# Case No. D67/06

**Salaries tax** – appeal out of time – whether or not there was reasonable cause preventing the taxpayer from giving notice of appeal within time – home loan interest deduction – whether loan from developer a 'home loan' – sections 26E(9), 66(1), 66(1A) of the Inland Revenue Ordinance ('IRO')

Panel: Kenneth Kwok Hing Wai SC (chairman), Fong Ho Yin and Vincent Kwan Po Chuen.

Date of hearing: 27 October 2006.
Date of decision: 14 December 2006.

The Deputy Commissioner of Inland Revenue confirmed the additional salaries tax assessment of the appellant. The appellant posted a notice of appeal to the Board of Review within the one-month period for appeal. The Board did not receive it. Upon learning of that, the appellant posted the notice to the Board again but that took place after the expiry of the one-month period. Her postal packet was returned to her due to insufficient postage. Subsequently the appellant delivered the notice to the Board by hand.

By an agreement dated 12 January 1998, the appellant agreed to buy a residential flat from the developers of a residential project. The agreement provided for completion on 16 January 1998. The appellant was unable to obtain the necessary finance for the payment of the balance of the purchase price by the completion date. By a supplemental agreement dated 16 January 1998 made between the appellant and the developers, the developers agreed to postpone completion and payment of the balance of the purchase price in consideration of the appellant' s agreement to pay the balance of the purchase price with interest by monthly instalments.

The appellant claimed deduction of the interest paid to the developers under the supplemental agreement as ' home loan interest' .

**Held:**

1. Giving of notice of appeal to the Board under section 66 of the IRO means actual service of the notice on the Clerk to the Board. On the facts of the case, the appeal is out of time (D41/05 applied).

2. The appellant attempted twice, unsuccessfully, to serve notice of appeal on the Board. The first packet was apparently lost in the post. The second packet was refused because of insufficient postage. The appellant has reasonable cause which has prevented her from complying with the time requirement. Time extension for the appeal is allowed (Chow Kwong Fai (Edward) v CIR applied).

3. To qualify as a 'home loan', the loan must be a loan of money which is 'secured … by a mortgage or charge over that dwelling or any other property in Hong Kong': see section 26E(9). The only document which the appellant relied on was the supplemental agreement. Plainly that is neither a mortgage nor a charge. In the absence of a qualifying loan, this appeal is unarguably bad and must be dismissed.

4. Furthermore, in order to qualify as 'home loan interest', interest must be paid to one of the entities listed in the definition of 'home loan interest' in section 26E(9) of the IRO. Developers were developers, not financial institutions and the appellant was unable to show that the developers were qualified lenders so as to satisfy the 'home loan interest' definition.

**Appeal dismissed.**

Cases referred to:

D41/05, (2005-06) IRBRD, vol 20, 590
Chow Kwong-fai (Edward) v CIR [2005] 4 HKLRD 687

Taxpayer represented by her representative.
Ng Yuk Chun for the Commissioner of Inland Revenue.

**Decision:**

***Introduction***

1. By his Determination dated 21 March 2006, the Deputy Commissioner of Inland Revenue confirmed the following assessments:

(a) Additional salaries tax assessment for the year of assessment 1998/99 under charge number 9-2318690-99-9, dated 22 February 2005, showing additional assessable income of $74,000 with additional tax payable of $3,630;

(b) Salaries tax assessment for the year of assessment 1999/2000 under charge number 9-2261828-00-8, dated 22 February 2005, showing net chargeable income of $80,323 with tax payable thereon of $4,388;

(c) Salaries tax assessment for the year of assessment 2000/01 under charge number 9-2292516-01-6, dated 22 February 2005, showing net chargeable income of $82,684 with tax payable thereon of $4,672; and

(d) Salaries tax assessment for the year of assessment 2001/02 under charge number 9-3532333-02-7, dated 22 February 2005, showing net chargeable income of $87,768 with tax payable thereon of $2,641.

***Whether to extend time for appeal***

2. The Determination was sent by registered post on 21 March 2006 but was returned unclaimed.

3. It was sent by ordinary post on 19 April 2006 (Wednesday).

4. By virtue of section 58(3) of the Inland Revenue Ordinance, Chapter 112, and in the absence of any evidence to the contrary, the Determination is deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. We proceed on the basis that it would have taken two working days for the postal packet to be delivered to the appellant's address in Kowloon. This means that the Determination is deemed to have been served on 22 April 2006 (Saturday). The one-month period for appeal expired on 23 May 2006 (Tuesday).

5. The appellant testified on oath that:

(a) she posted her notice of appeal on 15 May 2006 to the Board of Review;

(b) she did not send a copy of it to the Revenue;

(c) when she received the demands to pay salaries tax all dated 14 July 2006, she telephoned the Revenue and was told that there was no record of her appeal;

(d) she telephoned the Board and was told that there was no record of her appeal;

(e) she posted her notice of appeal to the Board on 22 July 2006 but her postal packet was subsequently returned to her; and

(f) she delivered her notice of appeal to the Board by hand on 1 August 2006.

