

Case No. D59/08

Salaries tax – absent from hearing – application for adjournment – section 68, 68(2B) and 68(2D) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Fred Kan and David Kwok Sek Chi.

Date of hearing: 3 February 2009.

Date of decision: 6 March 2009.

The Taxpayer, a pilot whose permanent address was in Country F, appealed against assessment to additional salaries tax. The Taxpayer did not agree to the facts contained in the Determination. When the date for the hearing of his appeal was fixed, the Taxpayer, through his solicitors, advised the Board that he was unable to confirm that he would be able to attend and applied to the Board to proceed to hear his appeal in his absence. The solicitors also stated that they would not be attending the appeal hearing. The Board did not accede to the application but was prepared to consider any application for an adjournment. At the hearing, neither the Taxpayer nor the Taxpayer's Solicitors attended before the Board.

Held:

This appeal involves questions of fact and evidence should be called. The Board thinks it should not proceed to hear the appeal in the absence of the Taxpayer under section 68(2D) and that section 68(2B)(b) does not apply. There has been no evidence before the Board that the Taxpayer's failure to attend the hearing was due to sickness or any other reasonable cause. The Board had invited the Taxpayer to provide a date for the adjournment of the hearing but the Taxpayer failed to provide any suitable dates. The Taxpayer had failed to make any application nor show any intention of applying for an adjournment of the hearing. There are no grounds for the Board to postpone or adjourn the hearing under section 68(2B)(a). After considering all matters and having reviewed the relevant communications and correspondence, the Board does not prepare to accede to an application for this matter to be heard in the absence of the Taxpayer pursuant to section 68(2D) and therefore, pursuant to section 68(2B)(c), the appeal is dismissed.

Appeal dismissed.

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Taxpayer in absentia.

Tsui Nin Mei and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Taxpayer whereby he objected to the additional salaries tax assessments for the years of assessment 1999/2000 and 2000/01 raised on him. The Taxpayer claims that certain sums received by him from his employer are refunds of rent and should not be fully assessable to salaries tax.

2. The Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') made a Determination on 25 August 2008 rejecting the Taxpayer's claim.

3. By a letter dated 19 September 2008, Messrs Weir & Associates, solicitors for the Taxpayer ('the Taxpayer's Solicitors') gave notice of appeal against the Determination of the Deputy Commissioner.

4. On 30 December 2008, the Clerk to the Board of Review ('the Clerk') gave notice to the Taxpayer that his appeal would be heard on 3 February 2009 at 5.15 p.m. The letter was addressed to the Taxpayer at his mailbox address with Company A's Department B at Address C. That letter was copied to the Taxpayer's Solicitors.

5. On 29 December 2008, the Taxpayer's Solicitors wrote to the Clerk advising that their client's permanent address was in Province E, Country F and that:

'

He is unable to confirm that he would be able to attend a hearing in Hong Kong. His job as a pilot does not guarantee his being in Hong Kong for any length of time.

On his behalf, therefore, we make application to the Board of Review, to proceed to hear his appeal in his absence. The application is made pursuant to s.68(2D) of the Inland Revenue Ordinance. We ourselves shall not be attending the appeal hearing either.'

6. On 7 January 2009, the Clerk (on the direction of the Chairman) wrote to the Taxpayer's Solicitors in the following terms:

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“I refer to the letter dated the 29 December 2008 from Messrs. Weir & Associates. An application was made by the Taxpayer’s solicitors to proceed to hear his appeal in his absence pursuant to s.68(2D) of the Inland Revenue Ordinance (Cap.112).

I am of the view that the Taxpayer is likely to be in Hong Kong within the relevant period. I have regard to the fact that he has appointed solicitors to act on his behalf in respect of this matter although they indicated that they are not instructed to appear at the hearing. I also refer to a note whereby he gave his address as c/o Mailbox [XXXX], [Department B], [Company A], [Address C]. He subsequently through his solicitors provided a permanent address in [Province E, Country F]. The Taxpayer is a [Company A] pilot and I am of the view that he could easily make arrangements to attend at the hearing on Tuesday, the 3rd February, 2009. Therefore, I am not prepared to accede to the application to have this matter heard in his absence. However, I am prepared to consider any application for an adjournment to fix a date when the Taxpayer would be available to attend before the Board if he cannot be present on the 3 February 2009. If the Taxpayer is minded to apply for an adjournment, he should provide dates when he is able to attend.’ ”

7. By a further letter dated 21 January 2009, the Taxpayer’s Solicitors replied to the Clerk and stated as follows:

‘ In reply to your letter of 7th January 2009 our client states the following verbatim from an email message to us:

“At [Company A] we do not receive our next month’s roster until the 15th of the previous month. If I am to request time off in the future, I have to request it from [Company A] 80 days in advance and there is no guarantee of having that request fulfilled.

I provided a Hong Kong address to the BOR only to ease their correspondence by sending it to a Hong Kong address

I can request a letter from [Company A] stating that I now work for [Company D] and now based in [City G, Country F].

I do not work for [Company A] anymore but for a Hong Kong Company called [Company D] which is wholly owned by [Company A].

