INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D46/03

Profits tax – appeal hearing – adjournment granted once – appellant remained out of the jurisdiction – appeal hearing resumed after two years – appellant's failure to attend – no other reasonable cause – application for stay of proceedings – discretionary – purpose of staying civil proceedings pending the resolution of parallel criminal proceedings – ensure a suspect has a fair criminal trial – not to encourage him to stay away from any criminal trial – nor to protect a suspect from arrest – no reason for further stay of this appeal – section 68(2B) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Kenneth Ku Shu Kay and William Tsui Hing Chuen.

Dates of hearing: 29 June 2001 and 4 July 2003.
Date of decision: 6 August 2003.

The appellant, through his solicitor, gave notice of appeal against the determination of the Commissioner of Inland Revenue dated 27 February 1998 in relation to nine years of assessment between 1985 and 1994, whereby some of the profits tax assessments and additional profits tax assessments were adjusted.

After three years and three months, the appeal was heard before the Board on 29 June 2001. The appellant was absent but his solicitor, Mr Halkes, applied for an adjournment of the hearing. The respondent opposed the application for adjournment.

In the course of hearing, it was revealed that a decision had been made to prosecute the appellant for false accounting in respect of alleged gross understatement of receipts in the tax returns and the accounts filed to support those tax returns. After hearing both parties, the Board decided to adjourn the hearing *sine die* with liberty to restore.

After one year and nine months, given the fact that since the last decision of the Board, the appellant had neither returned to Hong Kong nor was there any information indicating his intent to return, the Commissioner, who was ready to proceed with the hearing, sought directions from the Board as to whether the hearing be resumed.

The clerk to the Board therefore corresponded with Mr Halkes and invited him for comment on whether the appeal should be heard in July 2003. In reply, Mr Halkes made it clear that he had hitherto been unable to contact the appellant, who was a wanted person, and to take

instructions from the appellant. Despite so, Mr Halkes objected to the application that the matter be heard in July 2003.

Consequential upon further correspondence between the clerk and Mr Halkes, the clerk fixed a date in July 2003 for the hearing of the appeal and duly notified all parties concerned, including Mr Halkes.

After about 20 days, Mr Halkes by letter informed the Board that his firm did not have any instructions to act for the appellant, who had not contacted the firm directly since mid-2001. Their instructions to act in fact expired after the June 2001 hearing and had not been resumed or refreshed in any manner.

The clerk by letter then notified Mr Halkes that as he and his firm had no instructions to act for the appellant, the Board would not communicate with him and his firm any further in connection with the appellant's appeal.

One and a half months later, the same solicitors' firm acting for the appellant notified the Board by letter that it had then received instructions from the appellant to attend on his behalf at the hearing scheduled for 4 July 2003 and stated that '… the hearing should not proceed unless such situation has changed, so that the Appellant may come to Hong Kong without being immediately arrested. We shall raise this issue at the forthcoming hearing and seek an adjournment pending the resolution of the criminal investigations.'

The appeal hearing on 4 July 2003 proceeded as scheduled. The appellant was again absent but was represented by a Mr Dundon of the same solicitors' firm with limited instructions to seek an adjournment of the hearing. The respondent opposed the application.

Upon hearing the parties, the Board:

(a) refused the application for adjournment on the grounds set out in the ensuing paragraphs;

(b) dismissed the appeal under section 68(2B) of the IRO; and

(c) decided that written reasons for judgment would be delivered in due course.

Held:

1. It is not the function of the discretion to stay civil proceedings pending the resolution of parallel criminal proceedings to protect a suspect from arrest. The purpose is to

ensure that the suspect has a fair criminal trial, not to encourage him to stay away from any criminal trial.

2. The appellant had remained out of the jurisdiction since the last hearing in June 2001 and his solicitor said he had no instructions on whether the appellant intended to visit Hong Kong. The Board saw no reason why there should be any further stay of this appeal.

3. The appellant had two years since the last hearing to prepare for the hearing of his appeal if he had so wished.

4. The appellant failed to attend the hearing of the appeal on 4 July 2003, whether in person or by his authorised representative. There was no contention that his failure to attend was due to sickness. There was no other reasonable cause for his failure to attend. The Board therefore dismissed the appeal under section 68(2B).

Appeal dismissed.

Cases referred to:

Petroliam Nasional Berhad and others v Tan Soon-gin and others [1990] 1 HKLR 4
Paul John Pheby v Alois Paier and others, unreported
D135/02, IRBRD, vol 18, 231

Francis Kwan Government Counsel of Department of Justice for the Commissioner of Inland Revenue.
Chris Dunon of Messrs Halkes Dundon for the taxpayer.

