

Case No. D48/05

Penalty tax – an appeal against assessments for additional tax – whether the notice of appeal was given within time – whether a notice of appeal is only validly given when it is accompanied by all the requisite documents – sections 51(1), 82A(4), 82B(1) and 82B(1A) of the Inland Revenue Ordinance ('the IRO').

Panel: Jat Sew Tong SC (chairman), Paul Mok Yun Lee and Ronald Tong Wui Tung.

Date of hearing: 13 April 2005.

Date of decision: 16 September 2005.

The appellant is and was all material times a practising solicitor in Hong Kong. As a result of the investigations into the appellant's income for years of assessment 1997/98, 1998/99, 1999/2000 and 2002/03, the Commissioner of Inland Revenue ('the Commissioner') alleged that the appellant had, without reasonable excuse: (a) made incorrect tax return for the year of assessment 1997/98 by omitting or understating his income from his firm chargeable to tax, and (b) failed to file any tax return for the years of assessment 1998/99, 1999/2000 and 2002/03 despite having received notices given to him under section 51(1).

By the notice dated 1 September 2004 issued under section 82A(4), the appellant was notified of the Commissioner's intention to assess additional tax in respect of the said incorrect return and failures to file tax returns and he was invited to make written representations to the Commissioner. The appellant duly made written representations by letters dated 30 September 2004 and 10 December 2004. By the four notices of assessment and demand for additional tax under section 82A all dated 29 December 2004 ('the Notices of Assessment'), the appellant was notified of the Commissioner's determination to assess him to additional tax by way of penalty totalling \$160,000 in respect of the four years of assessment.

It was not in dispute that the Notices of Assessment were sent to the appellant by ordinary post on 29 December 2004 and would have been delivered to him on 30 December 2004, being the next business day after posting. After receipt of the Notices of Assessment, the Appellant apparently did nothing until at least 28 January 2005 when he allegedly wrote out in his own handwriting a notice of appeal which was dated 28 January 2005 and then left the same and the enclosed documents to the reception staff of his firm, but without giving specific instructions as to how and when the said documents should be delivered. The notice of appeal and enclosures were later delivered to the Board by hand on 31 January 2005. However the appellant did not enclose with the notice of appeal a copy of the notice of intention to assess additional tax under section

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82A(4) dated 1 September 2004, as required by section 82B(1)(iii). The appellant was informed of this omission by letter from the Clerk to the Board dated 2 February 2005. The appellant responded on 3 February 2005 by fax saying that he would obtain the missing document and sent it to the Board as soon as possible. A copy of the section 82A(4) notice was eventually delivered to the Board on 7 February 2005. On appeal, the appellant contended the failure to provide the section 82A(4) notice was only a technical failure.

The questions before the Board are (1) whether the notice of appeal was given within time and whether a notice of appeal under section 82B is only validly given when it is accompanied by all the documents required by section 82B(1); (2) if the appeal was out of time, whether an extension of time should be granted to the appellant under section 82B(1A); (3) if the notice of appeal was given within time, or an extension of time is to be granted, the substantive merits of the appeal.

Held:

Whether notice of appeal given within time

1. On the facts, the Notices of Assessment would probably have been delivered to the Appellant in the ordinary course of post by 31 December 2004 (section 8 of the Interpretation and General Clauses Ordinance applied). Accordingly, the one month period for appealing specified under section 82B(1)(a) would expire on 30 January or 31 January 2005 (D98/98 applying section 71 of Chapter 1 considered). In the present case, it makes no difference whether the last day for appealing was 30 January or 31 January 2005, since 30 January 2005 was a Sunday. Thus, in either case, the last day for appealing would be 31 January 2005.
2. The language of the section 82B(1) provides that the Board is enjoined from 'entertaining' any notice of appeal given unless it is accompanied by the requisite documents. On the true construction of section 82B(1), the Board therefore took a view that a valid notice of appeal under the section must be accompanied by all the requisite documents (i) to (iv). Of course, the grounds of appeal may appear in the notice itself, but the other documents, if they exist, must accompany the notice. A failure to comply with the section is not a mere irregularity but would render a notice of appeal ineffective.
3. The above interpretation is strengthened by the absence of any general discretion given to the Board to extend time to supply the requisite documents when the same do not accompany the notice of appeal. It should be noted that the jurisdiction to extend time under section 82B(1A) only applies to the giving of the notice of appeal but not to any of the accompanying documents.

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4. Furthermore, as pointed out in D4/99, the statutory requirements are intended to be observed. Non-compliance with the statutory requirements creates delay and may cause prejudice, and is not conducive to the efficient administration of the tax system.
5. Hence, despite the notice of appeal itself was given within time (on 31 January 2005), it was not validly given until 7 February 2005 when the section 82A(4) notice was supplied to the Board; and was therefore seven days late.

