

Case No. D43/10

Salaries tax – extension of time to give notice of appeal – sections 66 of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Kong Chi How Johnson and Leung Wai Keung.

Date of hearing: 13 January 2011.

Date of decision: 11 February 2011.

The taxpayer provided to the Inland Revenue Department ('IRD') an address in the UK in respect of all correspondence. A Determination was sent by registered post to the taxpayer at the UK address on 28 December 2009. The taxpayer's notice of appeal dated 24 March 2010 was posted from Hong Kong on 28 April 2010 and it was received by the Board on 29 April 2010. The taxpayer's position was that he never received the Determination until 27 February 2010 and asserted that he had some difficulties with the postal services between Hong Kong and the UK in respect of submitting his appeal.

Held:

The one-month period specified in section 66 runs from when the Determination was received at the UK address. Therefore the appeal was late by twelve weeks. Even assuming that the transmission of the Determination was completed on the alleged date of receipt, that is, 27 February 2010 or 28 February 2010, the lodging of the appeal on 29 April 2010 would still be out of time. It is incumbent upon the taxpayer to provide a correspondence address to make arrangements to ensure that documents are passed on to him. The giving of a correspondence address is not a means of providing an excuse for delay in receipt. Having given very careful consideration to the submissions by the taxpayer and having regard to the circumstances in respect of this matter, the Board is of the view that the taxpayer was not prevented from appealing within the relevant time limits prescribed by the relevant Section. His failure to file his appeal in time was not a result of him being prevented by illness or absence from Hong Kong or any other reasonable cause. That being the case, the Board is not prepared to exercise its discretion to extend the time in favour of the taxpayer and refuse to do so.

Application refused.

Cases referred to:

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

D2/04, IRBRD, vol 19, 76
D41/05, (2005-06) IRBRD, vol 20, 590
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D11/89, IRBRD, vol 4, 230
D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5, 537
D19/01, IRBRD, vol 16, 183
D142/99, IRBRD, vol 15, 72
D28/10 (unreported)

Taxpayer in person.

Leung Wing Chi and Chan Tsui Fung for the Commissioner of Inland Revenue.

Decision:

Issue

1. The issue in this case is whether the time for appeal should be extended under section 66(1A) of the Inland Revenue Ordinance (Chapter 112) ('IRO').

The facts

(A) The relevant facts

2. By an email dated 4 June 2004, the Taxpayer provided to the Assessor an address in the United Kingdom ('the UK Address') in respect of all correspondence.

3. By a Determination dated 28 December 2009, the Acting Deputy Commissioner of Inland Revenue increased the additional salaries tax assessment for the year of assessment 2001/02 raised on the Taxpayer.

4. The Determination was sent by a letter dated 28 December 2009. That covering letter drew to the Taxpayer's attention to sections 66(1), (1A) and (2) of the IRO and enclosed a sheet setting out in detail these Sections and provided the full address and contact details including the fax and email address of the Clerk to the Board of Review ('the Clerk').

5. The covering letter together with the Determination was sent by registered post to the Taxpayer at the UK Address on 28 December 2009. The covering letter was delivered to the UK Address on 4 January 2010.

6. The Taxpayer during the course of his evidence before us advised us that the UK Address was his mother's residence. However, during the relevant time, he told us that his mother was ill in hospital. However, he confirmed that there was a housekeeper and

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

accepted that the housekeeper must have received the registered letter on 4 January 2010.

7. He told us that he received the covering letter together with the Determination on or about 27 February 2010. He could not be precise as to how he received this and as to the circumstances in which it came in to his possession.

8. On 1 March 2010, the Taxpayer's wife telephoned the Assessor asserting that the Taxpayer had just received the Determination. It is clear that the Taxpayer's wife expressed an understanding of the appeal procedure and requested that the Assessor to put on record that the Taxpayer would file an appeal to the Board.

