

**Case No. D51/11**

**Appeal out of time** – delay in filing notice of appeal – whether an extension of time should be granted – section 66(1A) of the Inland Revenue Ordinance – whether absence from Hong Kong is a reasonable cause justifying late notice – whether incompetence of his own tax representative is a ground to extend time.

Panel: Colin Cohen (chairman), Cheng Chung Hon Neville and Corinne Marie D’Almada Remedios.

Date of hearing: 19 December 2011.

Date of decision: 21 February 2012.

The Taxpayer’s representative filed a notice of appeal against the salaries tax assessments. The Taxpayer’s appeal was late by some 27 months. The delay was down to the negligence of the Taxpayer’s authorized tax representative and that the Taxpayer was largely absent from Hong Kong, he was not at fault.

**Held:**

1. The provisions of section 66(1A) are very clear and restrictive. Extension of time can only be granted where a taxpayer has been prevented from giving notice of appeal within the prescribed period of one month. Absence from Hong Kong did not confer an automatic right for extension of time and that it was for the taxpayer to satisfy the Board that he was so prevented from giving the requisite notice. The burden is upon the taxpayer to satisfy the Board that he was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of an appeal and once it was proved that the Determination was delivered to the taxpayer’s correspondence address, the statutory time limit started to run (Chow Kwong Fai, Edward v Commissioner of Inland Revenue 6 HKTC 589, D9/79, IRBRD, vol 1, 354, D11/89, IRBRD, vol 4, 230, D3/91, IRBRD, vol 5, 537, D19/01, IRBRD, vol 16, 183, D2/04, IRBRD, vol 19, 76, D76/04, IRBRD, vol 19, 590 and D5/11, (2011-12) IRBRD, vol 26, 72 followed).
2. The Taxpayer was in Hong Kong within the one-month period and as such, he could very well have taken such steps to have ensured that an appeal was lodged. Absence from Hong Kong is not in itself a reasonable cause justifying late notice. Although the Taxpayer was not living in Hong Kong at the relevant times, there is no evidence that he had been prevented from

handling and dealing with his tax affairs. Although his stays in Hong Kong may have been short, there was no evidence that he was not able to lodge his appeal within the relevant time period. Therefore the Taxpayer was not prevented from lodging an appeal by virtue of his absence from Hong Kong.

3. Even if there were communication difficulties between the Taxpayer and his tax representatives, this in itself could not be constituted a reasonable cause preventing the Taxpayer from lodging an appeal within the relevant time period. The Taxpayer cannot rely on incompetence of his own tax representative as a ground to ask the Board to exercise its discretion in his favour to extend time.
4. Having read all the relevant papers and listened very carefully to the submissions, the Board has come to the view there is no evidence to show that the Taxpayer was prevented from lodging an appeal within the statutory time period by virtue of illness or absence from Hong Kong or other reasonable cause. Therefore an extension of time should not be granted to allow the Taxpayer to lodge an appeal out of time.

**Application refused.**

Cases referred to:

Chow Kwong Fai, Edward v Commissioner of Inland Revenue 6 HKTC 589  
D9/79, IRBRD, vol 1, 354  
D11/89, IRBRD, vol 4, 230  
D3/91, IRBRD, vol 5, 537  
D19/01, IRBRD, vol 16, 183  
D2/04, IRBRD, vol 19, 76  
D76/04, IRBRD, vol 19, 590  
D5/11, (2011-12) IRBRD, vol 26, 72

Kay K W Chan, Counsel instructed by Messrs Michael Pang & Co for the Taxpayer.  
Chow Shuk Yi and Tam Tai Pang for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. This is an appeal by the Taxpayer against the salaries tax assessments for the years of assessment 1998/99 to 2001/02. By virtue of a Determination dated 27 April 2009 by the Deputy Commissioner of the Inland Revenue ('the Deputy Commissioner') the

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relevant salaries tax assessments for the years of assessment 1998/99 to 2001/02 were upheld.

**The issue**

2. The preliminary issue which the Board needs to consider is whether the Taxpayer's late appeal should be entertained.

3. Acorate Consultants Limited ('Acorate') filed a notice of appeal on 26 August 2011. Therefore, the Taxpayer's appeal was late by some 27 months.

