Case No. D43/00

Salaries tax – deductions – payments made to alleged sub-agents – section 82A of the Inland Revenue Ordinance (' IRO').

Extension of time – notice of appeal filed out of time – section 66 of the IRO.

Panel: Ronny Wong Fook Hum SC (chairman), Eugene Ho and Ng Yin Nam.

Date of hearing: 14 April 2000.
Date of decision: 25 July 2000.

The taxpayer was employed as the sales manager of Company A and Company B. The taxpayer sought to deduct from his earnings sums which he allegedly paid to Ms C and Ms D as his sub-agents in locating customers for products of Company A and Company B. The taxpayer sought to support the deductions claimed by two signed statements from Ms C and Ms D.

The taxpayer explained that he sought Company A' s express approval for the engagement of sub-agents at his initial interview with Company A. He did not keep any record due to his reservations as to the legality of the rebates. The taxpayer did not keep an account in relation to his payments. Ms D said in her statement that all transactions were conducted in cash and she did not have any record. Ms C' s statement was to the same effect.

The Revenue asked the taxpayer to provide additional information in relation to the deduction but the taxpayer did not comply.

The Revenue obtained from Company A breakdowns of the commissions they paid to the taxpayer. The commissions were paid by cheques drawn by Company A. As far as Company B was concerned, they paid the taxpayer by transfers into the taxpayer' s bank account.

By her determination dated 11 October 1999 the Commissioner rejected the taxpayer' s claims for deduction. The determination was in English and was sent by registered post to the taxpayer. The taxpayer' s mother acknowledged receipt of this determination on 12 October 1999.

By a letter dated 6 November 1999 the taxpayer requested the Revenue for a Chinese version of the determination. The Chinese version of the determination sent by the Revenue to the taxpayer' s Chinese address on 29 November 1999 was returned to the Revenue on 8 December

1999 as the address was ' not clear' . The Revenue re-sent the Chinese version of the determination to the taxpayer' s English address on 13 December 1999. The taxpayer' s notice of appeal dated 9 January 2000 was received by the Board on 10 January 2000.

Letters from the Revenue to the taxpayer prior to the determination were all written in English. The taxpayer made no previous request for translation of those letters into Chinese. The taxpayer replied in English.

Held, dismissing the appeal:

1. Whilst there was understandable suspicion on the part of the Revenue that the request for a Chinese version of the determination was no more than a tactical ploy on the part of the taxpayer, the Board was of the view that no weight should be given to such suspicion given the fact that the Revenue themselves complied with the taxpayer' s request. The relevant period for consideration was the period between mid-December 1999 and 10 January 2000. The time taken by the taxpayer was not unreasonable in the circumstances. The Board granted time in favour of the taxpayer.

2. The taxpayer failed dismally in discharging his onus of proof in relation to whether or not

    a) he did incur payments to Ms C and Ms D in the amounts claimed;

    b) those sums were incurred in the production of the commission that he earned; and

    c) those sums were wholly, exclusively and necessarily incurred in the production of the commission that he earned.

3. Ms D' s statement did not tally with the amount claimed. The taxpayer gave no evidence as to Ms C and Ms D' s experience and standing in the clothing trade. Had genuine payments been made to Ms C and Ms D there would have been no difficulty in identifying from bank statements of the taxpayer the relevant withdrawal of cash in favour of Ms C and Ms D. Concern about legality of the rebates was no excuse for not keeping proper records. In any event, he should take the consequence of not coming up to proof if he chose to chance the legitimacy of his operations.

Appeal dismissed.

Case referred to:

D59/91, IRBRD, vol 6, 445

Cheung Lai Chun for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background

1. The Taxpayer was employed as the sales manager of Company A and Company B. His earnings for the relevant periods are set out hereunder. The Taxpayer is seeking to deduct from such earnings sums which he allegedly paid to Ms C and Ms D as his sub-agents in locating customers for products of Company A and Company B.

Period	**Employer**		**Earnings $**	**Deductions claimed**		
	Company A	**Company B**		**Ms D $**	**Ms C $**	**Total $**
1-4-1993 to 31-4-1994	Company A		382,151	162,123	69,768	231,891
1-4-1995 to 30-6-1995	Company A		68,799	115,896	78,835	194,731
1-7-1995 to 31-3-1996		Company B	320,034			
1-4-1996 to 30-9-1996		Company B	356,019	128,626	121,034	249,660
1-10-1996 to 4-3-1997	Company A		162,800			

2. In April 1995, the Taxpayer informed the Revenue that Ms C and Ms D were merely ordinary friends and were not relatives of his. He first deducted from payments he received from his employers rebates in favour of representatives of the customers. The balance of the payments would then be divided between himself and his sub-agents. He himself would retain about 1/3 of what he received. He did not keep any account in relation to his payments.

3. The Taxpayer sought to support the deductions claimed for the year of assessment 1993/94 by two signed statement from Ms C and Ms D. Ms D acknowledged receipt of $62,123 in her statement. She said all transactions were conducted in cash. She did not have any record and could assist the Revenue no further. Ms C's statement was to the same effect. She acknowledged receipt of $69,768.

