

Case No. D4/07

Salaries tax – late appeal – section 66(1A) of the Inland Revenue Ordinance (‘IRO’) – burden of proof to show that he was prevented from filing a timely appeal – taxpayer’s ignorance of obligation to observe time limit is not a ground.

Panel: Colin Cohen (chairman), John Peter Victor Challen and Wong Kwai Huen.

Dates of hearing: 21 March and 12 April 2007.

Date of decision: 11 May 2007.

The Commissioner’s determination on salaries tax assessment was delivered to the taxpayer’s address on 25 November 2005. The one-month appeal period expired therefore on 28 December 2005. The taxpayer sent a notice of appeal dated 22 December 2006 and was received by the Board on 8 January 2007. The issue was whether or not the taxpayer’s late appeal should be entertained. The taxpayer explained that he left Hong Kong on 28 April 2004 and therefore would like to invoke the provisions of section 66(1A) of the IRO.

Held:

1. The burden of proof is upon the taxpayer to show that he was prevented from filing a timely appeal (D11/89, IRBRD, vol 4, 230 followed).
2. The taxpayer has produced no evidence to show that because of his absence from Hong Kong, he was unable to file the notice of appeal within the time prescribed. Therefore the Board found that the taxpayer’s absence from Hong Kong has not in any way prevented him from filing an appeal in time and therefore could not amount to a reasonable ground that warrants such an extension.
3. The taxpayer’s ignorance of obligation to observe the time limit is not a sufficient ground of extending the period of time (D57/99, IRBRD, vol 14, 506 followed).
4. The Board accepted that the taxpayer’s lateness in filing the appeal for months or ignorance of his right or of the steps to be taken or of the legal requirement necessary to support a valid appeal is not a ground which extension can be granted.

Appeal dismissed.

Cases referred to:

D11/89, IRBRD, vol 4, 230
D57/99, IRBRD, vol 14, 506

Taxpayer in absentia.

Tsui Nin Mei and Leung To Shan for the Commissioner of Inland Revenue.

Decision:

1. This is an application for an extension of time under section 66(1A) of the Inland Revenue Ordinance ('IRO') in respect of a determination of the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') dated 25 November 2005 whereby:

- '(1) Additional salaries tax assessment for the year of assessment 2002/03 under charge number 9-1895492-03-7, dated 15 April 2004, showing additional net chargeable income of \$188,966 with additional tax payable of \$32,125 is hereby confirmed.
- (2) Salaries tax assessment for the year of assessment 2003/04 under charge number 9-0017377-04-1, dated 15 April 2004, showing net chargeable income of \$222,545 with tax payable of \$30,445 is hereby confirmed.'

2. The Deputy Commissioner's determination was delivered to the Taxpayer's address at Address A on 25 November 2005. The one-month appeal period expired therefore on 28 December 2005.

3. The Taxpayer sent a letter to the Board dated 28 October 2006, however, this was not accompanied by a copy of the determination as required under section 66(1)(a) of the IRO. It is clear that this letter did not constitute a proper notice of appeal. The Taxpayer therefore sent a notice of appeal dated 22 December 2006 which in turn enclosed a copy of the determination. This was received by the Board on 8 January 2007.

4. On 5 February 2007 a letter was sent to the Taxpayer advising him that the hearing would take place on 21 March 2007. Further correspondence took place by way of email whereby the Taxpayer requested an adjournment until October 2007. The Taxpayer was advised that the Board was prepared to grant a short adjournment to either April or May 2007 but was not

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prepared to adjourn the appeal until October 2007.

5. The Taxpayer therefore requested whether or not it would be possible to present his case in writing. This matter was therefore heard initially on 21 March 2007. On 20 March 2007, the representative of the Inland Revenue Department ('IRD') provided copies of their submissions both to the Board and to the Taxpayer in respect of this matter. At the hearing on 21 March 2007, we adjourned this matter until 12 April 2007 to allow time for the Taxpayer to respond to the written submissions if he so wished to.

6. This matter came before us again on 12 April 2007. The Taxpayer had not filed any further written submissions and therefore in turn we relied on his written submissions dated 16 March 2007. We accepted that his letter of 16 March 2007 was an application to have the appeal heard in his absence under section 68(2D) of the IRO. We acceded to this application.

