

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D57/99

**Profits Tax** – extension of time – notice of appeal filed out of time – when time began to run – sections 58 and 66 of the Inland Revenue Ordinance.

Panel: Ronny Tong Ka Wah SC (chairman), Mohan Bharwaney and Tse Tak Yin.

Date of hearing: 2 July 1999.

Date of decision: 27 August 1999.

Certain profits tax assessment was raised on the taxpayer who objected to it. The Commissioner rejected the objection in a determination dated 27 January 1998. The determination was twice sent to the taxpayer at his business address by registered post but was on both occasions returned. Subsequently the determination was resent by ordinary post to the taxpayer at the same address. The taxpayer then entered into correspondence with the Commissioner and asked for extension of time to give his notice of appeal. The taxpayer was informed that he should seek extension of time from the Board.

The taxpayer filed a notice to appeal which was not complete, over 13 months after the determination was made and almost 10 months after the determination was first sent to him by ordinary post. The clerk of the Board then entered into correspondence with the taxpayer reminding him of the requirement to file various missing items.

#### **Held:**

- (1) Under section 66 of the IRO, time to appeal begins to run from ‘the transmission’ to the taxpayer of the Commissioner’s written determination. The address is the taxpayer’s shop address and even if he is not there, there is someone to look after the shop. Under section 58(3) of the IRO, any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. In these circumstances, the burden plainly is on the taxpayer and he simply failed to discharge this burden.
- (2) The time limit within which an appeal to be lodged under the statute is for all to observe. The Board cannot function efficiently unless taxpayers exercise their right to appeal timeously. While the Board will exercise its discretion in favour of taxpayers who fail to appeal in time due to unavoidable or excusable circumstances, it will not exercise its discretion in favour of someone who

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blatantly and persistently ignores his obligation to observe the time limit laid down by the statute.

### **Appeal dismissed.**

Cheung Mei Fan for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

1. We have before us to-day an application for leave to give notice of appeal to this Board out of time. The facts indicate a rather sorry state of affairs.

### **History of delay**

2. Certain profits tax assessment was raised on the abovementioned Taxpayer, Mr A, for the year of assessment 1992/93 in respect of which he objected. Mr A claimed that the profit derived from the sale of certain industrial properties was capital in nature.

3. The objection was duly considered by the Commissioner of Inland Revenue and rejected in a determination dated 27 January 1998 ('the Determination').

4. The Determination was sent to Mr A at his business address in District B ('the Address') by registered post on 27 January 1998. Mr A was out of Hong Kong between 27 January 1998 and 31 January 1998 and the registered post was returned. The Determination was again sent by registered post to Mr A at his previous address on 13 March 1998. That, too, was returned.

5. On 14 May 1998, the Determination was again sent to Mr A at the Address this time by ordinary post. There is evidence produced before us that the letter of 14 May 1998 was duly addressed and posted. That letter was not returned.

6. On 10 August 1998, Mr A wrote to the Commissioner enquiring about the outcome of his objection. In reply, the Commissioner by ordinary post again sent to Mr A at the Address the Determination and reminded him of his right to appeal.

7. On 25 January 1999, Mr A again wrote to the Commissioner having received a notice of tax dated 1 January 1999. Again, he raised the question of his objection. It is to be noted that the notice of tax was also addressed to the Address.

8. The Commissioner replied on 4 February 1999, again addressed to the Address, sending for the third time now, the Determination.

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9. On 8 February 1999, Mr A replied acknowledging the receipt of the Determination and indicated that he wished to appeal. In this letter, he said: 'I understand that I have ... one month ... to file the appeal to the Board of Review'. He also asked for extension of time to give his notice of appeal.

10. On 12 February 1999, the Commissioner wrote to Mr A again at the Address, advising him of the procedure of the appeal. Mr A was also informed of the various letters previously sent to him at the Address and that he should seek extension of time from the Board as the Commissioner was not in a position to grant an extension of time for filing an appeal to the Board.

11. Mr A eventually filed a notice to appeal on 2 March 1999, over 13 months after the Determination was made and almost 10 months after the Determination was first sent to him by ordinary post.

12. The notice of appeal filed on 2 March 1999, however, was not complete. Section 66 of the Inland Revenue Ordinance, Chapter 112 ('the IRO') requires that no 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.' The notice of appeal dated 2 March 1999 did not enclose the Determination nor any grounds of appeal. Indeed, Mr A said in the notice of appeal: 'I did not have sufficient time to prepare a full statement of facts and grounds of appeal. I would submit a statement of facts together with full grounds of appeal forthwith.'

13. The clerk to this Board wrote on 3 March 1999 reminding Mr A that his notice lacked the grounds of appeal as well as the Determination.

14. On 10 March 1999, Mr A sent in his grounds of appeal minus the Determination.

15. On 19 March 1999, Mr A was again reminded by the clerk to this Board that he had not sent in the Determination.

16. Mr A then sent in the Determination which was incomplete. He was informed of the omission on 25 March 1999 and the full Determination was not lodged until 30 March 1999.

17. Even if one were to take 4 February 1999 as the time by which Mr A admitted as having received the Determination, he was late in submitting a properly constituted notice of appeal by about 3 to 4 weeks depending on whether one is prepared to overlook his failure to submit a full determination to the Board.

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### **When time began to run**

18. Under section 66 of the IRO, time to appeal begins to run from ‘the transmission’ to the taxpayer of the Commissioner’s written determination.

19. Mr A, however, claims he never received either the letter of 14 May 1998 nor the letter of 10 August 1998. His evidence is very hard to accept. According to him, which is confirmed by immigration records, he was in Hong Kong in May until 17 May when he left Hong Kong returning on 19 May and he remained in Hong Kong from 9 July 1998 onwards for the rest of the year.

20. The Address is Mr A’s shop address and even if he is not there, there is someone to look after the shop. Besides, all correspondence throughout the years save for the letter of 13 March 1998 were sent to the Address and Mr A never failed to receive any communication except the letters of 14 May 1998 and 10 August 1998.

21. Under section 58(3) of the IRO, any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.

22. Section 58(4) further provides that in proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted. This the Revenue has proved.

23. In these circumstances, the burden plainly is on Mr A to show the letters of 14 May 1998 and 10 August 1998 were not received by him. In our view, on the evidence, he simply failed to discharge this burden.

### **Delay since February**

24. In any event, even if one were to count from 4 February 1999, Mr A’s conduct can best be described as dilatory.

25. He accepted in his evidence that he did not take any active steps to find out precisely what he had to do to give a properly constituted notice of appeal. He made no enquiries with either the clerk to this Board or the Revenue. He also accepted that at least by 3 March 1999 he knew he must submit his grounds of appeal as well as the Determination to this Board. He has no excuse for not submitting the grounds of appeal until 10 March 1999 and the Determination until after another reminder on 19 March 1999.

### **Ruling**

26. The time limit within which an appeal is to be lodged under the statute is for all to observe. This Board cannot function efficiently unless taxpayers exercise their right to appeal timeously. While this Board will exercise its discretion in favour of taxpayers who fail to

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appeal in time due to unavoidable or excusable circumstances, we will not exercise our discretion in favour of someone who blatantly and persistently ignores his obligation to observe the time limit laid down by statute.

27. In all the circumstances, we decline to give leave to Mr A to give his notice of appeal out of time. His application for extension of time is refused.