9. By a separate email dated 1 March 2010 which was addressed to the Board and to the Inland Revenue Department ('IRD'), the Taxpayer asserted that he received the covering letter together with the Determination on 28 February 2010 and the one-month period for lodging the appeal should run from the date of receipt. He made the following contentions:

'I have just received a letter dated 28 December 2009 rejecting my objection to a tax assessment. It gives me one month to lodge an appeal with you but I live in the UK and the letter was sent to a previous address, after a complete lack of contact of about two years. I do wish to lodge an appeal and will contact [the Board] with detailed submissions. The purpose of this email is to give notice that I informed you of my intention to lodge an appeal as soon as the Inland Revenue letter reached me. I would hope that the notice period for an appeal would run from when I received your letter, being 28th February 2010.'

10. By an email dated 2 March, 2010, the Assessor drew to the Taxpayer's attention the provisions of section 66 of the IRO and the contact details of the Board.

11. By a further email dated 3 March 2010, the Clerk reminded the Taxpayer to ensure he complies with the relevant provisions of section 66 of the IRO.

12. By an email dated 3 March 2010, the Taxpayer informed the Clerk that he was working on his written notice of appeal and he hoped to send his appeal to the Board within the following two weeks.

13. The Taxpayer's notice of appeal was dated 24 March 2010. In the notice of appeal, the Taxpayer stated that he did not for the time being have a permanent address for correspondence purposes. He provided an address in Hong Kong and an email address for correspondence. During the course of his evidence, the Taxpayer told us that the address was that of his mother-in-law.

14. The Taxpayer's notice of appeal (dated 24 March 2010) was posted from Hong Kong on 28 April 2010 and it was received by the Board of Review on 29 April 2010.

15. By an email dated 20 May 2010 addressed to the IRD, the Taxpayer stated,

amongst other things, that he was based in Europe and that for correspondence purposes, he could still be reached care of the UK Address which he had previously given.

16. However, during the course of his evidence, the Taxpayer indicated to us that he recollects being in Hong Kong in March. He also recollects going to a Hong Kong post office and making arrangements for his notice of appeal to be sent to the Board. He recollects that he asked the post office for the correct postage. He asserts that although this was posted, this was returned to him. However, the Taxpayer then had the opportunity to look at his travel records, his diary showed that he was only in Hong Kong between 11 and 23 April 2010. However, he could not give any recollection as to whether or not he made any attempts to send the notice of appeal from the UK. Again, when he was in Hong Kong, he could not recollect clearly as to what attempts he made to send the notice of appeal to the Board during the time he was here although it is quite clear that on 28 April 2010, that is, after he had left, the notice of appeal was posted from Hong Kong. The Taxpayer told us that he really could not recollect nor could he give any reasons as to why he did not attempt to hand-deliver the notice of appeal whilst he was in Hong Kong or make proper arrangements for this to be sent by fax or by email to the Board.

The relevant statutory provisions

17. Section 66 of the IRO provides as follows:

'(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).'

The relevant case law

18. The case law is unequivocal and clear. The statutory one-month period was commented by the Board in D2/04, IRBRD, vol 19, 76 whereby they stated at page 80 as follows:-

‘7. by virtue of section 10B(2) of the Interpretation and General Clauses Ordinance, the words ‘1 month after the transmission to him under section 64(4) of the Commissioner’s written determination’ in the English text are presumed to mean the same as ‘ ’. The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins (that is, when Commissioner dispatched his determination), or whether he has the one month period after the process of transmission has been completed. In our view, the latter meaning is more consonant with the legislative intention. We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.’

19. In D41/05, (2005-06) IRBRD, vol 20, 590, the Board held that in the context of section 66 of the IRO, giving notice of appeal to the Board means actual service of the notice on the Clerk to the Board.

20. Ms Chan drew our attention to the Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 and to D11/89, IRBRD, vol 4, 230, D9/79, IRBRD, vol 1, 354, D3/91, IRBRD, vol 5, 537. Again, these authorities make it perfectly clear that the time limits must be observed, they are clear and restrictive. In D3/91, IRBRD, vol 5, 537, the Board stated at page 541 as follows:

‘The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are ‘with clean hands’ and that there are good reasons for the extension of time.’

