Case No. D37/11

Salaries tax – time limit for making an assessment – maladministration of the Inland Revenue Department ('IRD') – sections 14, 51, 59, 60, 64 and 68(8) of the Inland Revenue Ordinance.

Panel: Cissy K S Lam (chairman), Jeevan Hingorani and Elaine Liu Yuk Ling.

Date of hearing: 2 and 30 September 2011.
Date of decision: 28 November 2011.

The IRD issued a salaries tax assessment on the Appellant about 3 months short of 5 years after the Appellant filed his tax return. The IRD accepted responsibility for the delay and offered apologies. The Appellant objected to the assessment raised on him on the ground that the assessment was made out of time and that there was maladministration within the IRD.

Held:

1. The delay was inordinate and the explanation unsatisfactory. The Board sympathizes with the Appellant's complaints, but short of any capricious and dishonest conducts it does not find mere delay or flaws in administration as sufficient to affect the validity of the assessment.

2. Section 59(1) contains no time limit within which an assessment must be made. That section merely tells an assessor when he can start to make an assessment. There is only one time limit for the making of an assessment and that is the one prescribed by section 60(1). The present assessment was made within that time limit and is valid.

Appeal dismissed.

Cases referred to:

Mok Tsze-fung v CIR (1962) 1 HKTC 166
Parkin v Cattell (1971) 48 TC 464
Mandaria v CIR [1959] AC 114
Amoco (UK) Exploration Co v IRC [1983] STC 634
Nina TH Wang v CIR [1994] 2 HKLR 356
Hossack v IRC [1974] STC 262

Taxpayer in person.
Louie Wong, Senior Government Counsel of the Department of Justice and Leung To Shan for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to the salaries tax assessment raised on him for the year of assessment 2003/04 on the ground that the assessment was made out of time and that there was maladministration within the Inland Revenue Department ('IRD'). By a determination dated 31 January 2011, the Deputy Commissioner of Inland Revenue rejected his objection and confirmed the assessment. He now appeals to us.

2. The facts are straight forward enough and not in dispute:

(1) On 3 May 2004, the Assessor gave notice to the Appellant pursuant to section 51(1) of the Inland Revenue Ordinance, Chapter 112 ('IRO') to complete his tax return for the year of assessment 2003/04 ('the Return') within three months.

(2) The Appellant filed the return on 30 September 2004.

(3) But it was on 2 June 2009 (that is about 3 months short of 5 years after the return was filed) that the assessment was issued.

(4) There is no dispute about the quantum of the assessment, only its validity.

(5) The Appellant appointed his wife as his authorized representative (himself being out of Hong Kong) and on 7 August 2009 his wife had a meeting with the Assessor Ms Tam objecting to the assessment.

(6) There ensued further correspondence between the IRD and the Appellant/his wife. By a letter of 17 September 2009 the Appellant's wife maintained the objection to the assessment and asked for proper explanation for the delay. By a letter of 4 December 2009, the IRD apologized for replying late *'as we have tried to find out the reasons for the late issue of assessment, including the interview of the officer who has just returned to office after taking prolonged sick leave. Having conducted a thorough investigation, we concluded that our staff did not raise the assessment until June 2009 as the responsible officers had not paid heed to the long outstanding position of the 2003/04 assessment and had not taken prompt action to raise the assessment.'* The IRD further apologized for the late issue of the assessment but maintained that it was valid.

Grounds of appeal

3. The Appellant set out six Reasons for appeal. He withdrew the first two at the hearing leaving four for our consideration. The following refer to corresponding paragraphs in his Reasons for Appeal:

(1) Paragraph 3: Referring to the letter of 4 December 2009 above, 'the [IRD] has serious flaws with the administrative process of handling assessments, as it had to wait for a prolonged period of time to interview a member of staff, when surely comprehensive information should have readily been on file, and whether the member of staff handling the assessment 5 years previously was still within the unit and/or [the IRD], and if so, would be able to recall the exact details of one of a large number of files dealt with by each member of staff.'

(2) Paragraph 4: Under section 59 of the IRO, the IRD 'has failed to assess the Appellant, who furnished the return for 2003/04 within the time limited by the notice of [the IRD], within a reasonable time'.

(3) Paragraph 5: In the IRD's letters, the IRD 'has acknowledged that it is in fact responsible and has been negligent in raising the proper demand for the final tax 2003/2004'.

