Case No. D76/04

Salaries tax – whether or not an extension of time to appeal should be granted – burden of proof was the appellant to give reasons for failure to lodge his appeal within time – whether or not the appellant rendered all his services outside Hong Kong – whether or not all his visits to Hong Kong were less than 60 days – sections 8(1A)(b), 8(1B) and 66(1A) of the Inland Revenue Ordinance ('IRO').

Panel: Jat Sew Tong SC (chairman), Stephen Lau Man Lung and Daisy Tong Yeung Wai Lan.

Date of hearing: 15 December 2004.
Date of decision: 28 January 2005.

The appellant, a Japanese businessman, was the majority shareholder and a director of a Hong Kong registered company, Company A. By the 'replacement' employer's returns filed by Company A for the years ended 31 March 1996 to 1998, it was claimed that the appellant was paid salaries of HK$1,626,080 in 1995/96, HK$1,563,237 for 1996/97 and HK$1,522,655 in 1998/99 in his capacity as a director; and that the appellant 'mainly rendered his services in China and Japan and visited Hong Kong less than 60 days during the year'. On the other hand, the appellant himself failed to file any tax returns for 1996/97, 1997/98 and 1998/99. The IRD therefore determined that the appellant was liable to pay salaries tax for the assessment years in 1995/96, 1996/97 and 1998/99 (no salaries tax was raised for the assessment year of 1997/98 for the Appellant was within the 60 grace period), and assessed his liability on the basis of the replacement employer's returns.

By a written determination dated 25 June 2004 ('the Determination'), the appellant's grounds of objection to the assessments - he rendered all his services in connection with his employment with Company A outside Hong Kong during the relevant years and his visits to Hong Kong were less than 60 days during those years - were rejected. No appeal had been lodged by the Appellant until (at the earliest) 8 September 2004 when a letter written in Chinese bearing that date was delivered to the Clerk to the Board of Review.

According to the evidence from the Post Office place before the Board, the Determination was posted by way of registered post to the appellant's authorized representative at his residential address in Hong Kong and was delivered there on 26 June 2004.

Held:

1. The Board was prepared to proceed on the basis that the time for appealing did not start to run until the Determination was delivered to the appellant's authorized representative (D2/04, IRBRD, vol 19, 76 applied). In the instant case, that date was 26 June 2004. The appeal was therefore lodged out of time.

2. Further, even assuming that time did not begin to run until early July 2004 (when the appellant's authorized representative in Hong Kong first came to know about the Determination from his wife and had passed that information to the appellant), time for appealing would have also expired in early August 2004.

3. The burden was on the appellant to satisfy the Board that he was 'prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal' (D96/99, IRBRD, vol 14, 614 and D19/01, IRBRD, vol 16, 183 applied). The explanations given by the appellant as to why he had failed to lodge his appeal within time - he was in China and he had left everything to his authorized representative - were insufficient.

4. The Board was therefore unable to grant the appellant any extension of time. Accordingly, the appeal must be dismissed and the Board saw no need to go into the merits of the appeal.

Obiter:

1. The appellant was present in Hong Kong for slightly over 60 days during each of the relevant assessment years. The Board had gone through the immigration records which showed that on many occasions the appellant was present in Hong Kong for very short periods of time. For example, on many occasions the appellant entered Hong Kong at one immigration checkpoint and departed within a few hours at another checkpoint. It is highly possible that these were in fact transit trips or stopover through Hong Kong.

2. While not disagreeing with the previous decisions of the Board of Review (Commissioner of Inland Revenue v So Chak Kwong, Jack, 2 HKTC 174 and D11/03, IRBRD, vol 18, 355 applied) on how a 'day' should be calculated for the purposes of section 8(1B), this Board queries whether a short stay in the nature of a transit could be considered a '*visit*' within the meaning of section 8(1B).

Appeal dismissed.