Decision:

1. By his determination dated 27 February 1998, the Commissioner of Inland Revenue:

(a) reduced profits tax assessment for the year of assessment 1985/86, under charge number 2-8433344-86-9, dated 24 March 1995, showing assessable profits of $500,000 with tax payable thereon of $85,000 to assessable profits of $374,374 with tax payable thereon of $63,643;

(b) reduced additional profits tax assessment for the year of assessment 1986/87, under charge number 2-8433352-87-A, dated 24 March 1995, showing

additional assessable profits of $1,000,000 with additional tax payable thereon of $170,000 to additional assessable profits of $926,670 with additional tax payable thereon of $157,533;

(c) reduced additional profits tax assessment for the year of assessment 1987/88, under charge number 2-8433354-88-0, dated 24 March 1995, showing additional assessable profits of $2,300,000 with additional tax payable thereon of $379,500 to additional assessable profits of $1,573,402 with additional tax payable thereon of $259,611;

(d) reduced additional profits tax assessment for the year of assessment 1988/89, under charge number 2-8431036-89-A, dated 24 March 1995, showing additional assessable profits of $1,800,000 with additional tax payable thereon of $279,000 to additional assessable profits of $1,718,135 with additional tax payable thereon of $266,310;

(e) reduced additional profits tax assessment for the year of assessment 1989/90, under charge number 2-8431038-90-6, dated 24 March 1995, showing additional assessable profits of $2,000,000 with additional tax payable thereon of $300,000 to additional assessable profits of $1,986,252 with additional tax payable thereon of $297,937;

(f) increased additional profits tax assessment for the year of assessment 1990/91, under charge number 2-8431040-91-9, dated 24 March 1995, showing additional assessable profits of $2,500,000 with additional tax payable thereon of $375,000 to additional assessable profits of $2,670,018 with additional tax payable thereon of $400,502;

(g) reduced additional profits tax assessment for the year of assessment 1991/92, under charge number 2-8431042-92-A, dated 24 March 1995, showing additional assessable profits of $2,400,000 with additional tax payable thereon of $360,000 to additional assessable profits of $2,008,481 with additional tax payable thereon of $301,272;

(h) reduced additional profits tax assessment for the year of assessment 1992/93, under charge number 2-8431044-93-0, dated 24 March 1995, showing additional assessable profits of $2,200,000 with additional tax payable thereon of $330,000 to additional assessable profits of $2,009,668 with additional tax payable thereon of $301,450; and

(i) reduced additional profits tax assessment for the year of assessment 1993/94, under charge number 3-9450153-94-3, dated 24 March 1995, showing

> additional assessable profits of $3,300,000 with additional tax payable thereon of $495,000 to additional assessable profits of $862,124 with additional tax payable thereon of $129,318.

2. By letter dated 25 March 1998, Solicitors' Firm A gave notice of appeal on behalf of the Appellant.

3. Three years three months later, the appeal came up for hearing before us on 29 June 2001. The Appellant was absent. Mr Adrian J Halkes of Messrs Halkes Dundon, solicitors, appeared for the Appellant with limited instructions to seek an adjournment of the hearing. Mr Michael Yin, Counsel, who appeared on behalf of the Respondent, opposed the application for adjournment.

4. Mr Adrian J Halkes raised various points. A point which he did **not** take until he was confronted with the choice either to take it or risk it not being taken into account was that a decision had been made to prosecute the Appellant for false accounting in respect of alleged gross understatement of receipts in the tax returns and the accounts filed to support those tax returns. After hearing Mr Michael Yin and Mr Adrian J Halkes, we said:

> ' We are concerned about the warrant for arrest and imminent criminal prosecution. We do not wish to speculate on whether the Appellant would or would not give evidence had there not been a warrant for arrest or imminent criminal proceedings. We are unable to conclude that he would not give evidence in any event ... so our decision is therefore ... to adjourn the hearing *sine die* with liberty to restore ... before [any] panel of a chairman or deputy chairman and two members.'

5. One year nine months later, Ms Ngan Sin-ling, acting senior assessor, wrote her letter dated 3 April 2003 to the Clerk to the Board of Review:

> ' ... Since the last decision of the Board, the appellant has not returned to Hong Kong nor was there any information indicating his intent to return. In such circumstances, it is difficult to say that the criminal trial is impending. We would therefore like to seek further direction from the Board as to whether the hearing be resumed. The Commissioner is ready to proceed with the hearing.'

