Case No. D41/07

Salaries tax – Extension of time – absence from Hong Kong – hearing in the absence of the taxpayer – whether appeal was late – sections 66 and 68(2D) of the Inland Revenue Ordinance ('IRO') – additional service award – sections 8(1)(a), 9(1)(a) and 68(4) of the IRO

Panel: Anthony So Chun Kung (chairman), Mabel Lui Fung Mei Yee and Jessica Young Yee Kit.

Date of hearing: 6 December 2007.
Date of decision: 18 January 2008.

The taxpayer resigned from her employment due to her health condition and the Employer, 'in recognition of [the taxpayer's] contribution to (the Employer), exceptionally arrange to award [the taxpayer] a gratuity of an amount of HK$196,100 (the Sum)'. Both parties agreed to waive the three month's written notice required. The taxpayer accepted the Sum and agreed to waive all future claims regarding termination of her employment contract. The Employer filed a notification ['Form IR56F'] in respect of the taxpayer reporting, inter alia, the Sum as 'gratuity payment made to reward the taxpayer for her past contribution to the Employer'. The assessor considered that the Sum was the taxpayer's employment income and chargeable to tax. The taxpayer objected. In his Determination, the Acting Deputy Commissioner of Inland Revenue maintained the assessment. The Determination was sent to the taxpayer at her correspondence address in Hong Kong by registered post on 30 July 2007 which was then re-directed to Country B via airmail. The taxpayer's Notice of Appeal reached the Board on 2 October 2007. The hearing was fixed on 6 December 2007. The Board received an application by the taxpayer to have the hearing conducted in her absence on 12 November 2007.

Held:

1. Movement record supplied by the Immigration Department shows that the taxpayer has been residing outside Hong Kong in Country B since April 2007. The Board decided that section 68(2D) applied and proceeded hearing the taxpayer's appeal in her absence.

2. Both sides produced no solid proof when the Determination was transmitted to the taxpayer. However, the Board draws the compelling inference from the fact that during the ordinary course of the post, a post redirected by airmail from Hong Kong could have reached a Country B address in two days time, instead of in one and a

half months time. In the premises, the Board prefers the position of the Hong Kong Post Office and finds that the taxpayer was late in giving her notice of appeal. The taxpayer seemed to suggest that she was late with her notice of appeal because she was outside Hong Kong. Absence from Hong Kong however is not a reasonable cause justifying later notice. The taxpayer should have attended to her tax matter with the same attention whether she was residing inside or outside of Hong Kong. The taxpayer has herself to blame for her late appeal. In the circumstances, the Board refuses to extend time and dismisses her appeal.

3. For completeness, nevertheless, the Board decides to dispose her substantive appeal as well. Whether the Sum was a gratuity or compensation is a question of fact. The 'say-so' of the parties could not be decisive of the real nature of a payment. Evidence shows that it was the taxpayer who resigned. The Employer had paid up all payments which the taxpayer could be entitled upon termination of her employment contract. The taxpayer could have no further legal claims against the Employer in connection with her resignation or termination of employment. The Sum is not some payment which the taxpayer was entitled upon resignation or termination of her employment. Instead, it was an additional payment made beyond the requirement of law. It was paid by the Employer with no condition attached. The taxpayer was not required to give up anything for it. Plainly the Sum was not compensation for her loss of employment. The waiver in the form as it was could not stop the taxpayer pursuing claim against the Employer for her loss in working ability, if she had any. The Board finds no evidence supporting the taxpayer's claim for damages in work-related injuries or illnesses. The calculation of the terminal payment shows that the sum was in fact an additional service award. The Board therefore accepts the Employer's account that the Sum was a gratuity payment awarded in recognition of the taxpayer's past service. The Sum is therefore the taxpayer's employment income chargeable to salaries tax.

Appeal dismissed.

Cases referred to:

D16/07, IRBRD, vol 22, 454
D19/01, IRBRD, vol 16, 183
D80/00, IRBRD, vol 15, 715
D4/05, (2005-06) IRBRD, vol 20, 256

Taxpayer in absentia.
Yip Chi Yuen and Wong Ki Fong for the Commissioner of Inland Revenue.

Decision:

The appeal

1. This is an appeal by Ms A ('the Taxpayer') against the determination of the Ag Deputy Commissioner of Inland Revenue dated 30 July 2007 ('the Determination').

2. In his Determination, the Ag Deputy Commissioner of Inland Revenue maintained the assessment of the assessor to assess the Taxpayer for the year of assessment 2005/06 on a terminal payment of $196,100 known as additional service award.

