

Case No. D5/11

Salaries tax – appeal out of time – whether the appellant was prevented by his absence from Hong Kong or other reasonable cause – whether time limit to appeal should be extended – section 66(1A) of the Inland Revenue Ordinance (‘IRO’).

Panel: Cissy K S Lam (chairman), Patrick O’Neill and James Todd Wood.

Date of hearing: 24 March 2011.

Date of decision: 13 May 2011.

By a letter dated 3 August 2010 sent by registered post to the appellant, the Commissioner delivered a determination on salaries tax assessment (‘Determination’) to the appellant at his residential address on 4 August 2010. The said letter detailed the appellant’s right to appeal and the appeal procedure, and the full text of section 66 of the IRO was also enclosed.

The appellant sought to appeal against the Determination by filing a notice of appeal, which was only received by the Board of Review (‘the Board’) on 30 November 2010. The appellant applied for an extension on 4 grounds, namely: (1) absence from Hong Kong; (2) late discovery of the Determination; (3) complexity of his tax affair; and (4) financial and business stress.

Evidence showed that although the appellant was not in Hong Kong when the Determination was delivered on 4 August 2010, he returned shortly afterwards and was in Hong Kong between 8 August and 17 September 2010 except for 2 days.

Held:

1. Under section 66(1A) of IRO, the Board might extend the one month time limit if it was 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 subsection (1)(a).
2. Absence from Hong Kong did not confer an automatic right for extension of time. It was for the taxpayer to satisfy the Board that he was so prevented from giving the requisite notice. The appellant failed to satisfy the Board that his short absence from Hong Kong prevented him from lodging the appeal within the 1-month statutory period. (D19/01, IRBRD, vol 16, 183 considered)

3. Once it was proved that the Determination was delivered to the taxpayer's correspondence address, the statutory time limit started to run. Whether and when the taxpayer opened his mail and read it was irrelevant. Further, even if the Determination was misplaced hence it did not come to the appellant's attention, it was the appellant's own mistake which fell far short of 'a reasonable cause' within section 66(1A) of IRO. (D1/04, IRBRD, vol 19, 76 and Chow Kwong Fai v CIR [2005] 4 HKLRD 687 considered)

Per Curiam:

4. As to the appellant's further delay between September and November 2010, the appellant's assertions, even if they were true, did not constitute 'other reasonable cause' within section 66(1A) of IRO. Further, neither laches nor ignorance of one's rights or of the steps to be taken was a ground which an extension might be granted. (D33/07, (2007-08) IRBRD, vol 2, 791 and D9/79, IRBRD, vol 1, 354 considered)

Application refused.

Cases referred to:

Chow Kwong Fai v CIR [2005] 4 HKLRD 687
D19/01, IRBRD, vol 16, 183
D1/04, IRBRD, vol 19, 76
D33/07, (2007-08) IRBRD, vol 22, 791
D9/79, IRBRD, vol 1, 354

Taxpayer in person.

Wong Pui Ki, Chan Man On and Ong Wai Man for the Commissioner of Inland Revenue.

Decision:

1. The Taxpayer wishes to appeal against the Determination of the Deputy Commissioner of Inland Revenue ('CIR') dated 3 August 2010 ('the Determination') in respect of his salaries tax assessment. He contends that he was entitled to apportion his income on the basis that his employments were 'non-Hong Kong employments'.

2. Before hearing the substantive merits, we have to deal with the Taxpayer's application to appeal out of time under section 66(1A) of the Inland Revenue Ordinance, Chapter 112 ('IRO').

Background to application to appeal out of time

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3. The Determination was sent under cover of a letter dated 3 August 2010 by registered post to the Taxpayer. The covering letter detailed the Taxpayer's right to appeal and the appeal procedure and the full text of section 66 of the IRO ('section 66') was enclosed.
4. Information from the Hong Kong Post showed that the Determination was delivered to the Taxpayer's residential address on 4 August 2010.
5. The one month time limit for the appeal under section 66(1)(a) of the IRO thus commenced on 4 August 2010 and expired on 4 September 2010.
6. The proper notice of appeal was received by the the Board of Review ('the BOR') on 30 November 2010. There was thus a delay just short of 3 months.
7. The Board may extend the one month time limit under section 66(1A) of the IRO ('section 66(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)'.
8. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687, Woo VP had this to say at paragraph 20:

'In my opinion, while a liberal interpretation must be given to the word "prevented" used in s 66(1A), it should best be understood to bear the meaning of the term "未能" in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means "unable to". The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute.....'

