

Case No. D41/05

Penalty tax – appeal out of time – section 66 of the Inland Revenue Ordinance ('IRO') – whether or not giving notice of appeal means actual service of the notice on the Clerk and excludes oral notice.

Panel: Kenneth Kwok Hing Wai SC (chairman), Sandy Fok Yue San and Kwong Kok Shi.

Date of hearing: 28 July 2005.

Date of decision: 31 August 2005.

The Deputy Commissioner of Inland Revenue confirmed the personal assessment of the appellant and the Determination was posted on 25 February 2005 to the appellant's address, which was overseas. The registered item was delivered on 7 March 2005. By letter dated 6 April 2005 to the Deputy Commissioner, the appellant asserted that he took out the registered item on 8 March 2005. By letter dated 7 April 2005, the appellant informed the Clerk to the Board of Review that he was appealing against the Determination. No ground of appeal was given. The appellant's letter dated 7 April 2005 was received by the Clerk's office on 13 April 2005. The appellant insisted that his appeal was within time and said that he was not asking for an extension of time. By another letter dated 4 May 2005, the appellant alleged that his appeal was posted on 7 April by registered post.

Held:

1. As the letter dated 7 April 2005 was received on 13 April 2005, this appeal is out of time. The Board reject the appellant's allegation. It was a bare assertion and no documentary evidence of the date of posting was produced.
2. In the context of section 66, giving notice of appeal to the Board means actual service of the notice on the Clerk. This phrase excludes oral notice. It also excludes notice, which has not been received. A notice, which has not been received, cannot be 'entertained'. The Board find some support in section 58(2) for the conclusion that giving a notice means serving a notice (Chow Kwong Fai v Inland Revenue Board of Review [2004] 2 HKLRD 963; In re 88 Berkeley Road NW9 [1971] Ch 648 and Holwell Securities Limited v Hughes [1974] WLR 155 followed).

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Inland Revenue Board of Review [2004] 2 HKLRD 963
In re 88 Berkeley Road NW9 [1971] Ch 648
Holwell Securities Limited v Hughes [1974] WLR 155

Taxpayer in person.

Lau Wai Sum and Tsui Siu Fong for the Commissioner of Inland Revenue.

Decision:

1. By his Determination dated 25 February 2005, the Deputy Commissioner of Inland Revenue confirmed the personal assessment for the year of assessment 2000/01 under charge number 6-1944989-01-2, dated 26 April 2002, showing net chargeable income of \$191,595 with tax payable thereon of \$22,071.
2. The Determination was posted on 25 February 2005 to the appellant's address which was overseas.
3. The Hong Kong Post Office informed the respondent that according to the overseas post office, the registered item was delivered on 7 March 2005.
4. By letter dated 6 April 2005 to the Deputy Commissioner, the appellant asserted that he took out the registered item from a post box outside his overseas address on 8 March 2005.
5. By letter dated 7 April 2005, the appellant informed the Clerk to the Board of Review that he was appealing against the Determination. No ground of appeal was given.
6. The appellant's letter dated 7 April 2005 was received by the Clerk's office on 13 April 2005.

Whether appeal was out of time

7. The first issue for our decision was whether the appeal was outside the one month period for appeal under section 66(1) of the Inland Revenue Ordinance, Chapter 112, which provides that:

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

'(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.'

8. The one month period started to run on 8 March 2005, after the transmission of the Determination to the appellant on 7 March 2005.

9. The appellant insisted that his appeal was within time. By another letter dated 4 May 2005, he alleged that his appeal letter was posted on 7 April by registered post.

10. We reject the appellant's allegation. It was a bare assertion and no documentary evidence of the date of posting was produced.

Meaning of 'give notice of appeal to the Board'

11. In our Decision, in the context of section 66, giving notice of appeal to the Board means actual service of the notice on the Clerk.

12. The wording of the phrase which follows the phrase 'give notice to the Board' is:

'no such notice shall be entertained unless it is given in writing to the clerk to the Board'.

13. This phrase excludes oral notice. It also excludes notice which has not been received. The reason is simple. A notice which has not been received cannot be 'entertained'.

14. We find some support in section 58(2) for our conclusion that giving a notice means serving a notice. Section 58(2) provides that (emphasis added):

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

‘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.’

15. In Chow Kwong Fai v Inland Revenue Board of Review [2004] 2 HKLRD 963, the Honourable Mr Justice Hartmann used the words ‘give’, ‘file’ and ‘submit’ interchangeably. The learned judge quoted section 66(1) in paragraph 5 of his judgment and went on as follows:

‘6. From a reading of the section it is apparent that the Board has a discretion to grant an appellant an extension of time within which to file his notice of appeal and its accompanying material. This is spelt out clearly in section 66(1A) which reads:

“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) ... ”

7. In the present case, the applicant failed to submit his notice of appeal within the one month period provided for in section 66(1). Indeed, the notice of appeal was not filed until 25 November 2002, three months out of time. The Board, in hearing the appeal, was therefore obliged as a preliminary issue to consider whether to exercise its discretion to condone the late filing.’

16. In re 88 Berkeley Road NW9 [1971] Ch 648, Plowman J referred to section 36(2) and section 196(4) of the Law of Property Act 1925 and held at page 652 that:

‘where one is considering a notice in writing, there can be no difference between “serving” the notice and “giving” the notice’.

17. In Holwell Securities Limited v Hughes [1974] 1 WLR 155, Lawton LJ held at pages 160 and 161 that giving a notice means the same as serving a notice and that a notice which cannot impinge on anyone’s mind is not functioning as such.

‘A notice is a means of making something known. The Shorter Oxford English Dictionary gives as the primary meanings of the word: “Intimation, information, intelligence, warning, . . . Formal intimation or warning of

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

something.” If a notice is to be of any value it must be an intimation to someone. A notice which cannot impinge on anyone’s mind is not functioning as such.’ (at page 160)

‘Giving a notice means the same as serving a notice: see In re 88 Berkeley Road, NW9 [1971] Ch 648.’ (at page 161)

No extension of time

18. As the letter dated 7 April 2005 was received on 13 April 2005, this appeal is out of time. The appellant categorically said that he was not asking for an extension of time.

19. We would have declined to extend time under section 66(1A) had the appellant applied for it.

20. No ground had been alleged which might prevent him from giving notice in time. The appellant had at least a month to give notice of appeal. His letter dated 7 April 2005 contained no ground of appeal. He merely asked for more time. This was a delaying tactic which he had been employing since his letter dated 4 December 2003. Such delaying tactic must fail before the Board.

Wholly unmeritorious appeal

21. We would add that this appeal is totally devoid of merit. The case was so hopeless that we did not call on the assessor. It was a waste of public resources and had there been an appeal we would have made an order for costs of \$2,500 under section 68(9).

22. As the appellant’s letter dated 7 April 2005 contained no grounds, the effect of section 66(3) is that there was no ground which he could rely on.

23. On deduction of interest, the appellant made no attempt to answer the point that the proviso to section 42(1) only allows a deduction for interest payable on money borrowed for the purpose of producing that part of the total taxable property income which has been included for personal assessment under paragraph (a) for the relevant year of assessment. The appellant made no attempt to deal with the authorities included in the assessor’s bundle of authorities.

24. On deduction of expenses, the appellant had over 1 ½ years to give a detailed breakdown with supporting documents. The appellant made no attempt to make good his allegation of decoration expenses.

Conclusion

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

25. This appeal was out of time. There was no application to extend time for appeal. Thus, the assessment as confirmed by the Deputy Commissioner has now become final and conclusive under section 70 of the Ordinance.