INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D62/98

Salaries tax – delay of filing a notice of appeal – section 66(1A) of the Inland Revenue Ordinance – meaning of the word 'transmission' under section 66(1) of the IRO – burden of proof.

Panel: Christopher Chan Cheuk (chairman), Ho Chung Ping and Berry Hsu Fong Chung.

Dates of hearing: 20 March 1998 and 1 May 1998.
Date of decision: 22 July 1998.

It was a determination made by the then Commissioner in 1993 and the appeal was not heard until 5 years later. The reason for this delay was because the determination was sent to the former address of the taxpayer. On 25 July 1996 the Revenue discovered the taxpayer's recent address and sent the determination again to the taxpayer using the same letter but with the date '30 April 1993' deleted and typed below with the words 'redirected on 25 July 1996'. The taxpayer thought that the time for appeal had lapsed and there was nothing he could do. Therefore he did nothing until he received the tax demand note that required him to pay the tax. The taxpayer then filed the appeal and made an application for late filing.

In respect of the substantive issue in the appeal, the taxpayer argues that the assessable income was incorrect and excessive and the taxpayer claimed that the taxpayer did not receive any money from Company X, of which the taxpayer was a director and secretary.

Held:

(1) The Court will not interfere with the Commissioner's decision when he exercises the discretion under section 66(1A) unless there is flaw in the procedure (Chun Yuet Bun trading as Chong Hing Electrical Co v CIR 2 HKTC 325 applied).

(2) We have to examine the circumstances how the delay arose. Taking the literal meaning of the word 'transmission' under section 66(1) of the Inland Revenue Ordinance into account, the time counts from the date of sending by the Commissioner and not from the date of receipt by the taxpayer. The Board find it reasonable for the taxpayer to think that the time for appeal had expired on receipt of the re-directed letter, in which the Revenue had offered no explanation as to the effect of the re-directed letter. Every case has to be decided upon its own merits. The taxpayer was prevented to file the notice

of appeal within time by the manner that the determination was sent to him. The Board granted the application and allowed the taxpayer the extension of time to file the notice of appeal on 6 July 1997 which he had done (Chun Yuet Bun trading as Chong Hing Electrical Co v CIR 2 HKTC 325, D60/04, IRBRD, vol 9, 347, D3/91, IRBRD, vol 5, 537, D11/98, IRBRD, vol 4, 230 and D9/79, IRBRD, vol 1, 354 considered).

(3) The Board has had the opportunity of seeing the taxpayer and hearing his evidence. The Board finds that the taxpayer was an honest person and the Board believes in what the taxpayer told the Board. On balance of probabilities the Board finds that the taxpayer's claims that Company X did not have any account of its own and that he had not drawn any money from Company X were reliable. For this reason the taxpayer has discharged his burden of proof as required by section 68(4) of the Inland Revenue Ordinance.

Appeal allowed.

Cases referred to:

Chun Yuet Bun trading as Chong Hing Electrical Co v CIR 2 HKTC 325
D60/94, IRBRD, vol 9, 347
D3/91, IRBRD, vol 5, 537
D11/98, IRBRD, vol 4, 230
D9/79, IRBRD, vol 1, 354

Chiu Kwok Kit for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Appeal

1. This is an appeal by the Taxpayer against the determination made by the Commissioner of the Inland Revenue and dated 30 April 1993 in respect of the salaries tax assessment on the Taxpayer for the year of assessment 1998/99 ('the Determination').

Application for late filing

2. It was a determination made by the then Commissioner in 1993 and the appeal was not heard until 5 years later. The reason for this delay was due to the fact that the Determination was sent to the former address of the Taxpayer and the Taxpayer had already moved to another place. On 25 July 1996 the Revenue discovered the Taxpayer's recent

address and sent the Determination again to the Taxpayer using the same letter but with the date '30 April 1993' deleted and typed below with the words 'Redirected on 25 July 1996'. The contents of the letter remained unchanged in which sections 66(1), (1A) and (2) were quoted in full.

3. The Taxpayer told us that he thought that the time for appeal had lapsed and there was nothing he could do. Therefore he did nothing until he received the tax demand note that required him to pay the tax; then he contacted the Inland Revenue Department. He was informed that despite the time which had lapsed he could still file the appeal and could make application for late filing. Hence, we have the present application.