(4) Paragraph 6: '... the principle of generalia specialibus non derogant is relevant to this matter and therefore Section 59 subsequently overrides Section 60(1) in this matter.'

4. The crux of the Appellant's case is Paragraph 4 of the Reasons for Appeal and we shall examine that ground first.

Relevant sections of the IRO

5. Section 51(1): *'An assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish'* a return ('section 51 notice').

6. Section 59(1):

> '*Every person who is in the opinion of an assessor chargeable with tax under this Ordinance shall be assessed by him as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1): Provided that the assessor may assess any person at any time if he is of opinion that such person is about to leave Hong Kong, or that for any other reason it is expedient to do so.'*

7. Section 60(1):

> '*(1) Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, …*'

Was the assessment made within time?

8. The Appellant's case is that section 59(1) lays down a time limit of 'as soon as may be' which the IRD did not comply with. Section 60(1) is not relevant because section 59 is the applicable provision. The Appellant accepts that section 60(1) can apply to first assessments (where a person 'has not been assessed') as well as to additional assessments, but he submits that it can only apply where the IRD has discovered new information to enable a first assessment to be made. His argument is that an assessor must make an assessment 'as soon as may be' after a return is filed or after the expiration of the section 51 notice. If he does not do so, he is time-barred unless information not available at the time he made or should have made the assessment under section 59(1) subsequently came to light. It is only in such an event that the assessor, armed with such further information, can proceed under section 60(1).

9. In support of his contention, the Appellant relies on Mohamed, Hong Kong Inland Revenue Handbook, Part X, where in discussing section 60 additional assessments, it says that the section deals with cases *'where following an initial assessment further information is received which makes an additional assessment by the assessor justified:* Mok Tsze-fung v CIR (1962) 1 HKTC 166 at 180-182. *For section 60 to be invoked, further information must come to light and may include new inferences of fact'* and it relies on Mok Tsze-fung at 180 and Parkin v Cattell (1971) 48 TC 464 at 474 as authorities.

10. But an examination of the two authorities does not support the argument relied on. Parkin v Cattell was concerned with the interpretation of the word 'discover' in section 41(1) of the Income Tax Act 1952 and in section 5(3) of the Income Tax Management Act 1964. The wordings of those sections are different from the wordings of our provisions and offer little assistance. In any event we find nothing in that judgment to confine the applicability of the sections in question to the finding of new facts. Quite the contrary, Lord Denning MR held at page 474 that the word 'discover' simply means 'find out'. An Inspector of Taxes 'discovers' not only when he finds out new facts not known to him, *'but also when he finds out that he or his predecessor drew a wrong inference from the facts which were then known to him: and further, when he finds out that he or his predecessor got the law wrong and did not assess the income when it ought to have been.'* So first or additional assessment could be made even in the event of a mistake on the part of the tax inspector in using the original information.

11. In Mok Tsze-fung additional assessments were made because information had come to light to show that the appellant there had under reported his profits in the return. But

nowhere do we find in the judgment as saying that section 60 could be invoked only in such circumstances. True that at [1962] HKLR 276, Mills-Owens J held that section 60 was *'aimed at the case, amongst others, where following a first assessment under section 59 (whether on acceptance or rejection of a return) information comes to light justifying the assessor in inferring that the taxpayer has not disclosed the whole of his profits.'* It was only one 'amongst others'. Indeed at 277, Mills-Owens J found that section 60 would apply *'equally to the case where the fact of inadequate first assessment was due to some arithmetical error in assessment as to the case where the inadequate assessment was due to absence of full disclosure on the part of the taxpayer'*. Likewise we do not see why the section should not equally apply to a case of non-assessment where the failure to assess was due to delay, undue it may be, on the part of the assessor.

12. The Appellant further relies on the Privy Council decision in Mandavia v CIR [1959] AC 114. There the taxpayer was served with a notice under section 59 of the East African Income Tax (Management) Act 1952 (equivalent to our section 51 notice) requiring him to furnish his returns. By that section he was allowed a minimum of 30 days to do so. By section 71 of that Act, *'the commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.'* (similar to our section 59(1) but without the proviso). On learning that the taxpayer was abroad at the time of the notice, the commissioner proceeded to assess him before the expiration of the minimum 30 days period. It was held that the assessment must be set aside because before an assessment could be made the 'time allowed' under section 71 had to elapse. By 'time allowed' the Privy Council did not mean a time limit within which the commissioner must make an assessment, but rather the time allowed to the taxpayer to deliver his return. The commissioner could proceed to make an assessment as soon as may be after the time allowed, but not before.