I am only in Hong Kong twice a month and only for a few days at a time and during that time I have a flying schedule.

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I have leave in February but will be in [Country F] living at my [Country F] address and will not be able to attend the meeting on February 3.”

We enclose copies of our client’s rosters for January and February 2009.

In the circumstances if our client’s presence is mandatory we would ask that the hearing be adjourned for at least 80 days to allow him time to arrange leave with his employer to enable him to attend. If our client’s attendance is not required, please note that the matter may proceed in his absence. Our written submissions on his behalf have already been submitted and we asked that they be considered by the Board.’

8. On 22 January 2009, the Chairman directed the Clerk to write to the Taxpayer’s Solicitors in the following terms:

‘I refer to a letter dated the 21 January 2009 from Messrs. Weir & Associates.

I am prepared to agree to adjourn this matter but will only do so in the event that the Taxpayer provides a date in which he is able to attend before the Board in April or May 2009. I require a date to be provided to us by no later than close of business, Hong Kong time, the 29 January 2009. In the event of dates not being provided, the hearing on the 3 February 2009 will proceed.’

9. The Taxpayer’s Solicitors wrote on 23 January 2009 to the Clerk as follows:

‘In reply to your letter of 22nd January 2009, our client will be unable to meet the Chairman’s requirement to give a date for a hearing in April or May 2009 by close of business on 29th January 2009, for the reasons previously given by our client, namely,

“If I am to request time off in the future, I have to request it from [Company A] 80 days in advance and there is no guarantee of having that request fulfilled.”

Subsection 2D of section 68 IRO states:

.....

The Board is requested to proceed on 3rd February 2009 to hear our clients appeal, in accordance with Subsection 2D.’

10. On 23 January 2009, the Chairman to the Board directed the Clerk to write to the Taxpayer’s Solicitors in the following terms:

‘

I refer to Messrs. Weir & Associates’ letter of the 23 January 2009. I have already made a ruling in respect of the application by the Taxpayer to have this matter heard in his absence by virtue of a letter dated the 7 January 2009 sent to Messrs. Weir & Associates from the Clerk to the Board of Review.

Hence, the hearing will take place on the 3 February 2009.

The Taxpayer is able to make such application if he thinks fit at that hearing.’

The relevant statutory provisions

11. Section 68(2) of the Inland Revenue Ordinance (‘IRO’) provides as follows:

‘ Subject to subsection (2B), an appellant shall attend at the meeting of the Board at which the appeal is heard in person or by an authorized representative.’

12. Section 68(2B) of the IRO provides as follows:

‘ If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board may-

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal under subsection (2D); or

(c) dismiss the appeal.’

13. Section 68(2D) of the IRO provides as follows:

‘ The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.’

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14. At the hearing on 3 February 2009, neither the Taxpayer nor the Taxpayer's Solicitors attended before the Board despite the requirements of section 68(2) of the IRO. We accept the submissions put forward to us by Ms Tsui on behalf of the IRD that this appeal relates to the issue of deciding whether certain sums the Taxpayer received from his employer were refunds of rent. This clearly involves questions of fact. Hence, evidence should be called.

15. On 29 January 2009, the Chairman through the Clerk requested the Taxpayer's Solicitors to confirm whether or not any of the facts contained in the Determination were agreed. On the same date, the Taxpayer's Solicitors responded as follows:

'..... The facts in paragraph 1of the Commissioner's Determination are not agreed.'

16. Section 68(2D) of the IRO does require the Board to be satisfied that the Taxpayer was outside Hong Kong on the date fixed for the hearing of the appeal and was unlikely to be in Hong Kong within such period thereafter as the Board considered to be reasonable. The Chairman on 7 January 2009 made a ruling that the Taxpayer's application to have his appeal heard in his absence, was not acceded to. However, the Taxpayer was invited to make such an application as he thought fit at the hearing.

17. The Taxpayer failed to attend either in person or by the Taxpayer's Solicitors and no application was made before us for an adjournment.

18. We accept the submissions by Ms Tsui that we should not proceed to hear the appeal in the absence of the Taxpayer under section 68(2D) and that section 68(2B)(b) does not apply. There has been no evidence before us that the Taxpayer's failure to attend the hearing was due to sickness or any other reasonable cause. The Taxpayer through his solicitors indicated that he had leave in February.

19. The Taxpayer, if he so wished, could have instructed his solicitors to appear at the hearing and make such representations or conduct the appeal on his behalf. The Board had invited the Taxpayer to provide a date for the adjournment of the hearing but the Taxpayer failed to provide any suitable dates. It is also accepted that the Taxpayer had failed to make any application nor show any intention of applying for an adjournment of the hearing. We therefore accept the submissions of Ms Tsui that there are no grounds for the Board to postpone or adjourn the hearing under section 68(2B)(a).

20. After considering all matters and having reviewed the relevant communications and correspondence from the Taxpayer's Solicitors, we are not prepared to accede to an application for this matter to be heard in the absence of the Taxpayer pursuant to section 68(2D) and therefore,

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pursuant to section 68(2B)(c), the appeal is dismissed.