4. Mr CHIU for the Revenue opposed the application and cited to us five different cases for us to consider:

(a) Chun Yuet Bun trading as Chong Hing Electrical Co v CIR 2 HKTC 325, it deals with section 64(1)(a), the provision of which is similar to section 66(1A). Judge Sears in his judgement at 329 stated: *'The Government has entrusted the Commissioner with this responsibility and it is not for the Court to seek to interfere with it unless the decision making process is in same way flawed. Furthermore, it is not for the Court to set any standard, or guide lines for the Commissioner to follow, nor to infer that although three months late objection is too long, a lesser period may amount to a* ***"reasonable cause"****.'* The ruling is that the Court will not interfere with the Commissioner's decision when he exercises the discretion under section 64(1)(a) unless there is flaw in the procedure. Similarly we think the same rule applies to section 66(1A): the Board after considering the circumstances of the case makes its own decision.

(b) The present case is different from D60/94, IRBRD, vol 9, 347 in that the taxpayer in the latter case chose not to give any evidence why he failed to file the notice of appeal within time and when he was cross-examined on it he gave no particulars or reason at all.

(c) The attitude of the taxpayer in D3/91, IRBRD, vol 5, 537 was even worse: according to the decision at 541: *'At the hearing of the appeal, the managing director who represented the Taxpayer appeared to assume that he would be automatically granted an extension of time and did not have to justify the matter in any way'*.

(d) In D11/89, IRBRD, vol 4, 230 at 234 the taxpayer claimed that he did not file the notice of appeal in time because he did not have evidence viz., copies of the cheques. But when he finally decided to file the notice he still had not obtained copies of the cheques from the bank. He offered no explanation for it. The Board dismissed his appeal.

(e) In D9/79, IRBRD, vol 1, 354 the Board took a strict interpretation of the section and said that *'a Board of Review has jurisdiction to extend time if it is*

> *satisfied that an Taxpayer was* ***"prevented"*** *by illness or absence from the Colony or other reasonable cause from giving the requisite notice of appeal (section 66(1A)). The word* ***"prevented"****, as we see it, is opposed to a situation where an taxpayer 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. Although it appears that within the time prescribed for the filing of an appeal the late Mr T was suffering from a terminal affliction, there is nothing before us to show that because of it he could not file the notice and grounds of appeal. If section 66(1A) applies to appeals under section 82A, we do not find that we have jurisdiction to grant the application for the reason we have stated.'*

5. In the last case the Board rightly relied on the word **'prevented'**. We have to examine the circumstances how the delay arose. In the present case the letter sent to the Taxpayer enclosing the Determination quoted the relevant section 66(1) which states *"Any person … may within (a) one month after the transmission … of the Commissioner's written determination … either himself or by his authorised representative give notice of appeal …'.* It was the Taxpayer's belief that the Determination had been transmitted to him on the deleted date that is, 30 April 1993 and that the time for appeal had long passed. The word **'transmission'** was not a term of art and is not defined in the Ordinance. The ordinary meaning of the word **'transmit'** as we find in Oxford Advanced Learner's English Dictionary is *'send or pass on something from one person, place or thing to another'.* The time counts from the date of sending by the Commissioner and not from the date of receipt by the Taxpayer. Taking its literal meaning we find it reasonable for the Taxpayer to think that the time for appeal had expired on receipt of the re-directed letter, in which, we wish to emphasize, the Revenue had offered no explanation as to the effect of the re-directed letter. In fact it was the same letter which was given on 30 April 1993 and nothing was changed. For a person like the Taxpayer who was not a person of high intelligence, as we have observed, he might not be able to appreciate the effect of the letter re-directed to him. Every case has to be decided upon its own merits. The Taxpayer was prevented to file the notice of appeal within time by the manner that the Determination was sent to him. For the reason given above and having regard to the special circumstances we grant the application and allow the Taxpayer the extension of time to file the notice of appeal on 6 June 1997 which he had done.

Issue

6. In respect of the substantive issue in the appeal itself the Commissioner regarded that the only issue raised by the Taxpayer was: the assessable income was incorrect and excessive and the Taxpayer should be granted personal, wife, working wife, child and dependent parent allowances. In his notice of appeal dated 6 June 1997 the Taxpayer did not raise those issues about allowances but impliedly claimed as his ground of appeal that he did not receive any money from Company X, of which he was a director and secretary.

The Taxpayer's case

7. The Taxpayer was a jeweller and gems merchant importing, making and selling jewels and gems. He has carried on such business as sole proprietor since 1979 under the name of Company Y at various places. In the late 1980's he came to know an Indonesian Chinese called Mr Z and who was also in the same trade. In February 1988 they agreed to expand Company Y and Mr Z would inject money into Company Y at the rate of $25,000 per month. In return Company Y would not supply their products to other customers except Mr Z. On 13 May 1988 a private company known as Company X was incorporated. The intention was to have Company X to take over all the business of Company Y.