21. The mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one-month period. In D19/01, IRBRD, vol 16, 183, the Taxpayer was away for more than one month before the Determination was issued but there was no record indicating his return to Hong Kong. His appeal was late by five months. Again, the Board rejected the Taxpayer’s application for an extension of time and stated at 185 as follows:

‘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.'

22. In D142/99, IRBRD, vol 15, 72, the Taxpayer alleged that they came across the Determination late since their mail had been redirected to an address which they were not staying. In rejecting the Taxpayer's application for an extension of time to appeal, the Board made the following observations and comments at page 76:

'Whether there was a purpose for the redirection or not, we do not accept that the redirection of mail which, as alleged, caused the late receipt of the determination, amounts to a reasonable cause for the delay in filing the notice of appeal. If the Taxpayers had the necessity to redirect their mail to an address where they were not staying, they should see to it that the redirected mail would be drawn to their attention or would reach them in good time. If not, they did it at their own risks and should bear the consequences thereof.'

23. Indeed, it is quite clear in our view and having regard to the circumstances of the facts before us that in this case, the Taxpayer did provide the UK Address. Therefore, that address was that of his mother and as such, he should have made the necessary arrangements to ensure that all documentation was indeed received by him.

24. The Board also had the opportunity to consider D28/10 (unreported). Again, this decision reinforces the stringent conditions imposed upon a taxpayer with regard to filing appeals on time.

Discussion

25. The Taxpayer in his letter takes the position that he never received the Determination until 27 February 2010. He then also asserts that he had some difficulties with the postal services between Hong Kong and the UK in respect of submitting his appeal. We refer to his email dated 7 May 2010 whereby he says as follows:

'3) The delay in mail from HK to the UK has been increasingly long, mainly due to ongoing problems in the UK postal service. The letter took some months to reach me in the UK after having had no contact from the HK Inland Revenue for a couple of years. I would also ask you to note that I had to post my appeal to [the Board] three separate times. The first two times, the letter was returned to me, apparently for inadequate postage, although we put on the postage requested at the Post Office. We telephoned [the Board] in late April to confirm this.'

26. As set out above, it is clear that the one-month period specified in section 66 runs from when the Determination was received at the UK Address. The statutory

one-month for the Taxpayer to give notice commenced on 5 January 2010 and expired on 4 February 2010. The notice of appeal was not received by the Clerk until 29 April 2010. Therefore, the appeal was late by twelve weeks. Even assuming that the transmission of the Determination was completed on the alleged date of receipt, that is, 27 February 2010 or 28 February 2010, then the lodging of the appeal on 29 April 2010 would still be out of time.

27. The Board does have jurisdiction to extend time under section 66(1A) if it is satisfied that the Taxpayer was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with section 66(1A). The Taxpayer has made no assertion of any illness. It is also clear that the Taxpayer in his emails and his written submissions before us has given inconsistent explanations as to what took place in respect of this matter. The notice of appeal which was dated 24 March 2010 and provided a Hong Kong address, however, he made no efforts or attempts to make arrangements to ensure that this was sent by fax, email or delivered by hand to the Clerk. He talked about ongoing problems with the UK postal service. However, when he gave evidence, he asserted that he tried to make arrangements to go to a post office in Hong Kong whilst, he thought, he was here in March and then he recognized he was only here in early April.

28. Again, we repeat that when time limits are imposed, these must be observed. In this case, the Taxpayer gave a correspondence address in the UK and it is clear that the evidence that the Determination was delivered to that address on 4 January 2010. It is incumbent upon the Taxpayer to provide a correspondence address to make arrangements to ensure that documents are passed on to him. The giving of a correspondence address is not a means of providing an excuse for delay in receipt.

Conclusions

29. Having given very careful consideration to the submissions by the Taxpayer and having regard to the circumstances in respect of this matter, we are of the view that the Taxpayer was not prevented from appealing within the relevant time limits prescribed by the relevant Section. His failure to file his appeal in time was not a result of him being prevented by illness or absence from Hong Kong or any other reasonable cause.

30. That being the case, we are not prepared to exercise our discretion to extend the time in favour of the Taxpayer and refuse to do so.