

**Case No. D55/09**

**Salaries tax** – statutory time limit to lodge an appeal within 1 month after transmission of determination – notice of appeal filed 5 weeks out of time – whether time for filing notice of appeal be extended – whether Taxpayer prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within time limit – sections 66(1)(a) and 66(1A) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Vincent P C Kwan and James Mailer.

Date of hearing: 25 January 2010.

Date of decision: 8 March 2010.

The Taxpayer received the Determination in respect of his salaries tax assessments ('the Determination') on 9 April 2009. Between 10 and 13 April 2009, the Taxpayer travelled to Kuala Lumpur to pay a family visit, and was later on medical leave from 17 to 21 April 2009. On 5 May 2009 the Taxpayer sent an email to the Board requesting an extension of time. On the same day, the Board replied to the Taxpayer informing him as to the provisions set out in section 66(1) of the IRO and drew his attention to the time period imposed. The Board did not receive the Taxpayer's notice of appeal until 12 June 2009, some 5 weeks out of time.

At the hearing of the appeal, the Taxpayer contended that he was fully aware as to the time period for filing his notice of appeal, but felt entitled to sort out certain issues and receive clarification from the Inland Revenue Department to enable him to consider his response and file the notice of appeal. The point at issue was whether the Board should extend the time for filing the notice of appeal under section 66(1A) of the IRO.

**Held:**

1. The Board's power under section 66(1A) is very restrictive. An extension of time could only be granted where the taxpayer has been prevented from giving notice of appeal within the time limit, but not where the taxpayer was able to give notice but has failed to do so, or upon the taxpayer's unilateral mistake, misunderstanding or ignorance, or mere absence from Hong Kong, or due to complexity of affairs by virtue of having documents outside Hong Kong. The burden of proof is on the taxpayer to show that he was prevented from lodging an appeal in time by illness or absence from Hong Kong or other reasonable cause. (D11/89, IRBRD, vol 4, 230; D9/79, IRBRD, vol 1, 354; Chow Kwong Fai v CIR [2005] 4 HKLRD 687; D19/01, IRBRD, vol 16, 183; D86/03,

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IRBRD, vol 18, 843; D146/01, IRBRD, vol 17, 88; D1/00, IRBRD, vol 15, 159 and D33/07 (2007-08) IRBRD, vol 22, 791 considered)

2. None of the reasons given by the Taxpayer showed that he was prevented from filing and lodging an appeal in time. Further, the Taxpayer's contention that he was not familiar with Hong Kong tax laws and needed time to sort out certain issues was not a reason to allow further time for him to file an appeal. There is also a difference between lodging an appeal and preparing for an appeal, and clearly the Taxpayer was fully aware as to the various issues set out in the Determination.

**Application refused.**

Cases referred to:

D11/89, IRBRD, vol 4, 230  
D9/79, IRBRD, vol 1, 354  
Chow Kwong Fai v CIR [2005] 4 HKLRD 687  
D19/01, IRBRD, vol 16, 183  
D86/03, IRBRD, vol 18, 843  
D146/01, IRBRD, vol 17, 88  
D1/00, IRBRD, vol 15, 159  
D33/07, (2007-08) IRBRD, vol 22, 791

Taxpayer in person.

Chan Tak Hong and Wong Pui Ki for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. This is an appeal against the Determination by the Deputy Commissioner of Inland Revenue dated 2 April 2009 in respect of the salaries tax assessments raised on Mr A ('the Taxpayer') for the years of assessment 2004/05, 2005/06 and 2006/07 ('the Determination'). The Taxpayer claims that the gains realized under a share option scheme should not be chargeable to salaries tax.

**The issue – late appeal**

2. The Determination was delivered to the Taxpayer on 9 April 2009. Hence, the Taxpayer had until 9 May 2009 to file any notice of appeal with the Board. It was not until 12 June 2009 some five weeks out of time that the Board received the Taxpayer's notice of appeal.

### **The relevant statutory provisions**

3. Section 66(1)(a) of the Inland Revenue Ordinance ('IRO') provides that the time limit for lodging an appeal to the Board against a determination is within one month after the transmission of the determination to a taxpayer. Section 66(1) provides that no notice of appeal shall be entertained unless given in writing to the Clerk to the Board and is accompanied by a copy of the determination together with a copy of the reasons therefor and of the statement of facts and a statement of grounds of appeal.

4. Section 66(1A) of the IRO provides that the Board may extend for such period as it thinks fit 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 case law**

5. The provisions of 66(1A) are very clear and restrictive. Time limits are imposed and these clearly must be observed. The Board of Review in D11/89, IRBRD, vol 4, 230 made the following comments at page 234:

*'..... The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed within the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.*

*Furthermore, even if he had been prevented, he had no reasonable excuse because he had had more than sufficient time to put his house in order.'*

6. Therefore, the word 'prevented' cannot appropriately be used in a situation where a taxpayer is able to give notice, but has failed to do so. In D9/79, IRBRD, vol 1, 354, the Board said 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.'*

7. In Chow Kwong Fai v CIR [2005] 4 HKLRD 687, there, the appellant contended that he was late in filing an appeal to the Board because he misunderstood the requirements for a valid appeal under section 66(1) of the IRO and such misunderstanding

constituted a reasonable cause. The Court of Appeal took the view that reasonable cause could not possibly be extended to cover unilateral mistakes and the appellant's alleged misunderstanding and understanding, together with his alleged ignorance, even if fully accepted to be the true reasons, could not be amount to a reasonable cause under section 66(1A).