Whether extension of time to appeal should be given

6. On the facts, the appellant's own evidence was that after receiving the Notices of Assessment he did nothing until 28 January 2005. In any case, the appellant's claim that he did not know the statutory time limit and requirement as to documentary materials (or a technical failure), even if true, could not provide any 'reasonable cause'.
7. Accordingly, the Board was not satisfied that the appellant was prevented by any reasonable cause from giving notice of appeal in accordance with section 82B(1A).

Merits of the appeal

8. Given the Board's decision on the first and second questions, it was strictly speaking not necessary for the Board to consider the merits of the appeal. In order to avoid any possible doubt, the Board nevertheless considered the substance of the appeal and for the following reasons, came to the firm conclusion that it had no merits:
 - (a) It was undisputed that for year of assessment 1997/98, the appellant omitted to state in the tax return his income from his firm in the sum of \$687,455 (he only reported about 20% of his actual income). The appellant had not provided any explanation for such omission.
 - (b) It was not in dispute that the appellant had received notice to file tax returns for the years of assessment 1998/99, 1999/2000 and 2002/03. The Board rejected the appellant's explanation that he did not file tax returns himself because he thought that his employers would have filed the same for him. Bearing in mind that the appellant himself had filed tax returns before, the Board rejected his claim that he did not know that he had a duty to file correct tax returns when they were sent to him.
 - (c) There were blatant attempts by the appellant to put the blame on the Inland Revenue when it was clearly his own failure in filing tax returns accurately or at all which had led to the imposition of additional tax, which the Board found,

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was not excessive in the circumstances of this case.

Appeal dismissed.

Cases referred to:

D98/98, IRBRD, vol 13, 482

D4/99, IRBRD, vol 14, 141

Taxpayer in person.

King Chi Hung and Chung Wai Kuen for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal against assessments for additional tax made under section 82A of the Inland Revenue Ordinance, Chapter 112.
2. Three issues arise in this appeal.
 - 2.1. First, whether the notice of appeal was given within time. This raises, apparently for the first time, the question whether a notice of appeal under section 82B is only validly given when it is accompanied by all the documents required by section 82B(1).
 - 2.2. Second, if the appeal was out of time, whether an extension of time should be granted to the Appellant under section 82B(1A).
 - 2.3. Thirdly, if the notice of appeal was given within time, or an extension of time is to be granted, the substantive merits of the appeal.

Facts relevant to Questions 1 and 2

3. The facts relevant to the first and second questions are not in dispute. The Appellant is and was at all material times a practising solicitor. He has been in practice since 1987. Between 1 April 1997 and 31 March 2002, and from 1 November 2002 to 31 March 2003 he was employed as a consultant of a firm of solicitors. Between 1 April 2002 and 31 October 2002 he was employed as a consultant of Company A. Additionally, in years of assessment 1997/98 and 1998/99, the Appellant received salaries from Company B.

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4. In 2004, the Commissioner of Inland Revenue (‘the Commissioner’) conducted investigations into the Appellant’s income for years of assessment 1997/98, 1998/99, 1999/2000 and 2002/03. As a result of such investigations, the Commissioner considered that the Appellant had, without reasonable excuse: (a) made incorrect tax return for the year of assessment 1997/98 by omitting or understating his income chargeable to tax to the extent of \$687,455, and (b) failed to comply with the requirements of notices given to him under section 51(1) for the years of assessment 1998/99, 1999/2000 and 2002/03. The total amount of tax undercharged for the four assessment years was assessed at \$306,105.

5. Accordingly, by notice dated 1 September 2004 issued under section 82A(4), the Appellant was notified of the above and the Commissioner’s intention to assess additional tax in respect of the said incorrect return and failures to file tax returns. The Appellant was invited to make written representations to the Commissioner.

6. The Appellant duly made written representations by letter dated 30 September 2004, supplemented by another letter dated 10 December 2004.

7. Having considered the Appellant’s representations, the Commissioner by four notices of assessment and demand for additional tax under section 82A all dated 29 December 2004 (‘the Notices of Assessment’) notified the Appellant that the Commissioner had assessed the Appellant to additional tax by way of penalty under section 82A for the following sums:

	Year of assessment	Amount of additional tax
(a)	1997/98	\$62,000
(b)	1998/99	\$39,000
(c)	1999/2000	\$36,000
(d)	2002/03	<u>\$23,000</u>
		\$160,000

8. The Notices of Assessment were sent to the Appellant by ordinary post on 29 December 2004. There was no dispute that the Appellant did receive them. Mr King, who appeared on behalf of the Commissioner, invited the Board to find that the Notices of Assessment would have been delivered to the Appellant on 30 December 2004, being the next business day after posting. The Appellant did not object to that. In any case, the Notices of Assessment would probably have been delivered to the Appellant in the ordinary course of post by 31 December 2004: section 8 of the Interpretation and General Clauses Ordinance, Chapter 1.