13. The commissioner there rested his case on section 72 of the 1952 Act which provided that *'where it appears to the commissioner that any person liable to tax has not been assessed or has been assessed at a less than that which ought to have been charged, the commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged thereunder…'* (similar to our section 60(1)). That section did not save the commissioner because that section could not start to operate until the 'time allowed' had elapsed.

14. True that part of judgment seemed to suggest that section 72 of the 1952 Act dealt with reopening of cases owing to subsequent information, but nowhere did it confine that section to operate only to the re-opening of cases. Rather it is worthy to note that at page 124, the Privy Council found that section 72 (similar to our section 60(1)) *'contains a prima facie limitation of seven years'* whereas section 71 (similar to our section 59(1)) *'contains no limitation'*.

15. Mr Wong, Senior Government Counsel representing the Commissioner of the Inland Revenue, argues that there is no requirement of 'further information' under section 60(1) and section 60(1) applies giving the IRD a time limit of six years from the end

of the year of assessment to make the assessment. Section 59(1) does not limit the time an assessment is made, rather it provides for 'the starting time' when an assessor can begin to make an assessment. Assessment, he argues, is a process and the process begins with section 59(1) and ends with section 60(1).

16. We agree with Mr Wong's submission. It is clear from a plain reading of section 59(1) including the proviso that the purpose of the section is not to limit the time an assessment can be made, but to tell an assessor when he can proceed to make an assessment. We can envisage three scenarios:

(1) If a return is filed, clearly the assessor may proceed with the assessment as soon as may be after the filing of the return.

(2) If no return is filed but the assessor is of the opinion that the person is chargeable with tax, the assessor may nonetheless proceed to make an assessment as soon as may be after the expiration of the section 51(1) notice, but not before.

(3) Where no return is filed and the time for filing the return has not yet expired but the assessor is of the opinion that the person is about to leave Hong Kong or for any other reason expedient to do so, then the assessor may proceed with the assessment at any time.

17. Scenario 3 is the scenario envisaged by the proviso. The Appellant's argument that section 59(1) caps the time within which an assessor must make an assessment does not sit well with this proviso which empowers the assessor to make an assessment 'at any time' he thinks it expedient to do so.

18. An assessor may, on the other hand, decide not to proceed with an assessment where he is in the opinion that the person is not chargeable with tax or where sub-section 59(1A), (1B) or (1C) applies. These reinforce Mr Wong's argument that section 59 is the 'starting pistol' and not the 'finishing flag'. The section tells the assessor when the starting pistol can be fired.

19. Mr Wong further argues that 'as soon as may be' is not a workable time limit for tax assessment. He refers us to Amoco (UK) Exploration Co v IRC [1983] STC 634 at page 655-j where Walton J posed these questions: *'How long is he to be given for deliberation? May he put the papers aside to work on some more urgent business? Suppose that the only reason he has to put the papers aside to work on more urgent business is that the Board is understaffed? Is he to be assumed to be a doubting Thomas who question every ha'penny, or is he to be assumed to accept the return with the minimum of questioning?'* There is force in Mr Wong's argument. In the context of fiscal legislation it is unlikely that the Legislature would intend the jurisdiction to assess and collect tax, the failure of which would deprive the Government of important revenue, to depend on some indeterminate time limit.

20. Mr Wong further points out that it cannot be the intention of the legislature to prescribe two different time limits relating to assessments to one and the same tax. The Appellant's answer is that there can be two time limits because sections 59(1) and 60(1) are intended to apply to different situations – section 59 to first assessments simpliciter whereas section 60(1) to either additional assessments or first assessments where further information has come to light. But once this condition of 'further information' falls apart, as an examination of the authorities above shows that it does, then the whole of the Appellant's answer likewise falls apart.

21. We agree with Mr Wong that there cannot be two time limits and there is not. The one and only time limit is that prescribed by section 60(1). The assessment in the present case was made within that time limit.

