Case No. D96/99

Profits Tax – whether profits from the sale of a property assessable to profits tax – whether 'prevented' from giving the requisite notice of appeal – sections 66 and 68(4) of the Inland Revenue Ordinance (the 'IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Edmund Leung Kwong Ho and Anthony So Chun Kung.

Date of hearing: 12 November 1999.
Date of decision: 18 November 1999.

The taxpayer and his wife have two children. They bought a unit ('Property 1') on 25 September 1980 as the family's residence. On 3 April 1991, the taxpayer purchased a unit ('Property 2') by taking out an equitable mortgage over Property 2. One month later, a visa was issued in favour of the taxpayer and his family for immigration to Country H. Property 1 was sold subsequently and the taxpayer and his family resided in the unit of taxpayer's mother shortly before they landed in Country H on 12 September 1991. The taxpayer returned to Hong Kong in early 1992. He continued to reside with his mother. The taxpayer had made some loan arrangement in respect of Property 2, the occupation permit of it was issued on about mid-December 1992. Property 2 was assigned in favour of the taxpayer who duly paid the stamp duty. On or about March 1993, the taxpayer sold Property 2 before he left Hong Kong on a permanent basis in April 1993. A notice of assessment dated 20 October 1997 was sent to the taxpayer in Country H, in which he was assessed $150,000 profits tax on the basis that he made a profit of $1,000,000 arising from his dealings with Property 2. Almost 1.5 years later, on about 27 May 1999, the Commissioner revised the assessment of profits tax to $105,834 on the basis that he made a profit of $705,564 from the sale ('the Determination'). The Determination was again sent to the taxpayer in Country H. The taxpayer made various proposals to the Revenue with a view of settling the dispute but such proposals were all rejected by the Revenue on about late June 1999. The taxpayer then appealed to this Board by letter dated 3 July 1999 and the Board received the letter on 15 July 1999. There were three issues in this appeal hearing, first, whether the Board should exercise its discretion under section 66 (1A) of the IRO and extend time in favour of the taxpayer given his failure to comply with section 66(1) of the IRO; second, if so, whether the taxpayer was liable to profits tax in respect of his dealings with Property 2 and if so, the extent of his liability.

Held:

1. In deciding whether the taxpayer was prevented from giving the requisite notice of appeal, the Board referred to three of its past decisions which have laid down a general guideline as to when extension of time should be granted. D9/79, D11/89 and D3/91 followed.

2. Whilst the Board was sympathetic to the stance of the taxpayer, the Board found it difficult on the facts to conclude that he was 'prevented' from giving the requisite notice of appeal. There was little doubt that the Determination had come to his notice by 9 June 1999. The taxpayer was able at that juncture to give notice of appeal but he chose instead to embark upon negotiations with the Revenue. There was no inability to give the relevant notice. The excuse proffered by the taxpayer, whilst not unreasonable given his personal circumstances, was unrelated to any inability.

Obiter:

1. Had the Board exercised its discretion to extend time, which was not the case here, they would have power to discharge the assessment as they were satisfied that the intention of the taxpayer in acquiring Property 2 was to provide for his family as opposed to embarking upon a trade for gains.

2. Given its decision on the extension point, the Board did not have the power to discharge the assessment. Nevertheless, the Board did urge the Revenue to give this case their sympathetic consideration bearing in mind that the assessment was made in October 1997 and the Determination was issued in May 1999.

Appeal dismissed.

Cases referred to:

D9/79, IRBRD, vol 1, 354
D11/89, IRBRD, vol 4, 230
D3/91, IRBRD, vol 5, 537

Leung Wing Chi for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Background

1. The Taxpayer [' Mr A'] and his wife have two children. They were born in 1978 and 1982. Between 1 April 1991 to 31 March 1993, Mr A was employed as a manager by Company B. His earnings for the year of assessment 1991/92 was $204,000. This was reduced to $200,000 for the year of assessment 1992/93. Mrs A was then a housewife with no income.