9. Accordingly, the one month period for appealing specified under section 82B would expire on 30 January or 31 January 2005: see Case No D98/98, IRBRD, vol 13, 482, applying section 71 of Chapter 1. In the present case it makes no difference whether the last day for

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appealing was 30 January or 31 January 2005, since 30 January 2005 was a Sunday. Thus, in either case, the last day for appealing would be 31 January 2005.

10. Each of the Notices of Assessment (in standard form) contained the following statement:

‘Your attention is drawn to section 82B of the Inland Revenue Ordinance. **If you wish to appeal against this assessment, you must give notice in writing to the Clerk to the Board of Review, [address], within 1 month after this notice of assessment is given to you.** Your notice must be accompanied by:

- (a) a copy of this notice of assessment;
- (b) a statement of the grounds of appeal from the assessment;
- (c) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and
- (d) a copy of any written representations made under section 82A(4).’ (original bold type)

11. The statement was a faithful summary of section 82B(1), which provides as follows:

‘(1) *Any person who has been assessed to additional tax under section 82A may within—*

- (a) *1 month after the notice of assessment is given to him; 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—*
 - (i) *a copy of the notice of assessment;*
 - (ii) *a statement of the grounds of appeal from the assessment;*
 - (iii) *a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and*
 - (iv) *a copy of any written representations made under section 82A(4).’*

12. The Appellant admitted that he had read the Notices of Assessment. He also accepted that he knew that there was a time limit for appealing. But he apparently did nothing until at least 28 January 2005, when he allegedly wrote out in his own handwriting a notice of appeal which was dated 28 January 2005.

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13. The Appellant alleged that after writing out the notice of appeal, he left it and the enclosed documents to the reception staff of his firm to have the same delivered to the Board. He told the Board that he did not give his staff any specific instructions as to how and when the notice of appeal and enclosures should be delivered. He presumed that the documents would be delivered by hand. But he admitted that having left the notice of appeal and enclosures to his staff, he himself took no further steps to ensure when and how the same would be delivered to the Board.

14. The notice of appeal and enclosures were delivered to the Board by hand on 31 January 2005. However, the Appellant did not enclose with the notice of appeal a copy of the notice of intention to assess additional tax under section 82A(4) dated 1 September 2004, as required by section 82B(1)(iii).

15. The Appellant was informed of this omission by letter from the Clerk to the Board dated 2 February 2005. The Appellant responded on 3 February 2005 by fax saying that he would obtain the missing document and send it to the Board as soon as possible. A copy of the section 82A(4) notice was eventually delivered to the Board on 7 February 2005.

Whether notice of appeal given within time

16. In the circumstances, the first question for the Board to decide is whether the appeal was lodged within time.

17. As mentioned above, the last day for appealing fell on 31 January 2005. On that day the notice of appeal and enclosures were delivered to the Board, but not accompanied by one of the documents required by section 82B(1). The question is whether the notice of appeal was validly given on 31 January 2005, or when the missing document was supplied on 7 February 2005.

18. Mr King informed the Board that he was unable to find any previous decision on that question or throwing light on the answer. He also informed the Board that to his knowledge there was no known decision under the similarly worded section 66(1). In the absence of any previous decisions as guidance, we turn to the language of the section.

19. The section provides that a taxpayer who wishes to appeal under the section must give notice of appeal to the Board, but *'no such notice [of appeal] shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by'* the requisite documents. The section draws a distinction between a notice of appeal and the documents which must accompany it; and the one month limit applies to the giving of the notice of appeal. It may therefore be argued that as long as the notice of appeal itself is given within one month, the appeal is lodged within time.

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20. On the other hand, the Board is enjoined by the section from 'entertaining' – which we take to mean 'admit for consideration' - any notice of appeal given unless it is accompanied by the requisite documents. In our view this points strongly to the requirement that the notice of appeal must have all the requisite documents enclosed in order to be valid. It makes no sense that a notice of appeal could be validly given despite the absence of the requisite documents, but the Board is not being able to entertain the appeal.

21. Further, the above interpretation is strengthened by the absence of any general discretion given to the Board to extend time to supply the requisite documents when the same do not accompany the notice of appeal. In this connection, it should be noted that the jurisdiction to extend time under section 82B(1A) only applies to the giving of the notice of appeal but not to any of the accompanying documents.