Relevant issues

3. There are two issues in Taxpayer's case:

   (a) Whether the Taxpayer's appeal was late and if so, whether the Board should extend time; and

   (b) If Taxpayer's appeal was not late, or if the Board should extend time, whether the terminal payment of $196,100 known as additional service award was assessable to salaries tax.

Hearing in the absence of the Taxpayer

4. The Taxpayer's Notice of Appeal reached the Board on 2 October 2007. The Board issued a Notice of Hearing on 31 October 2007 with the hearing fixed on 6 December 2007. The Taxpayer filed an application to have the hearing conducted in her absence. The Taxpayer claimed she had family commitments in Country B. The Board received such an application on 12 November 2007, more than seven days before the date of hearing.

5. Section 68(2D) of the Inland Revenue Ordinance ('IRO') provides,

   'The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.'

6. Movement record supplied by the Immigration Department [R1/9] shows that the Taxpayer has been residing outside Hong Kong in Country B since April 2007. The Board decided that section 68(2D) applied and proceeded hearing the Taxpayer' s appeal in her absence.

Late appeal

7. Section 66 of the IRO provides that a taxpayer must give notice of appeal to the Board within one month after the transmission to him the Commissioner' s written determination:

> *'(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). 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.'*

Transmission of the Determination

8. The Determination of the Ag Deputy Commissioner of Inland Revenue was sent to the Taxpayer at her correspondence address in Hong Kong by registered post on 30 July 2007 [R1/2]. According to the Hong Kong Postmaster General, the said registered post was re-directed to Country B via airmail on 4 August 2007 [R1/4] and the Country B Post Office advised that it was delivered in Country B on 6 August 2007, but no proof of delivery was provided [R1/6].

9. The Taxpayer on the other hand claimed that the Determination reached her in Country B through the Redirect Mail Service of the Hong Kong Post on 20 September 2007 [B1/1], and not 6 August 2007. In normal case where a taxpayer received a determination late, one would expect he or she would have retained the envelope as proof of late delivery by showing the late postal mark. In this case, the Taxpayer retained no such proof.

10. Both sides produced no solid proof when the Determination was transmitted to the Taxpayer. However, we draw compelling inference from the fact that during the ordinary course of the post, a post redirected by airmail from Hong Kong could have reached a Country B address in two days time, instead of in one and a half months time! In the premise, we prefer the position of the Hong Kong Post Office and find that the Determination as redelivered by airmail from Hong Kong on 4 August 2007 was delivered by the Country B Post Office to reach Taxpayer's Country B address in two days time on 6 August 2007, and not on 20 September 2007. The statutory one-month period to file a Notice of Appeal as prescribed by section 66 of the IRO should start to run on 7 August 2007 and expire on 6 September 2007.

11. By giving her notice of appeal reaching the Board on 2 October 2007 [B1/1-2], the Taxpayer was late. It was given outside the statutory one month period.

12. Further, Taxpayer's Notice of Appeal was incomplete with appendices missing. According to section 66(1)(a), a notice of appeal with missing appendices should not be entertained. The Board in D16/07, IRBRD, vol 22, 454 said [R2/74],

> *'48. Giving notice of appeal "in accordance with subsection (1)(a)" (of section 66) requires more than just giving notice within 1 month time limit. The requirements for giving notice "in accordance with subsection (1)(a)" are as follows:-*
>
> *(a) The notice of appeal must be given in writing.*
> *(b) The written notice must be given to the Clerk.*
> *(c) The written notice must be accompanied by all the specified accompanying documents.*
> *(d) Both the written notice and the specified accompanying documents must be served on the Clerk within the 1 month time limit.'*

13. In her notice of appeal, the Taxpayer missed out sending appendices A, B & D of the Determination. The clerk to the Board by letter dated 4 October 2007 [R1/11-12] directed the Taxpayer to send the missing appendices. The Taxpayer sent the missing appendices reaching the Board on 22 October 2007 [R1/13]. The missing appendices were also given outside the statutory one month period.

14. The Board in D16/07 said [R2/76],

> *'54…There is no reason why on principle a taxpayer who has failed to give any notice at all should be treated differently from a taxpayer who gives a notice but without the specified accompanying documents. Both have failed to comply with the requirements to give a valid notice. It seems to us illogical that someone who has not given any notice at all within time may be better off than someone who has given notice within time but without one or more of the specified accompanying documents. In paragraphs 17 – 19 of D2/07, the Board considered that the "unfairness" is more apparent than real. With respect, we disagree. As stated earlier in this paragraph, there may be circumstances where a taxpayer is prevented by illness or absence from Hong Kong or other reasonable cause from furnishing the Clerk with one or more specified accompanying documents within the 1 month time limit.'*

15. The Taxpayer did not explain why she gave her notice of appeal late. She also failed to explain why there were missing appendices and why she was late in sending such missing appendices.

