

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D39/02

**Profits tax** – appeal out of time – whether reasonable cause.

Panel: Patrick Fung Pak Tung SC (chairman), Daisy Tong Yeung Wai Lan and Mary Teresa Wong Tak Lan.

Date of hearing: 11 June 2002.

Date of decision: 23 July 2002.

At the hearing of this appeal, the Revenue took a preliminary objection that the notice of appeal was served out of time.

The taxpayer did not appear but was represented by his tax consultant, Ms A. Ms A accepted that the appeal was out of time but explained that the taxpayer only sent her the documents with a note of instruction to lodge the appeal but they were only sent to her office after her maternity leave had begun. Thus, she only discovered the note when she returned to her office after her maternity leave. By then, the appeal was out of time. Ms A did not have the note of instruction with her at the hearing.

#### **Held:**

1. The Board did not accept the explanation put forward by Ms A. The Board found it difficult to believe that the taxpayer only sent the documents to Ms A's office for lodging the appeal without even a call to her to inform her of his action.
2. The Board found no reasonable cause and refused to extend the time for lodging the appeal.

#### **Appeal dismissed.**

Fung Ka Leung for the Commissioner of Inland Revenue.

Taxpayer represented by his representative.

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### Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against a profits tax assessment for the year of assessment 1998/99 raised on him. An objection was lodged by the Taxpayer against such assessment. By his letter dated 25 January 2002, the Respondent ('the Commissioner') made a determination and rejected the Taxpayer's objection and revised the notice of assessment for the year of assessment 1998/99 against the Taxpayer dated 19 May 2000 by amending the assessable profits from \$1,300,000 to \$2,599,775 and the amount of tax payable from \$195,000 to \$389,966 ('the Determination'). The Taxpayer has brought this appeal against the Determination.

2. On 28 March 2002, the Clerk to the Board of Review received a notice of appeal signed by Ms A and dated 25 March 2002 ('the Notice of Appeal') lodged on behalf of the Taxpayer against the Determination.

3. At the hearing of the appeal, the representatives of the Commissioner took a preliminary objection to the appeal on the ground that the Notice of Appeal was served out of time. We decided to deal first with such preliminary objection.

4. Section 66 of the Inland Revenue Ordinance ('IRO') provides as follows:

***'66. Right of appeal to the Board of Review***

*(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.*

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(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). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.'*

5. It is to be noted that the Taxpayer himself did not appear at the hearing of the appeal. He was represented by his tax consultant, Ms A.

6. Ms A admitted that a notice of appeal against the Determination should have been lodged by 25 February 2002. She attributed the delay to the fact that she was hospitalised for childbirth between 19 February and 1 March 2002. She said that in about the beginning of February 2002 the Taxpayer sent to her office by post a bundle of documents relating to this case with a 'draft note of instruction' to her to lodge an appeal against the Determination. She however did not have with her the 'draft note of instruction' at the hearing of appeal. She further said that by the time that the documents from the Taxpayer reached her office, she had already begun her maternity leave and that she did not return to her office until about 20 March 2002; it was only then that she discovered the documents sent by the Taxpayer and quickly sent the Notice of Appeal. She said that the Taxpayer never communicated with her to inform her that he had sent her the documents for the purpose of lodging an appeal. When questioned as to whether she kept track of what was happening in her office and whether she had someone in the office to open her letters for her, she said that there was someone in the office who would only open or deliver to her home letters which were marked 'urgent' on the outside. Hence, nobody drew her attention to the documents sent by the Taxpayer to her office.

7. We find the explanation put forward by Ms A to be extraordinary. We do not accept that Ms A would simply walk away from her business and stay at home without keeping track of the incoming mail. We do not accept that she did not have someone in the office to open her mail or deliver all her mail (whether marked 'urgent' or not) to her home. We further find it difficult to believe that the Taxpayer would simply send a bundle of documents to Ms A's office for the purpose of lodging an appeal without his having at least made a telephone call to her to inform her of his action or to make sure that she had received the documents and set the appeal process in motion. Furthermore, any ordinary person would under normal circumstances have been concerned with how much it would cost to lodge and conduct an appeal and would have tried to find out. Since the Taxpayer did not even attend the appeal, we were deprived of the opportunity of investigating into the matter by asking him questions.

8. The burden is clearly on the Taxpayer to persuade the Board under section 66(1A) of the IRO that he 'was prevented by illness or absence from Hong Kong or other reasonable cause

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from giving notice of appeal in accordance with subsection (1)(a)'. We are of the view that in all the circumstances the Taxpayer has failed to discharge this burden by reason of his failure to appear and the explanation put forward by Ms A which we do not find acceptable.

9. We therefore refuse to extend the time for the Taxpayer to lodge a notice of appeal against the Determination. Accordingly, there is no need and no point for us to deal with the merits of the appeal.

10. Accordingly, we formally dismiss the late appeal by the Taxpayer and confirm the Determination made by the Commissioner.