Cases referred to:

B/R 104/03 (Decision reported in D2/04, IRBRD, vol 19, 76)
D96/99, IRBRD, vol 14, 614
D19/01, IRBRD, vol 16, 183
Commissioner of Inland Revenue v So Chak Kwong 2 HKTC 174
D11/03, IRBRD, vol 18, 355

Lai Wing Man for the Commissioner of Inland Revenue.
Taxpayer in person.

Reasons for decision:

Introduction

1. In this appeal the Taxpayer objected to the salaries tax assessment for the years of assessment 1995/96, 1996/97 and 1998/99 raised on him.

2. The appeal was lodged out of time. At the hearing of the appeal on 15 December 2004, the Board first considered whether an extension of time to appeal should be granted to the Appellant pursuant to section 66 (1A) of the Inland Revenue Ordinance, Chapter 112 ('IRO'). Having heard evidence from the Appellant and considered the relevant materials, the Board came to the clear view that no extension of time should be granted and the appeal was accordingly dismissed without going into the merits of the appeal. We now give our reasons for so deciding in writing.

Relevant facts

3. The relevant facts could be briefly stated. The Appellant was a Japanese businessman. He was the majority shareholder and a director of a Hong Kong registered company, Company A. That company's registered address is a rented unit in Kowloon, which also served as temporary residence for Company A's directors and overseas guests. Company A filed employer's returns for itself for 1996/97 and 1997/98 showing that he was paid salaries of HK$1,200,000 each year in his capacity as a director. The Appellant himself failed to file any tax returns for 1996/97, 1997/98 and 1998/99. The IRD therefore raised on the Appellant estimated salaries tax assessments on the basis of the employer's return filed by Company A.

4. The Appellant, through his tax representatives, objected to the assessments on various grounds. Amongst them were the grounds that the Appellant was entitled to claim exemption under section 8(1A)(b) and section 8(1B) of the IRO because the Appellant rendered

all his services in connection with his employment with Company A outside Hong Kong during the relevant years, and his visits to Hong Kong were less than 60 days during those years.

5. In answering enquiries from the IRD, the Appellant's tax representatives stated (inter alia) that the Appellant was in fact employed by Company B, a Japanese company, and was in charge of Company B's business in China. It was claimed that he was required to work in China since 1993. It was also claimed that all his remunerations arose from his services rendered in China for Company B, and he in fact never received any salary or director's fees from Company A.

6. It is further claimed on the Appellant's behalf that he had not rendered any services in Hong Kong and his 'visits' to Hong Kong during the relevant years were stopovers in Hong Kong en route to other destinations.

7. The IRD had ascertained from the Immigration Department that the Appellant was present in Hong Kong for more than 60 days in the relevant assessment years (but was in Hong Kong for only 47 days in 1997/98, hence no salaries tax was raised for that assessment year):

7.1.	1995/96	66 days
7.2.	1996/97	65 days
7.3.	1998/99	74 days

8. Company A then filed another employer's returns for the years ended 31 March 1996 to 1998, to supercede the previous ones mentioned in paragraph above. These 'replacement' employer's returns stated that the Appellant was paid salaries of HK$1,626,080 in 1995/96, HK$1,563,237 for 1996/97, and HK$1,522,655 in 1998/99. It was claimed in these replacement employer's returns that the Appellant 'mainly rendered his services in China and Japan, and visited Hong Kong less than 60 days during the year'.

9. The IRD determined that the Appellant was liable to pay salaries tax for the assessment years in question, and assessed his liability on the basis of the replacement returns. The Appellant objected to the assessments which objection was rejected by a written determination dated 25 June 2004 ('Determination'). From that Determination the Appellant appealed to this Board.

Facts relevant to extension of time

10. As stated above, the Determination was dated 25 June 2004. There was evidence from the Post Office placed before the Tribunal that the Determination was posted by way of registered post to the Appellant's authorised representative in Hong Kong, a Mr C, at Mr C's residential address in Hong Kong and was delivered there on 26 June 2004. It is the Appellant's

evidence that he had authorised Mr C to deal with the IRD on his behalf and he left matters entirely to Mr C.