16. The Taxpayer in her notice of appeal stated [B1/1],

> '1. My husband' s new employment is in [Country B] since January 2007, the whole family had moved to [Country B] since April 2007, …'

17. The Taxpayer seemed to suggest that she was late with her notice of appeal because she was outside Hong Kong in Country B.

18. Absence from Hong Kong however is not a reasonable cause justifying late notice. The Board in D19/01, IRBRD, vol 16, 183, 185 said [R2/35],

> *'14. Absence from Hong Kong does not confer an automatic right for extension of time. It is for the Taxpayer to satisfy us that he was so prevented from giving the requisite notice. The determination was sent to the Taxpayer at Address D. Correspondence before and after the determination were all sent to the Taxpayer at this address. No explanation was furnished to us as to why the determination escaped his attention. We are therefore not prepared to extend time in favour of the Taxpayer.'*

19. The Taxpayer should have attended to her tax matter with the same attention whether she was residing inside or outside of Hong Kong.

20. Soonest upon receipt of the Determination, she could have consulted her tax adviser. She could have also enquired the Clerk to the Board by telephone, facsimile or email. She should have sent in her notice of appeal with all specified accompanying documents to reach the Board within the one month time limit. Indeed, the Determination was dispatched to the Taxpayer under cover of a detailed note explaining how to apply for an appeal with a full reprint of the relevant section 66 of the IRO. The Taxpayer however let time overrun in her case for no reason at all. The Taxpayer has herself to blame for her late appeal. In the circumstances, we refuse to extend time and dismiss her appeal.

Substantive appeal

21. Having dismissed her appeal for being late, the substantive appeal of the Taxpayer will appear academic. For completeness, nevertheless, we decide to dispose her substantive appeal as well.

22. We find the following facts as narrated in the Determination relevant to the Taxpayer's substantive appeal:

(1) The Taxpayer commenced her employment with Company C (formerly known as Company D) ['the Employer'] as Finance & Accounting manager on 1 November 1997. Her employment contract dated 27 October 1997 (Appendix A) included, among other things, the following terms and conditions:

'3. Termination

Employment may be terminated by either side by giving two weeks' notice in writing during (the probationary period). After the probationary period, a three-month's written notice is required.'

(2) By letter dated 17 January 2006 (Appendix B), the Employer informed the Taxpayer the following arrangements concerning her resignation:

'We regret that following our various discussion in the past few months, you would like to leave (the Employer) at your own will, due to your health condition.

In recognition of your contribution to (the Employer), we exceptionally arrange to award you a gratuity of an amount of HK$320,000, which consists of the long service pay and an additional service award. This is in addition to the unused annual leave pay and the pro-rated 13th month pay.

Both you and (the Employer) agree to waive the 3 month's written notice required.'

The Taxpayer accepted the above arrangements on 25 January 2006.

(3) On 27 January 2006, the Employer made a payment of $346,532 to the Taxpayer. In its letter of even date (Appendix C), the Employer gave a breakdown of the sum as follows:

	$	$
Unused annual leave of 10 working days		22,447
Pro-rata 13th month salary 2006		4,085
Gratuity		
Long service pay equivalent		
($22,500 x 2/3 x 8.26 years)	123,900	
Additional service award	196,100	320,000
		346,532

The Taxpayer accepted the sum and agreed to waive all future claims regarding termination of her employment contract.

(4) The Employer filed a notification ['Form I.R.56F'] in respect of the Taxpayer for the year ended 31 March 2006 to the Inland Revenue Department ['the Department'] reporting, among other things, the following particulars:

(a) Reason for cessation	:	Resignation due to ill health
(b) Period of employment	:	1 April 2005 to 31 January 2006

(c) Particulars of income		$
(i) Salary / Wages	:	533,185
(ii) Leave pay	:	22,447
(iii) Gratuity (Note)	:	320,000
(iv) Payments from retirement scheme	:	70,083
(v) Others	:	83,319
Total	:	1,029,034

Note

The Employer attached a sheet (Appendix D) showing the breakdown of the sum as follows:

(1) Long service payment

= Last month's salary (capped) x 2/3 x No. of years of service
= $22,500 x 2/3 x 8.26
= $123,900

It was made as the Taxpayer resigned on ground of ill health.

(2) Additional service award
= $196,100 (i.e. $320,000 - $123,900)

It was made to reward the Taxpayer for her past contribution to the Employer.