22. The Appellant contended that the failure to provide the section 82A(4) notice was only a technical failure. We cannot agree with that view. As pointed out in Case No D4/99, IRBRD, vol 14, 141, the statutory requirements are intended to be observed. Both the Inland Revenue and the taxpayer are entitled to have any disputes resolved as quickly as possible. For that reason, the time limit for appealing under section 66(1) is strictly construed. The same applies to the identically worded section 82B(1A). Non-compliance with the statutory requirements creates delay and may cause prejudice, and is not conducive to the efficient administration of the tax system.

23. For these reasons, it is our view that on the true construction of section 82B(1), a valid notice of appeal under the section must be accompanied by all the requisite documents (i) to (iv). Of course the grounds of appeal may appear in the notice itself; but the other documents, if they exist, must accompany the notice. A failure to comply with the section is not a mere irregularity but would render a notice of appeal ineffective.

24. The result is that notice of appeal in this case, although delivered to the Board on 31 January 2005, is not validly given until 7 February 2005 and is therefore seven days late.

Whether extension of time to appeal should be given

25. We can answer the second question very shortly. If, as we have concluded above, the notice of appeal was given late, the Appellant has failed to discharge the burden to show that he was prevented by any reasonable cause from giving notice of appeal within time.

26. The Appellant's own evidence is that after receiving the Notices of Assessment he did nothing. The only grounds relied upon are that:

26.1. He had not read section 82B. But he admitted that he had read the Notices of Assessment which contained the statement quoted in paragraph 10 above.

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In any case, his claim that he did not know the statutory time limit and requirement as to documentary materials, even if true, could not provide any 'reasonable cause'.

26.2. The failure to enclose the section 82A(4) notice was only a 'technical point', which we have rejected.

27. Accordingly, we are not satisfied that the Appellant was prevented by any reasonable cause from giving notice of appeal in accordance with section 82B(1A). For this reason, this appeal must be dismissed.

Merits of the appeal

28. Given our decision on the first and second questions, it is strictly speaking not necessary for us to consider the merits of the appeal. However, in case our decision on the first question is wrong, and in order to avoid any possible doubt, we have considered the substance of the appeal and have come to the firm conclusion that it has no merits.

29. The facts are again undisputed. For year of assessment 1997/98, the Appellant did not state in the tax return signed and filed by him his income received from his firm. He only stated his income from Company B was \$160,000, while his income from his firm was \$687,455. In other words, the Appellant only reported about 20% of his actual income for that assessment year. The Appellant has not provided any explanation for such omission.

30. For the years of assessment 1998/99, 1999/2000 and 2002/03, the Appellant failed to file any tax return at all. The Commissioner's investigations revealed (and the Appellant has not disputed) that his total income for those years was \$515,090, \$477,085 and \$505,918 respectively. The Appellant did not dispute that he did receive the tax returns, but has not provided any reasonable explanation of his failure to file tax returns for those years.

31. Before the Board, the Appellant claimed that he thought that his employers had filed tax returns for him so he thought that he did not have to file tax returns himself. He therefore only paid the tax demanded of him by the Inland Revenue. However, the Appellant could not have failed to notice that (1) the Inland Revenue's assessments were estimate assessments only and made on the basis of no tax return having been filed by the Appellant, and (2) the estimated chargeable income for each of those years was much less than his actual income.

32. We find the Appellant's explanation wholly incredible. Bearing in mind that he himself had filed tax returns before, he could not have believed that he had no duty to file correct tax returns when they were sent to him. Indeed, we are astonished that any responsible citizen, not to say a practising solicitor, would claim that he did not know that he had a duty to file a correct tax return. We find the Appellant's claim totally incredible and have no hesitation in rejecting the same.

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33. In the notice of appeal, the Appellant advanced the following grounds of appeal:
- 33.1. The Commissioner has failed to exercise its administrative duties properly and efficiently causing delay;
 - 33.2. The Commissioner has failed to exercise its discretionary power fairly and equitably;
 - 33.3. The Commissioner has failed to take into account the practicable issue that the Appellant was not able to pay the fine imposed; and
 - 33.4. The Commissioner has failed to take note of the main theme of the administrative policy of the Chief Executive ‘以民為本’ and ‘急市民所急’.
34. The Board finds no substance in any of the above grounds. These are blatant attempts to put the blame on the Inland Revenue when it was clearly the Appellant’s own failure in filing tax returns accurately or at all which has led to the imposition of additional tax. Nor do we find the amount of additional tax excessive in the circumstances of this case.
35. Accordingly, we would dismiss the substantive appeal even if the appeal was lodged within time.