11. The Appellant said that he was working in China in June to July 2004 together with Mr C and he (the Appellant) personally did not receive the Determination. He also claimed that Mr C did not return to Hong Kong until 27 July 2004 and would not have seen it before that date.

12. However, it is the Appellant's own evidence that in about the beginning of July, Mr C had informed him that he (Mr C) had been told by his wife that a letter from the IRD had been delivered to Mr C's residence in Hong Kong. There was no evidence that the IRD had sent any other communication to Mr C at around end of June to early July 2004. In all probability, and we so find, the letter from the IRD delivered to Mr C's address mentioned by by Mr C was the Determination.

13. Moreover, the Appellant was not able to provide any answer as to why the letter from the IRD could not have been faxed or otherwise passed to Mr C or him even though they were both in China. Although the Appellant was told about the letter from the IRD, he did not do anything himself and simply left things to Mr C.

14. In any case, no appeal had been lodged until (at the earliest) 8 September 2004, when a letter written in Chinese bearing that date was delivered to the Clerk to the Board of Review. That was followed by another letter, also written in Chinese, dated 11 September 2004.

No extension of time could be granted

15. Section 66 of the IRO provided (in so far as material) as follows:

> *'(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within-*
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> *(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts; or*
>
> *(b) such further period as the Board may allow under subsection (1A),*
>
> *either himself or by his authorized representative give notice of appeal to the Board; but no such 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.

(1A) 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 Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1) ...

(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'

16. This Board was prepared to proceed on the basis that the time for appealing did not start to run until the Determination was delivered to the Appellant through Mr C, who was the authorised representative of the Appellant, at Mr C's address: see Case No B/R 104 of 2003 (decision 27 April 2004). In the instant case, that date was 26 June 2004. Time to appeal therefore expired on 26 July 2004.

17. Further, and in any case, even assuming that time did not begin to run until early July 2004, when Mr C was told by his wife that a letter from the IRD had been delivered to his address (which, as we have found, must have been the Determination) and when he had passed that information to the Appellant, time for appealing would have expired in early August 2004. The appeal was therefore about a month out of time even on that more generous basis.

18. The burden was on the Appellant to satisfy the Board that he was 'prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal': see, for example, Case No D96/99, IRBRD, vol 14, 614 (decision 18 November 1999) and Case No D19/01, IRBRD, vol 16, 183 (decision 26 April 2001).

19. The only explanations given by the Appellant as to why he had failed to lodge his appeal within time were that he was in China and that he had left everything to Mr C. That was clearly insufficient. In the circumstances, although the Board was sympathetic to the Appellant, it was unable to accept that the Appellant was 'prevented by any reasonable cause' from lodging the appeal within time.

20. The Board was therefore unable to grant the Appellant any extension of time. Accordingly, the appeal must be dismissed and the Board saw no need to go into the merits of the appeal.

21. There is, however, one matter that the Board wishes to raise. As noted in paragraph 7 above, the Appellant was present in Hong Kong for slightly over 60 days during each of the relevant assessment years. The Board has gone through the records retrieved from the Immigration Department. These records show that on many occasions the Appellant was present in Hong Kong for very short periods of time. For example, on many occasions the Appellant entered Hong Kong at one immigration checkpoint (such as the Hong Kong China Ferry Terminal) and departed within a few hours at another checkpoint (such as the Hong Kong International Airport). It is highly possible that these were in fact transit trips or stopover through Hong Kong. The IRD, relying on precedents such as Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174 and Case No D11/03, IRBRD, vol 18, 355, deemed each such presence in Hong Kong to constitute a 'day'. While not disagreeing with these decisions on how a 'day' should be calculated for the purposes of section 8(1B), this Board queries whether a short stay in the nature of a transit could be considered a *'visit'* within the meaning of section 8(1B). In the circumstances of this case, if one ignores the Appellant's presence in Hong Kong for less than three hours (which could be counted as two days if the presence spans over midnight), the Appellant might well be able to benefit from the exemption under section 8(1B). Nevertheless, the point does not arise for determination in this appeal and this Board expresses no view on it.