6. By letter dated 4 April 2003, the Clerk wrote to Messrs Halkes Dundon enclosing a copy of the letter from the assessor and stated that:

> ' If you have any comment on whether the appeal should be heard in July 2003, please let me have your comment by **4:00 p.m. on 14 April 2003**.'

7. Messrs Halkes Dundon replied by letter dated 9 April 2003 in these terms (written exactly as it stands in the original):

> ' We refer to your letter of the 4th April 2003.
>
> We are endeavouring to have your letter together with the correspondence from the Inland Revenue forwarded to [the Appellant] and will take his instructions thereon, as you are aware he is not in the HKSAR.
>
> It will be recalled that it was disclosed during the past hearing that [the Appellant] was a wanted person and would thus be subject to arrest on entry to the HKSAR.
>
> In this matter, unless this position has changed, we see no change whatsoever in the factual matrix upon which the Board reached its decision. It would thus appear that any application to have the matter heard in July would in effect need to be based upon some change in circumstances, which is not evident from the correspondence.
>
> As we cannot be positive that we will be able to reach our client within the time limits mentioned, we hereby state we object to the application that the matter be heard in July. However, we will correspond further when we have been able to take our clients instructs.'

8. By letter dated 11 April 2003, the Clerk wrote to Messrs Halkes Dundon and the Respondent referring to the letters dated 3 April 2003 and 9 April 2003 and stated that:

> ' The absence of the appellant from the HKSAR for over 1 year and 9 months is prolonged and unexplained. Any comment on preferred dates in July 2003 should be in writing and reach me by **4:00 p.m. on 17 April 2003, Thursday**, after which I shall immediately fix a date in July for the hearing of the appeal.'

9. Messrs Halkes Dundon wrote further by letter dated 17 April 2003 (written exactly as it stands in the original):

> ' As of the date of this letter, we still have been unable to contact our client and take instructions. However, subject to this, we do have the following observations.
>
> 1. In order to correctly prepare for any hearing, the parties thereto should have access to all relevant documentation including copies of all documents seized from our client and passed onward by the Inland Revenue Department to the Hong Kong Police.

We understand the document list is quite lengthy, however as the Commissioner has in hand these documents and our client does not, it is matter of fairness that a copy set be produced and provided.

2. Our client was of the view that attempts to have him appear at a hearing were a ruse to lure him to the HKSAR, where he was quite possibly not going to be permitted to attend at such hearing.

   At the last date, it was disclosed, at a very late stage, that our client will be arrested and taken into custody should he return to the HKSAR. We have every reason to believe such remains the case.

   Should our client wish to appear at a hearing, he faces immediate arrest if he lands in the HKSAR and subsequent detention and or custody for an indeterminate period.

3. Our client has taken up residence overseas where he has a young family, if he returns to the HKSAR and is arrested he may lose the right to travel out of the HKSAR, to be with his family and to earn a living in his new chosen home. As far as we are aware, our client has not been subject to any extradition attempts by the HKSAR Government. However, we have, in the past, advised our client that, should he attend at a hearing, to do so may cause him to lose his liberty potentially up to a trial date, such remaining an unknown duration. He also may be kept in the HKSAR and lose contact with his family, lose his ability to make income and the like.

4. July is a very short deadline for a hearing date of high complexity; and there appears to be no pressing reason to force a swift hearing date in light of the above.

5. It goes without saying that the HKSAR is gripped by a killer viral epidemic where globally, Governments are advising against travel to the HKSAR. In light of such, until such travel advisory is lifted, it would again appear there is no pressing reason for our client to be forced to attend the HKSAR and no prejudice arises that we can see in the order staying as made.

We continue to seek our clients instructions.'

10. By letter dated 22 April 2003, the Clerk wrote:

' The appellant has more than 1 year and 9 months since the last hearing to prepare for the hearing if he had so wished. As I have received no comment on preferred

dates in July 2003 I shall notify the parties under separate cover of a date in July for the hearing of the appeal.'

11. By letter dated 23 April 2003 the Clerk gave notice to the parties of the 4 July 2003 hearing date.

12. By letter dated 12 May 2003, Messrs Halkes Dundon wrote (written exactly as it stands in the original):

'We have been unable to contact [the Appellant] directly and remain unable to do so.

We have thus been unable to speak to him or formally take instructions from him in a manner which we believe to be satisfactory.