8. The proposition did not develop into a good business relation: Mr Z did not pay the Taxpayer the said monthly sum of $25,000 and neither did he give Company Y sufficient orders to sustain its business. In about August or September 1988 Mr Z's sister came and looked after the accounts of the company. A certain assistant was employed to assist her.

9. The business did not improve and Mr Z failed to inject the money as agreed. At the same time Company Y was used as a vehicle to borrow money; this resulted in certain litigation. When the time for filing the annual returns for Company X came the Taxpayer refused to sign them. In April 1989 the Taxpayer decided to 'walk away' from Company X. On 6 May 1989 he was removed as secretary of Company X.

10. According to the notice of change of directors filed with the Companies Registry the Taxpayer resigned as director with effect from 7 August 1989. According to the business registration record Company X ceased business on 31 July 1990. It was dissolved and was struck out on 28 February 1997.

Evidence

11. In the Taxpayer's own salaries tax return as set out at pages 5 to 8 in Exhibit 'R1' he clearly stated that he was in the employ of Company X for the period from 1 April 1988 to 31 March 1989 and had received a sum of $96,905 as salary/wages. In a telephone conversation with Mrs CHU Tsang Hin-ngor, assessor of the Inland Revenue Department, which was very well documented in a written note, the Taxpayer clearly stated that during the year ended 31 March 1989 he had drawn living expenses about $96,000. When he was asked to give a breakdown of his salaries he wrote back in a long letter setting out all his expenses in detail. The letter could be found in Exhibit 'R1' at pages 9 to 13. All these are very cogent evidence which works contrary to the Taxpayer's claim. Mr Chiu for the Revenue alleged in his submission that the ground of appeal submitted to the Board as set out in paragraph 6 above was an afterthought and a recent invention.

12. The Board has had the opportunity of seeing the Taxpayer and hearing his evidence. The Board finds that the Taxpayer was a person of average intelligence. He was unable to give a coherent sequence of the events and he was more eager to air his grievances than to present the facts to us. His submission was not properly organised and so was his

testimony. The Board had to use great effort to understand the central theme of his argument. However we find that he was an honest person and we believe in what he told us.

13. We have tested whether what he told us was true. He claimed that the expenditure as set out in Appendix B to the Commissioner's determination was in fact money drawn from the accounts of Company Y. We went through the items for the month of April 1988 one after another and checked each of them against the bank statement that Company Y had with the bank. It matched without fail. We also took other items at random and they produced the same result. It is safe for us to conclude that Company X took the accounts of Company Y as its own account.

14. The Taxpayer also told us that during the material period Company X did not have any bank account. At the beginning of 1989 he introduced Company X to the bank for opening of a current account. We find a letter among Exhibit 'A1' at pages 63 to 64 dated 7 April 1989 from the bank which confirmed that an application had been made by Company X for opening a current account and was at that time being processed. We accept the Taxpayer's claim that Company X did not have any bank account at the material time.

15. Company X's financial statements for the period from 13 May 1988 to 30 April 1989 was audited by certified public accountants, Eddie K K Lau & Co. Theoretically the accuracy of the report should not be challenged. However, the auditors have qualified the report to such an extent that we have great reservation whether the report reflected the true financial situation of Company X. The following are some of the statements made by the auditors:

> *'In common with many business of similar size and organisation the company's system of control is dependent upon the close involvement of the directors who are major shareholders. Where independent confirmation of the completeness of the accounting records was therefore not available …'*
>
> *'No proper stock records were kept by the company throughout the period …'*
>
> *'In view of the significance of the matter referred to in the preceding paragraphs, we are unable to form an opinion as to whether the financial statements give a true and fair view of the state of affairs of the company …'*

16. We do not think that the ground of appeal was an afterthought and nor was it a recent invention. In fact as early as 19 February 1990 in his letter to the Commissioner he had pointed out how the accounts of Company X was made up. The main trouble was that the Taxpayer was unable to express himself clearly. As stated earlier he was not articulate and was not good in organizing himself. He was very emotional and could easily confuse the listener with his own personal grievances. We believe that out of ignorance of facts he completed the salaries return for the year of assessment 1988/89. He did not challenge the money drawn was for his personal use but he did not express it clearly that the money was drawn from the account of Company Y.

Decision

17. On balance of probabilities we find that the Taxpayer's claims that Company X did not have any account of its own and that he had not drawn any money from Company X were reliable. For this reason the Taxpayer has discharged his burden of proof as required by section 68(4) of the Ordinance.

18. Accordingly we allow the appeal and order that the salaries tax assessment for the year of assessment 1988/89 dated 20 December 1989 be cancelled and that the Commissioner's determination be set aside.