it to the board of review. They could no longer handle the case without going through a board of review. But I guess these dates are off by a couple of days but anyway right about that time. But I received this package it should be, well, I don't know, this is, here this is Inland Revenue letter. It says April 16th.

Chairman: Well, you present your case. The Revenue will respond later. You can't really ask them questions as you go along.'

Authorities on extension of time for appeal

13. Section 66(1) and (1A) of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') 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).'

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 section 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[4] and Barma J[5] 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*' [6].

Barma J[7] agreed with the Cheung JA's additional observation.

Board's decision on application for adjournment and extension of time for appeal

16. By letter dated 23 August 2005, the Appellant stated that she was distressed by two letters[8] from the Inland Revenue Department ('IRD'). She gave an overseas address ('the overseas address') as her address.

17. By letter dated 20 September 2005, the Assessor wrote to the Appellant at the overseas address asking for further information about her objection to the assessments.

18. The Appellant's case is that:

(1) the property at the overseas address was sold in late October 2005;

(2) she did not inform the IRD of (1) above and the reason given by her was that:

> ' there was really no reason at that time from my standpoint to have advised Inland Revenue that I had a change of address or anything like that'; and

(3) she had not received the documents sent to the overseas address.

19. We reject the reason given by the Appellant as quoted in paragraph 18(2) above for not informing IRD. It is plainly bad and unacceptable. The Appellant knew from the

[4] At paragraph 38.
[5] At paragraph 47.
[6] At paragraph 46.
[7] At paragraph 47.
[8] Dated 5 August 2005 and 10 August 2005.

letter dated 20 September 2005 that IRD was beginning to investigate her objection to two salaries tax assessments and had asked for further information from her. She has made no allegation of having responded to the Assessor's 20 September 2005 letter. Tax cannot be avoided by trying to be incommunicado.

20. A lot of paper work was generated and IRD wasted considerable resources as a result of the Appellant's decision not to inform IRD of her new contact address.

21. Be that as it may, assuming in favour of the Appellant that she did not receive the 2007 Determination sent to the overseas address in 2007, the next question for our decision is: when was a copy of the July 2007 Determination transmitted to her?

22. It is clear from the notice of appeal referred to in paragraph 2 above that the Appellant had received a copy of the Determination sent with the Assessor's letter of 22 February 2010. The Assessor could have been more helpful had she made it a point to identify in her letters the document she was responding to and had also listed the enclosures to her letters. That would have saved the Board a lot of time trying to follow the correspondence and to make proper findings of fact. Be that as it may, the Assessor appeared to be responding to the Appellant's letter dated 2 February 2010. The Appellant wrote as follows:

> 'I am shocked and outraged with the action your department has taken on my bank account at [names of 2 banks omitted here] without responding to my inquiry dated August 2 2008 and July 2 2009 (see attached). Without a clear explanation, your action is legally improper. I hereby request a formal explanation within the next 10 working days.
>
> It is unacceptable to have such unjustified action from a government department.'

As with most of her letters, the Appellant did not give her address. However, the Assessor noted that the Appellant had enclosed a letter dated 19 January 2010 from one of her banks sent to the Appellant and her husband at the Hong Kong address. The Assessor sent her 22 February 2010 letter to the Hong Kong address.

23. By letter dated 22 March 2010 which IRD received on 8 April 2010, the Appellant wrote as follows:

> 'I called last week and spoke to [Ms B], Assessor, [omitted], to let her know that I had just received the letter of notice from the HK Inland Revenue Department and I needed some time to investigate the matter since it was so long ago.
>
> …

> I am currently [overseas]. After reviewing your package of letters and documents, I have questions, but I must clarify what benefits I am in fact entitled to …
>
> …
>
> Please continue to mail correspondences (*sic*) to my in law's Hong Kong address you have on record. I will call you from [overseas], and look forward to resolving this issue very soon.'

24. By letter dated 16 April 2010, the Assessor replied to the Appellant's letter dated 22 March 2010 and reminded her that if she disagreed with the 2007 Determination, she must lodge her appeal directly to the Board.

25. The Immigration Department's movement records showed that between February and April 2010, the Appellant was in Hong Kong during the following periods:

Date		Date	
11-02-10	Arrival	14-02-10	Departure
25-02-10	Arrival	01-03-10	Departure
01-04-10	Arrival	05-04-10	Departure
29-04-10	Arrival		

26. We have no hesitation in rejecting, and do reject, the Appellant's allegation that she did not receive a copy of the 2007 Determination until on or about 16 April 2010. It is plain and obvious from her letter dated 22 March 2010 that she had already received the 22 February 2010 packet.

27. Significantly, she has made no allegation of the date when the 22 February 2010 packet was delivered to the Hong Kong address, in contrast with the date when she chose to read the contents.

28. Section 58(3) of the Ordinance provides that:

> '*Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.*'

29. We find as a fact that the 22 February 2010 packet was delivered to the Hong Kong address by 25 February 2010, at the latest, and that the copy 2007 Determination was served on the Appellant by 26 February 2010, at the latest.

30. Thus, the Appellant was out of time by the time when her notice of appeal was transmitted to the Clerk on 14 April 2010.

31. She has not made good any of the grounds under section 66(1A) for extension of time.

32. As we have assumed in favour of the Appellant that she had not received the 2007 Determination sent to the overseas address in 2007, the date of sale of the property at the overseas address becomes irrelevant. That is why we refuse to postpone the hearing.

Conclusion

33. 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. The merits or otherwise of her intended appeal do not arise for our decision and we express no views on the merits.