7. The issue which we had to consider was whether or not the Taxpayer's late appeal should be entertained. In his letter dated 16 March 2007, the Taxpayer gave his reasons for his appeal being late as follows:

'I must apologize for the late Appeal. Information from your office is sent to my Hong Kong address. This information is then sent to my address in Canada. At some point along the line this information was misplaced and as a result I was late in the appeal process. Now that we are communicating via e-mail I hope to avoid any further unnecessary delays. I hope you give me the opportunity to continue with the appeal process.'

8. As we had previously indicated, the Taxpayer's notice of appeal was late for over 12 months. The Taxpayer in his notice of appeal dated 22 December 2006 stated that he left Hong Kong on 28 April 2004 and therefore would like to invoke the provisions of section 66(1A) of the IRO. It is clear that the Taxpayer's absence from Hong Kong per se does not necessarily follow that we would necessarily grant an extension of time pursuant to section 66(1A) of the IRO.

9. The authorities are clear in that the burden of proof is upon the Taxpayer to show that he was prevented from filing a timely appeal. In particular, we refer to D11/89, IRBRD, vol 4, 230 where the Board stated at page 234:

'The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed within the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.'

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10. The Taxpayer had all along maintained the Hong Kong address as his correspondence address and indeed, in his tax return dated 23 March 2004, this was stated as his new postal address. It is clear from the Immigration Department's records that the Taxpayer had departed Hong Kong since 30 April 2004. The determination was delivered to his Hong Kong address on 26 November 2005. The Taxpayer had sent a letter dated 4 February 2006 to the Board (however, this was faxed to the IRD). Therefore, the Taxpayer had received the determination through his Hong Kong address. The Taxpayer has produced no evidence to show that because of his absence from Hong Kong, he was unable to file the notice of appeal within the time prescribed. Therefore, we have no difficulties in finding that the Taxpayer's absence from Hong Kong has not in any way prevented him from filing an appeal in time and therefore could not amount to a reasonable ground that warrants such an extension.

11. It is also clear that the Taxpayer's ignorance of obligation to observe the time limit is not a sufficient ground of extending the period of time. In D57/99, IRBRD, vol 14, 506, the taxpayer there filed a notice of appeal which was not complete, over 13 months after the determination and nearly 10 months after it was first sent to him by the ordinary post. Correspondence was entered into between the Clerk to the Board and the taxpayer by which he was reminded of the requirement to file various missing items, namely a copy of the determination and the grounds of appeal. Even taking the date the taxpayer admitted having received the determination, he was late in submitting a properly constituted notice of appeal (with all missing items submitted) by about three to four weeks. The Board, in rejecting an application for extension of time to file an appeal, said:

Ruling

26. *The time limit within which an appeal is to be lodged under the statute is for all to observe. This Board cannot function efficiently unless taxpayers exercise their right to appeal timeously. While this Board will exercise its discretion in favour of taxpayers who fail to appeal in time due to unavoidable or excusable circumstances, we will not exercise our discretion in favour of someone who blatantly and persistently ignores his obligation to observe the time limit laid down by statute.'*

12. In the case before us, the Taxpayer's right of appeal as well as the procedures and time limit in lodging an appeal were sent to him in the Deputy Commissioner's covering letter of 25 November 2005 which enclosed the determination. By a subsequent letter dated 23 March 2006, the assessor advised the Taxpayer of his right of appeal to the Board of Review and the contact details of the Clerk of the Board including the fax line and email address. We accept the IRD's submission that the Taxpayer should have then been able to contact the Clerk for filing an appeal or for details of the appeal procedures and should have sent his letter dated 24 June 2006 to the Board and to the IRD again. The Clerk in his letter dated 31 October 2006 reminded the Taxpayer

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the need for his due compliance of the requirements of section 66(1) of the IRO should he wish to appeal. However, the Taxpayer did not file the determination with the Board until 8 January 2007. Therefore, we again accept that the Taxpayer's lateness in filing the appeal for months or ignorance of his right or of the steps to be taken or of the legal requirement necessary to support a valid appeal is not a ground upon which an extension can be granted.

13. In all circumstances and having regard to the history and background in respect of this matter, we have no hesitation in concluding this is not a case whereby we are prepared to grant any extension of time to the Taxpayer's late appeal. Hence, we dismiss the appeal.