(5) The Taxpayer filed her 2005/06 Tax Return – Individuals to the Department reporting that total income accrued to her during the year was $638,951*.

* $533,185 [Fact (5)(c)(i)] + $22,447 [Fact (5)(c)(ii)] + $83,319 [Fact (5)(c)(v)]

(6) The assessor considered that the additional service award of $196,100 ['the Sum'] was the Taxpayer's employment income and chargeable to tax. Accordingly, he raised on the Taxpayer the following salaries tax assessment for the year of assessment 2005/06:

	$
Income	835,051
($638,951 [Fact (6)] + $196,100 ('the Sum'))	
Less:	
Charitable donations	(700)
Home loan interest	(48,512)
Retirement scheme contributions	(12,000)
Outgoings	(3,055)
Net assessable income	770,784
Less:	
Allowances	(180,000)
Net chargeable income	590,784
Tax payable thereon	107,356

(7) The Taxpayer objected to the above assessment on the ground that the Sum was not taxable. She contended that the Sum was paid on the reason of her ill health which resulted in the cessation of her employment. It was not associated with her services provided to the Employer for any period of time.

(8) In response to the assessor's enquiries concerning the circumstances leading to the payment of the Sum, the Employer provided the following information:

(a) There was no formula for calculation of the Sum.

(b) The Sum was awarded to the Taxpayer at the management's discretion considering her past contribution during her service with the company.

23. The Employer by a letter to the Revenue dated 2 November 2007 elaborated further on Taxpayer's resignation as follows:

'…

3) (The Taxpayer) had not given a written resignation although she told us that she would be leaving the company due to her health condition in late 2005. Therefore, we prepared the letter dated 17 January 2006 and asked her to confirm her resignation.

…

4)c) (The Taxpayer) had asked for a lump sum payment as a gratuity for her past service. The amount was not discussed as whether it would be granted or not was totally a management's discretion. The amount given was not the result of the discussion but purely a management discretion.

d) The service award was not in exchange for her voluntary resignation. It was totally a reward for her excellent service in the past.

e) (The Employer) had not mentioned to (the Taxpayer) that the award was related to her loss of ability of work. Our letter had indicated clearly that it …is an award for the employee's past contribution to (the Employer).

f)(The Taxpayer) was required to give 3 month's notice for her resignation but the Company waived the requirement as the discussion on her intention to leave the company had already been carried on for a few months and we got ourselves ready for the transition of her duties to other employees. For her best interest due to her health condition, we waived the requirement.

g) We are good employer and our employment practices are usually better than the minimum requirement of the law. Therefore we did not set long service payment off the retirement payment for employee leaving on grounds of ill

health. (The Taxpayer) resigned due to her health condition and so as a caring employer, we waived the notice requirement for her best interest. The separate sum of HK$196,100 was solely a service award and paid at the management discretion for her excellent service in the past.

…

5) (The Taxpayer) had not indicated that she would have any claims on (the Employer). The statement "to waive all future claims regarding termination of your employment contract" is just a standard clause in our letter and all employees were asked to confirm to waive future claims upon leaving (the Employer).'

The law

24. According to sections 8(1)(a) and 9(1)(a) of the IRO, income arising in or derived from any office or employment of profit is chargeable to salaries tax, and that includes gratuity payment.

Section 8(1)(a) of the IRO provides,

'8(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –

(a) an office or employment of profit …'

Section 9(1)(a) of the IRO provides,

'9(1) Income from any office or employment includes -

(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, ...'

Employer's account

25. The Employer in its Form IR56F respectively dated 15 March 2006 and 3 May 2006, and in its reply to the Revenue respectively dated 2 January 2007 and 2 November 2007 stated that the Sum was a gratuity payment, being an additional service award in rewarding the Taxpayer for her past contribution.

Taxpayer's contention

26. The Taxpayer on the other hand said that working for the Employer had caused her illnesses and as a result she had to stop work [B1/1, Notice of Appeal paragraph 2]. The Sum was paid by the Employer to compensate her of her loss in ability to work [B1/1, Notice of Appeal paragraph 3]. The Sum was a compensation payment and should not be chargeable to salaries tax.

Analysis

27. Whether the Sum was a gratuity or compensation is a question of fact. To find out, we have to examine all available evidence. The 'say-so' of the parties could not be decisive of the real nature of a payment. The Board in D80/00, IRBRD, vol 15, 715, 725 said,

> *'…it is not the label, but the real nature of the payment, that is important. .. it would not be right for this Board to take the say-so of an employee or that of the representative of the employer in determining what is the real nature of the payment… It is simply that the Board cannot abdicate its responsibility of finding objectively what is the nature of the payment on the basis of the evidence before it.'*

28. Evidence shows that it was the Taxpayer who resigned. According to the employment contract, she should have given three months prior notice to the Employer. The Employer however agreed to waive the notice period mutually. Neither the Taxpayer nor the Employer was required to make payment in lieu of notice to the other party.