6. The first question for our decision is whether we accept the appellant's evidence on these points. At our request, the appellant showed us the original postal packet returned to her in July. The packet was postmarked 22 July 2006. Postage paid was $1.40. A chop dated 26 July 2006 showed postage due of $13.60. Another chop stated that the packet was refused.

7. It is clear that what the appellant said on (e) & (f) is true. The appellant was not challenged in cross-examination on (a). We have no reason to disbelieve what the appellant said on (a) to (f) and we accept it.

8. In D41/05, (2005-06) IRBRD, vol 20, 590, the Board held that giving of notice of appeal to the Board under section 66 means actual service of the notice on the Clerk.

9. Actual service took place on 1 August 2006, and this appeal is out of time.

10. The next issue is whether the appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with section 66(1)(a).

11. In Chow Kwong Fai (Edward) v CIR [2005] 4 HKLRD 687, at paragraph 20, Woo VP (with whose judgment the other two members of the Court of Appeal agreed) said:

> *'20. In my opinion, while a liberal interpretation must be given to the word "prevented" used in s 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 imposed by a taxation statute. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:*
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> *"It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have (sic) considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community."'*

12. At paragraph 46, Cheung JA (with whose observation Barma J agreed) added the following observation:

> *'46. If there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement of section 66(1A). It is not necessary to put a gloss on the word "prevent" in its interpretation. If an appellant does not file the notice of appeal within time because of that reasonable cause, then it must be the reasonable cause which has "prevented" him from complying with the time requirement.'*

13. The appellant attempted twice, unsuccessfully, to serve notice of appeal on the Board. The first packet was apparently lost in the post. The second packet was refused because of insufficient postage. Ms Ng Yuk-chun did not take any point on insufficient postage. In our Decision, the appellant has reasonable cause which has prevented her from complying with the time requirement.

14. We extend time for appeal under section 66(1A).

***Whether appeal meritorious***

15. By an agreement dated 12 January 1998, the appellant agreed to buy a residential flat from the developers of a residential project. The agreement provided for completion on 16 January 1998 and payment of the purchase price of $3,209,500 by payment of $168,500 upon signing of the agreement, $152,450 by 13 January 1998 and the balance of $2,888,550 by 16 January 1998.

16. The appellant was unable to obtain the necessary finance for the payment of the balance of the purchase price in the sum of $2,888,550.

17. By a supplemental agreement dated 16 January 1998 made between the appellant and the developers, the developers agreed to postpone completion and payment of the balance of the purchase price in consideration of the appellant' s agreement to pay the balance of the purchase price with interest by 240 monthly instalments of $33,841.60.

18. The appellant defaulted in the payment of the monthly instalments. By letter dated 6 June 2002, the developers determined the agreement and rescinded the sale.

19. The appellant claimed deduction of the interest paid to the developers under the supplemental agreement as 'home loan interest'.

20. To qualify as a 'home loan', the loan must be a loan of money which is 'secured ... by a mortgage or charge over that dwelling or any other property in Hong Kong', see section 26E(9).

21. We asked the appellant to identify the mortgage or charge. The only document which the appellant pointed to was the supplemental agreement. Plainly that is neither a mortgage nor a charge.

22. In the absence of a qualifying loan, this appeal is unarguably bad and must be dismissed.

23. Further, to qualify as 'home loan interest', interest must be paid to:

(a) the Government;

(b) a financial institution (that is, an authorised institution within the meaning of section 2 of the Banking Ordinance, Chapter 155, or any associated corporation of such an authorised institution which, being exempt by virtue of section 3(2)(a) or (b) or (c) of the Banking Ordinance would have been liable to be authorised as a deposit-taking company or restricted licence bank under that Ordinance had it not been so exempt);

(c) a credit union registered under the Credit Unions Ordinance, Chapter 119;

(d) a money lender licensed under the Money Lenders Ordinance, Chapter 163;

(e) the Hong Kong Housing Society;

(f) an employer of the appellant; or

(g) any organisation or association approved by the Commissioner of Inland Revenue under section 26E(7) as a recognised organisation or association, see sections 2 and 26E(9).

24. The appellant accepted that the developers were developers, not financial institutions and was unable to show that the developers were qualified lenders so as to satisfy the 'home loan interest' definition.

25. This is another reason why this appeal is unarguably bad and must be dismissed.

***Decision***

26. We dismiss the appeal and confirm the assessments appealed against as confirmed by the Deputy Commissioner.

***Postscript***

27. At the end of the hearing, the appellant' s representative stated that this appeal was not arguable if it was to be decided in accordance with tax law. To pursue an appeal knowing that it is unarguable is an abuse of process and taxpayers who do so should expect an order of costs under section 68(9).