**The relevant statutory provisions**

4. Section 58 of the Inland Revenue Ordinance ('IRO') provides as follows:

*(2) Every notice given by virtue of this Ordinance may be served on a person either personally or by being delivered at, or sent by post to, his last known postal address, place of abode, business or employment or any place at which he is, or was during the year to which the notice relates, employed or carrying on business or the land or buildings or land and buildings in respect of which he is chargeable to tax under Part II.*

.....

*(4) In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.'*

5. Section 66(1) of the IRO provides as follows:

*'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.'*

6. Section 66(1A) of the IRO provides as follows:

*‘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).’*

7. Our attention was also drawn to the following decisions:

- (a) Chow Kwong Fai, Edward v Commissioner of Inland Revenue 6 HKTC 589;
- (b) D9/79, IRBRD, vol 1, 354;
- (c) D11/89, IRBRD, vol 4, 230;
- (d) D3/91, IRBRD, vol 5, 537;
- (e) D19/01, IRBRD, vol 16, 183;
- (f) D2/04, IRBRD, vol 19, 76;
- (g) D76/04, IRBRD, vol 19, 590;
- (h) D5/11, (2011-12) IRBRD, vol 26, 72.

8. The Court of Appeal in Chow Kwong Fai, Edward v Commissioner of Inland Revenue 6 HKTC 589 held that word ‘prevented’ in section 66(1A) could best be understood to mean ‘unable to’ which would appear to give proper effect to the rigour of the time limit by the taxation statute. We refer to the well-quoted passage of Woo VP at page 613 where he says as follows:

*‘20. In my opinion, while a liberal interpretation must be given to the word “prevented” used in section 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 by a taxation statute. ....’*

9. Therefore, it is quite clear and unequivocal that the provisions of section 66(1A) are very clear and restrictive. Extension of time can only be granted where a taxpayer has been prevented from giving notice of appeal within the prescribed period of one month. It has also been held that absence from Hong Kong did not confer an automatic right for extension of time and that it was for the taxpayer to satisfy the Board that he was so prevented from giving the requisite notice. The relevant authorities also make it perfectly clear that the burden is upon the taxpayer to satisfy the Board that he was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of an appeal and that once it was proved that the Determination was delivered to the taxpayer's correspondence address, the statutory time limit started to run.

**The facts of this case**

10. At the hearing before us, Mr Kay K W Chan of Counsel ('Mr Chan') did not call any evidence. Hence, we did not have the opportunity of hearing from the Taxpayer.

11. In short, his submission was that the delay was down to the negligence of the Taxpayer's authorized tax representative and that the Taxpayer was largely absent from Hong Kong from 27 April 2009, he was not at fault.

12. From our review of the relevant papers, the following facts are relevant:

- (a) On 27 April 2009, the Deputy Commissioner issued the Determination. The Determination was sent by registered post to Room 2301, 23<sup>rd</sup> Floor and 17<sup>th</sup> Floor, Ginza Square, 565-567 Nathan Road, Yaumatei, Kowloon. This was the business address of the Taxpayer's then authorized tax representative, Honest Joy Accounting Services Company Limited ('Honest Joy').
- (b) Evidence was shown to the Board that the Determination was successfully delivered to Honest Joy's address on 28 April 2009.
- (c) On 26 June 2009, in the absence of any appeal against the Determination, revised Salaries Tax assessments for the years of assessments 1998/99 to 2001/02 were issued in accordance with the Determination and sent to the Taxpayer at Honest Joy's address.
- (d) On 30 August 2010, upon application by the Inland Revenue Department ('IRD'), the District Court made a Departure Prevention Direction preventing the Taxpayer from leaving Hong Kong without first paying the outstanding tax or providing satisfactory security to the Commissioner of Inland Revenue.
- (e) On 19 October 2010, the Taxpayer was stopped by the Immigration Department when he attempted to leave Hong Kong.

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- (f) By virtue of various communications and correspondence by way of letters between 21 October 2010, 19 November 2010 and 20 December 2010, the Taxpayer applied to the IRD for payment of the outstanding tax by way of instalments.
- (g) On 26 August 2011, the Taxpayer through his new tax representative, Acorate, lodged an appeal against the Determination.