29. Apart from waiving notice period, the Employer paid to the Taxpayer (i) unused annual leave, (ii) pro-rata 13th month salary 2006, (iii) long service payment and (iv) retirement scheme payment (fact (3) above). The Employer had paid up all payments which the Taxpayer could be entitled upon termination of her employment contract. The Taxpayer could have no further legal claims against the Employer in connection with her resignation or termination of employment.

30. The Board in D4/05 (2005-06), IRBRD, vol 20, 256, 260 held,

> *'The Taxpayer also tried to argue that the Sum was compensation for loss of employment. This cannot be correct. For a sum to be compensation, it must be shown that there is the loss or surrender of rights on the part of the Taxpayer and a legal liability on the part of Company B to pay compensation for loss of such rights. However, the Taxpayer's employment with Company B was determinable by any party upon giving the appropriate three months' written notice….Furthermore, the Taxpayer admitted that the Sum was a unilateral*

> *offer from Company E without asking him to surrender any rights. We accept the Revenue's submissions that the Taxpayer had lost no rights and was not entitled to claim any damages from any party for the potential loss of office in Company B when the Sum was proposed or paid to him.'*

31. The Sum of $196,100 is not some payment which the Taxpayer was entitled upon resignation or termination of her employment. Instead, it was an additional payment made beyond the requirement of law. It was paid by the Employer with no condition attached. The Taxpayer was not required to give up anything for it. Plainly, the Sum was not compensation for her loss of employment.

32. The Taxpayer however claimed that the Sum was compensation for her loss in ability to work. The Taxpayer said that the Sum was paid because she had future claims of loss against the Employer, and because of that the Employer in its payment letter dated 27 January 2006 requested her 'to waive all future claims regarding termination of your employment contract'. She argued that such request for waiver was evidence showing she had claims against the Employer for otherwise the Employer would not have requested her to waive her future claims [B1/1, Notice of Appeal paragraph 3].

33. We reject Taxpayer's argument.

34. First, the waiver was stated to be in respect of claims regarding the termination of the employment contract. It was not regarding loss in working ability as alleged by the Taxpayer. That is to say, the waiver in the form as it was could not stop the Taxpayer pursuing claim against the Employer for her loss in working ability, if she had any. The Taxpayer wrongly believed that she had foregone her right to claim for loss in working ability by countersigning the waiver. In the premise, Taxpayer's argument that the Sum was paid in exchange for her claim for loss in working ability must fail.

35. Secondly, we find no evidence supporting the Taxpayer's claim for damages in work-related injuries or illnesses. There was simply no evidence showing that the Taxpayer had suffered injuries or illnesses as a result of her employment. There was no evidence showing how and why the Employer became liable to such injuries and illnesses alleged and the basis in calculating the compensation sum. After all, there was no evidence showing that at the time of Taxpayer's resignation, she was negotiating any loss in work-related injuries or illnesses with the Employer. There is absolutely no trace of evidence showing the Sum was paid as compensation for Taxpayer's loss in working ability.

36. Thirdly, the calculation of the terminal payment (fact (3)) shows that the Sum was in fact an additional service award. It was a sum paid in addition to a long service pay equivalent of HK$123,900 whereby the Employer rounded up a gratuity payment to HK$320,000:

	$	$
Unused annual leave of 10 working days		22,447
Pro-rata 13th month salary 2006		4,085
Gratuity		
Long service pay equivalent		
($22,500 x 2/3 x 8.26 years)	123,900	
Additional service award	196,100	320,000
		346,532

37. The way how the Sum was calculated indicates that the Employer had not contemplated compensating the Taxpayer of any loss as she alleged. In this connection, we accept Employer's explanation (paragraph 24 above) that the waiver clause which it requested the Taxpayer to countersign is in fact a general waiver of all future claims, and not a waiver of a specific claim in respect of her loss in working ability caused by injuries or illnesses.

38. We therefore accept the Employer's account that the Sum was a gratuity payment awarded in recognition of Taxpayer's past services. The Sum is therefore Taxpayer's employment income chargeable to salaries tax.

Conclusion

39. Section 68(4) of the IRO provides that:

> *'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

For reasons stated above, we find that the Taxpayer has failed to discharge her onus.

41. In the result, we dismiss the Appellant's appeal and confirm the assessment.