4. By letter dated 17 November 1995, the Revenue asked the Taxpayer to provide additional information in relation to the deduction of $231,891 claimed for the year of assessment 1993/94. The Taxpayer was asked to furnish the exact basis of how the sum was calculated; the date of each payment and the amount paid to each of his sub-agents; copies of bank statement or passbook to show the cash withdrawn for such payments and the names and addresses of the customers introduced by each of his sub-agents. Despite the reminder, the Taxpayer did not comply with this request.

5. By letter dated 28 July 1996, the Taxpayer informed the Revenue that the commissions he received from his employers were computed in accordance with the volume of his business. After receiving his commissions from his employers, he would then split the same with his sub-agents. No fixed formula was adopted for each business deal. He could not explain how the figures were computed. He did not keep any accounting entries. He was not in a position to furnish any further proof.

6. Further correspondence passed between the Taxpayer and the Revenue whereby the Revenue pressed the Taxpayer for the production of further proof in support of his claims. The Taxpayer maintained the stance as outlined above.

7. The Revenue obtained from Company A breakdowns of the commissions they paid to the Taxpayer between 1993 and 1994. The commissions, computed on the basis of $0.1 for each yard of material sold, were paid by cheques drawn by Company A. As far as Company B and its associate companies are concerned, they paid the Taxpayer by transfers into the Taxpayer's bank account.

8. By her determination dated 11 October 1999, the Commissioner rejected the Taxpayer's claims for deduction. The determination was in English. It was sent by registered post to the Taxpayer's address at District E. The Taxpayer's mother acknowledged receipt of this determination on 12 October 1999.

9. By letter dated 6 November 1999, the Taxpayer requested the Revenue for a Chinese version of the determination. This request was received by the Revenue on 22 November 1999.

10. The Revenue sent a Chinese version of the determination to the Taxpayer at his last known Chinese address on 29 November 1999. This was returned to the Revenue on 8

December 1999 as the address was ' not clear' .

11. The Revenue re-sent the Chinese version of the determination to the Taxpayer at his English address on 13 December 1999.

12. The Taxpayer' s notice of appeal dated 9 January 2000 was received by this Board on 10 January 2000.

13. Letters from the Revenue to the Taxpayer prior to the determination were all written in English. The Taxpayer made no previous request for translation of those letters into Chinese. The Taxpayer replied in Chinese. At no time did he make any request that exchanges with the Revenue should be conducted in Chinese.

The issues before us

14. There are two issues before us :

(a) whether we should extend time in favour of the Taxpayer under section 66(1A) of the IRO (Chapter 112).

(b) if so, whether the Taxpayer is entitled to the deductions claimed.

Extension of time

15. Section 66 of the IRO provides that appeal against the Commissioner' s determination be made within ' 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' . This Board is entitled to extend the 1 month period if ' satisfied that a Taxpayer was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal.'

16. We have to decide whether the Taxpayer was prevented by a reasonable cause from giving his notice of appeal. Whilst there is understandable suspicion on the part of the Revenue that the request for a Chinese version of the determination was no more than a tactical ploy on the part of the Taxpayer, we are of the view that no weight should be given to such suspicion given the fact that the Revenue themselves complied with the Taxpayer' s request. The relevant period for our consideration is the period between mid-December 1999 and 10 January 2000. We are of the view that the time taken is not unreasonable in the circumstances. We extend time in favour of the Taxpayer pursuant to section 66(1A) of the IRO.

The deductions claimed

17. The Taxpayer did not give sworn testimony before us. He explained that he sought

Company A' s express approval for the engagement of sub-agents at his initial interview with Company A. He did not keep any record due to his reservations as to the legality of the rebates.

18. As pointed out by the decision of this Board in D59/91, IRBRD, vol 6, 445, the Taxpayer must prove :

(a) that he did incur payments to Ms C and Ms D in the amounts claimed;

(b) that those sums were incurred in the production of the commission that he earned and

(c) those sums were wholly, exclusively and necessarily incurred in the production of the commission that he earned.

19. The Taxpayer failed dismally in discharging his onus of proof in relation to all three issues outlined above :

(a) We reject the two statements of Ms C and Ms D. Ms D' s statement does not tally with the amount claimed. Both statements are mere attempts to ward off investigations by the Revenue.

(b) We have no information as to the background of Ms C and Ms D. Ms D is a lady aged 62 and Ms C a lady aged 57. The Taxpayer gave no evidence as to their experience and standing in the clothing trade.

(c) The transactions leading to commission payments from Company A and Company B could easily be identified. Had genuine payments been made to Ms C and Ms D, there would have been no difficulty in identifying from bank statements of the Taxpayer the relevant withdrawal of cash in favour of Ms C and Ms D. The Taxpayer made no attempt to perform such exercise.

(d) Concern about legality of the rebates is no excuse for not keeping proper records. On his own case, the Taxpayer himself played no part in the alleged illegality. In any event, he should take the consequence of not coming up to proof if he chose to chance the legitimacy of his operations.

(e) The Revenue pressed the Taxpayer for proof shortly after he made his claim for the year of assessment 1993/94. He should not be under any illusion as to the material required in order to advance his claims for that and for subsequent years.

20. For these reasons, we dismiss the Taxpayer' s appeal.

INLAND REVENUE BOARD OF REVIEW DECISIONS