Thus we are unable to confirm if he has been advised of the hearing scheduled and are unable to convey your letters of 22 and 23 April to him.

We have no address at which to reach him and as such we have been unable to satisfy ourselves that he has your correspondence or has been advised the impact of such.

For the avoidance of doubt we have no instructions from [the Appellant] to receive service of correspondence to him from the Board.

Our instructions to act expired after the June 2001 hearing and have not been resumed or refreshed in any manner.

Please be aware that in light of this [the Appellant] may be, and quite possibly is; totally un-aware of your intent to resume the hearing in July.'

13. The Clerk wrote her letter dated 13 May 2003:

'It is incumbent on a party to notify the Board of any change in mode for communication.

Please state specifically whether you have any instructions to act for the appellant, and if not, why you have not said so until your letter of 12 May 2003. If your answer is that you have no instructions to act for the appellant, no further communication with the appellant will be sent to you.'

14. Messrs Halkes Dundon responded by letter dated 14 May 2003 (written exactly as it stands in the original):

'[The Appellant] has not contacted us directly since mid-2001.

We have no instructions to act for [the Appellant] at this time and stated so at paragraph five and six of our letter of 12 May 2003.

Out of an abundance of caution as to preserving [the Appellant's] right to be informed of any matters that may effect him; we wished the Board to be aware of the position.

We re-state:

(i) For the avoidance of doubt we have no instructions from [the Appellant] to receive service of correspondence to him from the Board.

(ii) Our instructions to act expired after the June 2001 hearing and have not been resumed or refreshed in any manner.'

15. This resulted in the Clerk's letter dated 16 May 2003:

'Thank you for your letter dated 14 May 2003. Mr Kenneth KWOK Hing-Wai, SC, Chairman of the panel, has requested me to send you this letter informing you that as you have no instructions to act for the appellant, the Board will not communicate with you any further in connection with the appellant's appeal.'

16. One and a half months later, Messrs Halkes Dundon wrote their letter of 30 June 2003 (written exactly as it stands in the original):

'We refer to the above matter.

We write to inform you that we have today received instructions from appellant in the above matter to attend on his behalf at the hearing scheduled for 4 July 2003.

We would reiterate our comments in our letter to you of 9 April 2003, that "it was disclosed during the past hearing that [the Appellant] was a wanted person and would thus be subject to arrest or entry to the HKSAR".

It appears that the situation in respect of the criminal investigations being carried out by the Hong Kong Police in respect of the same facts and matters, which arise in the above captioned matter has not changed since the adjourned hearing of 29 June 2001.

> Accordingly, the hearing should not proceed unless such situation has changed, so that the Appellant may come to Hong Kong without being immediately arrested. We shall raise this issue at the forthcoming hearing and seek an adjournment pending the resolution of the criminal investigations.'

17. The appeal came up for hearing again on 4 July 2003. The Appellant was again absent. Mr Chris Dundon of Messrs Halkes Dundon appeared for the Appellant again with limited instructions to seek an adjournment of the hearing. Mr Francis Kwan, Government Counsel, appeared on behalf of the Respondent and opposed the application.

18. Mr Chris Dundon cited:

(a) Petroliam Nasional Berhad and others v Tan Soon-gin and others [1990] 1 HKLR 4; and

(b) Paul John Pheby v Alois Paier and others, unreported, Suffiad J, 27 June 2003, HC Action No A4665 of 2002.

19. Mr Francis Kwan cited Board of Review decision D135/02, IRBRD, vol 18, 231.

20. After hearing Mr Chris Dundon and Mr Francis Kwan, we:

(a) refused the application for adjournment;

(b) dismissed the appeal under section 68(2B) of the IRO; and

(c) said that our reasons would be given in writing.

21. We now give our reasons.

22. It is not the function of the discretion to stay civil proceedings pending the resolution of parallel criminal proceedings to protect a suspect from arrest. The purpose is to ensure that he has a fair criminal trial, not to encourage him to stay away from any criminal trial. The Appellant had remained out of the jurisdiction since the last hearing in June 2001 and Mr Chris Dundon said he had no instructions on whether the Appellant intended to visit Hong Kong. We saw no reason why there should be any further stay of this appeal.

23. The Appellant had two years since the last hearing to prepare for the hearing of the appeal if he had so wished.

24. The Appellant failed to attend the hearing of the appeal on 4 July 2003, whether in person or by his authorised representative. There was no contention that his failure to attend was

due to sickness. There was no other reasonable cause for his failure to attend. We therefore dismissed the appeal under section 68(2B).