9. The Taxpayer applied for an extension on 4 grounds (1) absence from Hong Kong; (2) late discovery of the Determination; (3) complexity of his tax affair and (4) financial and business stress. The burden of proof lies on the Taxpayer.
10. The Taxpayer first wrote to the Clerk to the Board of Review ('the Board') by letter dated 11 September 2010 ('Email/Letter T1'):

'I refer to the letter from the Deputy Commission of Inland Revenue ... dated 3 August 2010 which unfortunately I have only today had the opportunity to read completely.

I was out of Hong Kong and only returned on 9 August 2010. I was also away again from 27 – 30 August 2010. During my absence from Hong Kong all the mail that arrived was mis-placed by the persons staying at my residence and I

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only discovered it at the beginning of this week, that is 6 September 2010 and then I only had the opportunity to read the opening few sentences.

My first appeal therefore is for the Clerk to the [Board] to extend the one month appeal period to 6 October 2010 in order that I may have the full one month to properly review the Deputy Commissioner's formal decision (the "written determination"), the reasons for the decision and the statement of the facts upon which the written determination was arrived at. I will also need the full one month to prepare my formal notice of appeal and statement of the grounds of my appeal.'

11. That letter was sent by both email and mail to the Clerk to the Board. The Clerk to the Board immediately replied likewise by email as well as letter. The email was sent to the Taxpayer marked urgent on 14 September 2010 ('Email B'). It was sent to the email address used by the Taxpayer when he sent Email T1. The Taxpayer expressly confirmed to us that he did receive Email B. A letter dated 13 September 2010 ('Letter B') in identical terms to Email B was sent to the Taxpayer by registered mail which was returned as 'unclaimed' mail and was later redirected by ordinary mail to the Taxpayer on 12 October 2010.

12. In both Email B and Letter B, the Clerk to the Board pointed out to the Taxpayer the importance of section 66 and urged the Taxpayer to forthwith comply with that section; and that any application for an extension of time to appeal would be decided by the Board at the hearing.

13. When the Taxpayer finally submitted his appeal together with the Determination, he stated in his letter of 26 November 2010 ('Letter T2') as follows:

'Many thanks for your letter dated 13 September 2010, that was redirected to me by regular mail on 12 October 2010.

You have pointed out and I understand the need to comply with section 66(1) of the IRO and I hereby wish to lodge an appeal with the [Board].

It is now more than one month since the Commissioner's determination, however for the following reasons I would sincerely appreciate the [Board] accepting my late lodging of appeal and to go on to hear the merits of my appeal in the usual way.

1. When the original determination was issued I was in the UK visiting my ailing parents, and in particular my mother who had just undergone a third operation for a cancer removal. I only became aware of the CIR's determination in September and wrote to you requesting an extension to sometime in October.
2. Internally in my household I only discovered your response letter

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(referred in my opening) towards the end of November as I have not spent a lot of time at home with work and further overseas traveling and our domestic helper had placed the mail in a location I was not familiar with.

3. Due to these reasons I was only able to start to study the CIRs determination at the beginning of this month and there was an extensive amount of material to research. My case is covering 2006/07 and 2007/08 during which time I was engaged with 3 different companies.
4. There is a substantial amount of money involved in this case and together with the global financial crises I have been under considerable mental and financial stress and strain to stay focused and afloat. It has not been easy at all to find the required time to bring any appeal to this stage. I have not been able to afford any representation.

Please find attached the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts.'

14. The Taxpayer then continued to state his grounds of appeal by going through the Determination paragraph by paragraph.

Absence from Hong Kong

15. Movement record from the Immigration Department showed the Taxpayer's movement in and out of Hong Kong as follows:

Date	Time (partial extract)	Arrival (A) or Departure (D)
1-8-2010	22:15	D
8-8-2010	13:29	A
28-8-2010	00:05	D
30-8-2010	07:59	A
17-9-2010	23:42	D

16. So although the Taxpayer was not physically in Hong Kong when the Determination was delivered on 4 August, he returned shortly afterwards and between 8 August and 4 September, he was in Hong Kong except for 2 days. (Indeed he was in Hong Kong up to 17 September except for 2 days.)

17. What the Board said in D19/01, IRBRD, vol 16, 183 at page 185 is apt here:

'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.'

18. The Taxpayer has not satisfied us that his short absence from Hong Kong was such as to prevent him from lodging the appeal within the 1-month statutory period.

Late discovery of the Determination

19. The Taxpayer at first claimed that the Determination was not delivered to his home but that the post office had left a card notifying him of the parcel and that he later sent his domestic helper to collect it. Such a claim was not made in either of the two letters quoted above.