13. Hence, it can be seen the Taxpayer was fully aware as to the Determination by 21 October 2010. Indeed, Mr Chan conceded this point before us.

14. We have no hesitation in accepting that this must have been the case.

15. We are also of the view that there can be no doubt in our judgment that the Determination was indeed validly served on the Taxpayer on 28 April 2009. He had appointed representatives and there was evidence before the Board that Honest Joy was appointed to receive correspondence on the Taxpayer's behalf.

16. We are also of the view that the one-month period started to run after the process of transmission had been completed. Mr Chan in his submissions suggested that we should take into account the Taxpayer's extensive absence from Hong Kong. However, we have had the opportunity to consider the immigration records and it is quite clear that the Taxpayer was in Hong Kong on 30 April 2009, 9 May 2009 and 19 May 2009.

17. In our view, it is quite clear that he was in Hong Kong within the one-month period and as such, he could very well have taken such steps to have ensured that an appeal was lodged.

18. We accept that absence from Hong Kong is not in itself a reasonable cause justifying late notice. Although the Taxpayer was not living in Hong Kong at the relevant times, there is no evidence before us that he had been prevented from handling and dealing with his tax affairs. We also accept that at all relevant times, Honest Joy was appointed as his tax representatives. Although his stays in Hong Kong may have been short, there was no evidence before us to suggest that he was not able to lodge his appeal within the relevant time period.

19. Therefore, we have no hesitation in accepting Ms Chow's submissions that the Taxpayer was not prevented from lodging an appeal by virtue of his absence from Hong Kong.

20. Mr Chan's case was that Honest Joy was negligent and did not keep the Taxpayer informed as to what was happening after Ms A who had been handling the Taxpayer's account had left. However, if one looks very closely at the documentation, this allegation was not made out. In accordance with the Employer's Return filed by Honest Joy,

Ms A left Honest Joy on 12 August 2007. However, after that date, in March 2008, Honest Joy was still representing the Taxpayer in their dealings with the IRD. There was a telephone conversation between Mr Danvil KH Chan of Honest Joy in respect of various matters in 2008. Mr Danvil KH Chan was a Director of Honest Joy. Therefore, to state that the Taxpayer had lost contact with Honest Joy after August 2007 when Ms A left Honest Joy was not correct. In any event, we also accept Ms Chow's submissions that even if there were communication difficulties between the Taxpayer and his tax representatives, this in itself could not be constituted a reasonable cause preventing the Taxpayer from lodging an appeal within the relevant time period. The Taxpayer cannot rely on incompetence of his own tax representative as a ground to ask the Board to exercise its discretion in his favour to extend time.

21. There was also a clear concession by Mr Chan that it was beyond any doubt that the Taxpayer was fully aware as to the Determination by or about 20 October 2010. Although thereafter he terminated Honest Joy as his tax representative on 22 October 2010, he appointed C & K Accounting Services as his new tax representative on the same date. Hence, it can be seen that throughout the period of time from the date of the Determination until Acorate filed a notice of appeal on 26 August 2011, he had tax representatives acting for him.

22. At that stage, he (and/or his tax representatives) was fully aware of what was happening. Hence, that being the case, there can be no reason why he (and/or his tax representatives) could not have filed a notice of appeal as soon as he was aware as to the contents of the Determination which was by the latest, on or about 20 October 2010. However, he did not do so.

23. Indeed, he entered into extensive communications and correspondence with the IRD in an attempt to try to reach agreement as to the amount of tax that he should pay and the instalments by which he could make payment.

24. We would also mention that it was quite clear that his new tax representatives, Acorate, received instructions to deal with matters on 15 July 2011. However, they did not file the notice of appeal until 26 August 2011. Therefore, more than one month had elapsed.

25. Having read all the relevant papers and listened very carefully to the submissions put to us by Mr Chan, we have come to the view there is no evidence put before us to show that the Taxpayer was prevented from lodging an appeal within the statutory time period by virtue of illness or absence from Hong Kong or other reasonable cause. Therefore, we are of the view that an extension of time should not be granted to allow the Taxpayer to lodge an appeal out of time.