8. Various decisions of the Board of Review have concluded that a mere absence from Hong Kong does not necessarily 'prevent' a timely appeal within the statutory one-month period specified under section 66(1).

9. In D19/01, IRBRD, vol 16, 183, there the taxpayer had been away from Hong Kong before the determination was issued, with no further record indicating his return to Hong Kong. His appeal was late by five months. The Board, in rejecting an application for extension of time to file an appeal, said at page 185:

*'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. .... 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.'*

10. We also refer to D86/03, IRBRD, vol 18, 843, D146/01, IRBRD, vol 17, 88 and D1/00, IRBRD, vol 15, 159. Those decisions clearly show that an assertion by the taxpayer that due to the complexity of his affairs by virtue of having documents outside of Hong Kong could not be said to prevent a timely appeal from being lodged within the normal one-month period.

11. In particular, we refer to a decision of D33/07, (2007-08) IRBRD, vol 22, 791, there, the determination was delivered to the taxpayer on 6 February 2007 and a properly constituted notice of appeal was received by the Board on 28 May 2007. There, the taxpayer explained that his appeal was late because of his travelling in February and March, his travelling for his wife's operation and treatment in April and his household and personal effects were in storage. The Board after reviewing the various authorities, stated at page 794 as follows:

*'We have also had the opportunity to consider the Court of Appeal decision in Chow Kwong Fai v CIR CACV 20/2005. The Court of Appeal held that section 66(1)(a) imposes a high threshold which is more than an excuse and as such the reasonable cause cannot possibly be extended to cover unilateral mistakes made by the Taxpayer. We are of the view that time limits that are imposed must be observed. The authorities are clear in that various principles that have been laid down, clearly show that the mere fact that one is travelling or one's tax affairs are complex cannot be said to prevent a timely appeal being lodged within the normal one-month period. Again, the mere absence from Hong Kong does not necessarily prevent a timely appeal within the statutory one-month period as particularized by the Section.'*

*..... it is not sufficient for the Taxpayer that he has proved that his failure in time was due to illness, absence from Hong Kong or other reasonable cause but he must also satisfy the Board that he was prevented by such illness, absence or reasonable cause to lodge an appeal within the time prescribed .....*

12. As can be seen from the above authorities, the burden of proof is on the Taxpayer to show that he was prevented from lodging an appeal in time by illness or absence from Hong Kong or other reasonable cause.

13. The Taxpayer gave evidence before us and explained to us the various reasons as to why he was not able to file his appeal in a timely fashion.

14. He confirmed that he did receive the Determination on 9 April 2009, he thereafter sent an email dated 5 May 2009 to the Clerk to the Board of Review requesting an extension of time to appeal. On the same day, the Clerk to the Board of Review replied to the Taxpayer informing him as to the provisions set out in section 66(1) of the IRO and drew his attention to the time period imposed.

15. The Taxpayer again sent another email on the same day seeking further advice. The Clerk replied to the Taxpayer again enclosing a copy of section 66 of the IRO.

16. The Taxpayer accepted before us that he was fully aware as to the time period for filing his notice of appeal. He, however, drew our attention to the following:

- (a) He indicated to us that he was on medical leave from 17 to 21 April 2009 (a total of 5 days). He produced to us a medical certificate showing that he underwent a laser treatment to his eyes. He also drew to our attention that before he had the laser treatment, he travelled to Kuala Lumpur leaving Singapore on 10 April 2009 (which was a Good Friday and a public holiday in Singapore) and returned on Monday, 13 April 2009. He went to Kuala Lumpur to visit his family.
- (b) He stated that he did not have time to read the Determination due to the fact that he was busy at work and he had little time in which to consider the various matters that were being set out and raised by the IRD. He indicated that he was unfamiliar with Hong Kong tax laws and in short, needed time to sort out certain issues with the IRD before he could provide a complete response to the Board.

17. In his evidence before us, he made it clear that he was fully aware as to the time periods that were imposed upon him but felt that he was entitled to receive some further clarification from the IRD to enable him to consider his response and then file a notice of appeal.

18. However, from the authorities we have set out above, it is quite clear that none of these reasons shows that he was prevented from filing and lodging an appeal in time. Although he was on a sick leave for seven days and took a short trip to Malaysia, this did not prevent him from filing a notice of appeal within the one-month period.

19. We are also of the view that his contention that he was not familiar with Hong Kong tax laws and he needed time to sort out certain issues is not a reason for us to allow further time for him to file an appeal.

20. We also accept the submissions of Miss Chan that there is indeed a difference between lodging an appeal and preparing for an appeal. It is also clear that the Taxpayer had been corresponding for some time with the IRD before the Determination was made and he was fully aware as to the various issues that were set out in the Determination.

21. We therefore conclude that time limits imposed must be observed. Having regard to all the circumstances of this case, having regard to the authorities and having listened very carefully to the Taxpayer, we are of the view that he has not provided us with any good reasons that he was prevented from filing his appeal in time. That being the case, we are not prepared to grant the necessary extension of time required to enable him to do so. Therefore, the appeal is dismissed.