20. Memo from the Hong Kong Post together with a copy delivery receipt confirmed that the Determination was delivered by registered post to the Taxpayer at his residential address on 4 August 2010. When shown these documents, the Taxpayer reverted to what he said in his letters.

21. When asked whose signature was on the delivery receipt, he claimed he could not recognise it but that it might be his partner's. He claimed that his helper or his partner or both had mislaid the Determination 'at a place unfamiliar to' him. The Taxpayer was less than forthcoming in this part of his evidence and we do not know how or why the Determination sent by registered post had come to be misplaced. Nor did he tender any evidence from his helper or partner in support of his assertion that the Determination had been misplaced.

22. In any event, once it is proved that the Determination was delivered to the Taxpayer's correspondence address, the statutory time limit started to run. We agree with the Board when it said in D1/04, IRBRD, vol 19, 76 at page 80 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.*' Whether and when a taxpayer actually opens his mail and reads it is neither here nor there. Moreover even if it were true that the Determination was misplaced and did not come to the Taxpayer's attention until 6 September 2010 as alleged, it was the Taxpayer's unilateral mistake which falls far short of 'a reasonable cause' within section 66(1A) (Chow Kwong Fai above at page 701).

23. In all the circumstances, we are not satisfied that there was any reasonable cause which 'prevented' the Taxpayer from lodging his appeal within the statutory 1-month period, and his application to appeal out of time must fail.

24. The various other reasons given by the Taxpayer for the delay in lodging his appeal at most explained the further delay between September and November. Whilst we do not find these reasons convincing either, for the sake of completeness, we have set out our views on these reasons below.

Delay between September and November

25. Even on his own evidence the Taxpayer discovered the Determination on 6 September 2010. Instead of taking immediate action to file a proper notice of appeal, he emailed the Clerk to the Board asking for an extension. Despite Email B emailed to him on 14 September 2010 by which he must have understood the importance of compliance with section 66, the Taxpayer remained inert until the end of November.

26. When questioned about this, the Taxpayer claimed he was not clear as to his legal position under section 66. He said he had called the office of the Clerk to the Board for advice but the answer was confusing. When asked whether he was alleging misrepresentation by any staff of the Board, he emphatically answered in the negative.

27. The Taxpayer was rather vague in his submissions as to why he remained inert for so long. But if he was alleging that he did not know what documents he was required to file under section 66, then we do not accept such an allegation. The section is in plain English. In fact in the last paragraph of Letter T1 quoted above, the Taxpayer asked for time 'to properly review the Deputy Commissioner's formal decision (the "written determination"), the reasons for the decision and the statement of the facts upon which the written determination was arrived at' so he clearly knew as at 11 September 2010 what these documents were. The only document he had to prepare was his statement of the grounds of appeal.

28. With regard to any alleged telephone conversation between the Taxpayer and the office of the Board, the Taxpayer has not provided us with sufficient evidence to conclude that such conversation took place and that any answer was confusing. The occurrence of such telephone conversation was alleged for the first time at the hearing when asked questions by the Board. In Letter T2, the Taxpayer referred to Letter B from the Clerk to the Board and said that : 'You have pointed out and I understand the need to comply with section 66(1) of the IRO and I hereby wish to lodge an appeal with the [Board]'. Nowhere did he mention any confusion of the section or any telephone conversation.

29. As to the alleged complexity of the case, the Taxpayer did not gather any new document or information in preparing his appeal. When in Letter T2 he said that 'there was an extensive amount of material to research', it appears that he meant that he had to spend time sitting down and going through the Determination paragraph by paragraph. According to him he had to spend 'well over two business days' doing this.

30. When asked why he did not sit down and spend the two days to prepare his appeal on 14 September 2010 when he received Email B, the Taxpayer gave no clear answer save to claim that he was flying in and out of Hong Kong and that he was under a lot of financial and family stress. The statutory period is there to be observed. It is not there to suit a taxpayer's convenience. Even if these assertions were true, they in no way constituted 'other reasonable cause' within section 66(1A) (see D33/07, (2007-08) IRBRD, vol 22, 791).

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31. We agree with what the Board said in D9/79, IRBRD, vol 1, 354 at page 355: *'... The word "prevented", as we see it, is opposed to a situation where an appellant is able to give notice but has failed to do so. In our view, therefore, neither laches nor ignorance of one's rights or of the steps to be taken is a ground upon which an extension may be granted.'*

Conclusion

32. For the above reasons, we do not find any ground to extend the time for appeal beyond the statutory 1 month period and certainly not up to November 2010. The Taxpayer's application to extend the time of appeal is hereby dismissed.