Any duty to assess under section 59(1)

22. In paragraph 4.12 of the Appellant's written submission, the Appellant had this to say: 'Further, even if, contrary to Mandavia, ss.59 and 60 may be used alongside or to supplement each other, the maxim "generalia specialibus non derogant" would apply as the Commissioner has an obligation under Section 59 (that a person shall be assessed "as soon as may be") i.e., it is a mandatory provision under Section 59 for the Commissioner to raise an assessment, under Section 60 it is only a power, the Commissioner may raise an assessment, in circumstances as described at 4.6 above, by Mohamed – "shall" imposes a greater obligation on the Commissioner by the Legislature than does "may", when they lie alongside each other in the statute. Secondly, in the circumstances of this case file, Section 59 is simply the more relevant and so more applicable Section when contrasted with Section 60'.

23. Whilst the maxim generalia specialibus non derogant has clearly no application here, with both sections being equally relevant and applicable, the contention that there is a mandatory duty under section 59 to raise an assessment requires further examination. We seek guidance from the Privy Council decision in Nina TH Wang v CIR [1994] 2 HKLR 356. That case concerned with section 64 of the IRO, sub-section (1) of which allows a person to object to an assessment and file a notice of objection. Sub-section (2) provides that on receipt of a valid notice of objection, *'the Commissioner shall consider the same and within a reasonable time may confirm, reduce, increase or annul the assessment objected to ...'* The taxpayer there contended that the Deputy Commissioner failed to respond within a reasonable time as a result of which his determinations of the objections must be quashed. The taxpayer relied on the word 'shall' as showing a mandatory duty.

24. The Privy Council found on the facts that the determinations were made within a reasonable time. Secondly, on the assumption that there had been a breach of the time limit, the Privy Council held that the Deputy Commissioner had not been deprived of his jurisdiction. After reviewing earlier case law Lord Slynn of Hadley, giving the judgment of the Privy Council, observed [at 366]:

> '*. . . their Lordships consider that when a question like the present one arises –*

an alleged failure to comply with a time provision – it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?

In the present case the legislature did intend that the Commissioner should make his determination within a reasonable time. At the same time it is no less plain that the legislature imposed on the Inland Revenue authorities, including the Commissioner, the duty of assessing and collecting profits tax from "every person carrying on a trade, profession or business in Hong Kong" (section 14). If the Commissioner failed to act within a reasonable time he could be compelled to act by an order of mandamus. It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable time is to be taken as having expired, which will depend on all the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the Commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the Government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of Government expenditure; the alternative result (that the Commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay.

Their Lordships accordingly consider that in the context of this legislation a failure to act within a reasonable time (had it occurred) would not have deprived the Commissioner of jurisdiction or made any determination by him null and void.'

25. Wang v CIR was concerned with the Commissioner's duty to act in the event of an objection. It is quite different from an assessor's duty, if any, to assess. This question of statutory duty was not canvassed before us at the hearing. Without proper argument it is not the opportune moment to come to a definitive conclusion. Suffice for us to say that even if there was such a duty and that there was a breach of it, it is equally clear from Wang v CIR that such a breach would not be sufficient to invalidate the otherwise valid assessment.

Maladministration

26. The above dispose of Paragraphs 4 and 6 of the Reasons of Appeal. The other reasons refer to maladministration of the IRD. The Appellant points to the correspondence between him/his wife and the IRD in which the IRD accepted responsibility for the delay

and offered apologies. The delay was inordinate and the explanation unsatisfactory. We sympathize with the Appellant's complaints, but short of any capricious and dishonest conducts (which are not alleged) we do not find mere delay or flaws in administration as sufficient to affect the validity of the assessment. We again seek support from the dictum in Wang v CIR above; see also Hossack v IRC [1974] STC 262.

Conclusion

27. In conclusion, we find that section 59(1) contains no time limit within which an assessment must be made. That section merely tells an assessor when he can start to make an assessment.

28. There is only one time limit for the making of an assessment and that is the one prescribed by section 60(1). The present assessment was made within that time limit and is valid.

29. We do not accept that the authorities cited by the Appellant support his argument that section 60(1) applies only where there is new information. There is no such condition.

30. We make no finding that there is an actionable duty to assess but even if there is, the breach of it does not invalidate the otherwise valid assessment.

31. For the above reasons, the objections fail. The assessment is confirmed and the appeal is hereby dismissed.

32. We have read the mitigations sought in the Appellant's written submission, but section 68(8) gives us no power to grant such relief. We would, however, invite the IRD to give them their best consideration.