2. On 25 September 1980, Mr and Mrs A purchased a unit at District C [' Property 1'] as the residence of their family.

3. By a provisional contract dated 26 March 1991 [' the Provisional Contract'], one Mr D purchased from the developer a unit at District E [' Property 2'] for $1,756,800. Under this Provisional Contract, Mr D had to pay the developer $30,000 upon the signing of the contract, $145,680 on or before 2 April 1991 and the balance of $1,581,120 on or before 9 April 1991.

4. By an agreement dated 31 March 1991, Mr D disposed of his interest in the Provisional Contract in favour of Ms F at $1,756,800 plus a further sum of $40,000 described as ' queuing fee' . Ms F is the sister of Mrs A.

5. By amendments dated 3 April 1991, the Taxpayer [' Mr A'] replaced Mr D as the purchaser under the Provisional Contract.

6. By a facility letter dated 8 April 1991, Bank G extended a loan of $1,580,000 in favour of Mr A secured by an equitable mortgage over Property 2. The loan was repayable by 300 monthly instalments of $14,357 each.

7. On 7 May 1991, a visa was issued in favour of Mr and Mrs A and their two children for immigration to Country H.

8. Property 1 was sold on 10 June 1991 for $1,390,000. The sale was completed on 22 July 1991. Mr A and his family moved into the room of Mr A' s mother in District I.

9. Mr A and his family landed in Country H on 12 September 1991. They had with them $50,000 in Country H' s currency when they landed.

10. Mr A returned to Hong Kong in early 1992. He continued to reside with his mother who had by then moved to a unit at Public Housing Estate J.

11. On or about 11 December 1992, Mr A obtained a fresh loan of $1,920,000 from a finance company secured by Property 2. This replaced the loan of $1,580,000 from Bank G. The

fresh facility was repayable by 240 monthly instalments of $16,360 each. After repaying Bank G and discharging various outgoings in respect of Property 2, Mr A was paid a sum of $275,900.27.

12. By letter dated 14 December 1992, Mr A was informed of the issuance of occupation permit for Property 2. The flat was duly assigned in favour of Mr A. He paid stamp duty of $48,312 on that assignment.

13. By an agreement dated 14 February 1993, Mr A sold Property 2 for $2,850,000. The sale was completed on 15 March 1993. Mr A left Hong Kong on a permanent basis in April 1993.

14. By a notice of assessment dated 20 October 1997 and sent to Mr A in Country H, Mr A was assessed $150,000 on the basis that he made a profit of $1,000,000 arising from his dealings with Property 2.

15. By a determination dated 27 May 1999 [' the Determination'], the Commissioner revised the assessment on Mr A to $105,834 on the basis that he made a profit of $705,564 from the sale. The Determination was again sent to Mr A in Country H.

16. By letter dated 9 June 1999, Mr A made various proposals to the Revenue with the view of settling the dispute. Those proposals were rejected by letter of the Revenue dated 23 June 1999.

17. Mr A appealed to this Board by letter dated 3 July 1999. We received his letter on 15 July 1999.

18. There are 3 issues before us:

(a) Whether we should exercise our discretion under section 66(1A) of the Inland Revenue Ordinance and extend time in favour of Mr A given his failure to comply with section 66(1) of that Ordinance.

(b) If so:

(i) Whether Mr A is liable to profits tax in respect of his dealings with Property 2 and

(ii) If so, the extent of his liability.

Whether extension of time should be granted

19. The Taxpayer returned to Hong Kong for the purpose of this appeal. He gave sworn evidence before us. He explained that there was no direct mail delivery to his house. He had to fetch his mail from the post office after receiving notification via a supermarket. He responded promptly to the Determination. It takes about a week for letters from Hong Kong to reach him.

20. In D9/79, IRBRD, vol 1, 354 the Board pointed out that:

> *'... a Board of Review has jurisdiction to extend time if it is satisfied that an Appellant was "prevented" by illness or absence from the Colony or other reasonable excuse from giving the requisite notice of appeal ... The word "prevented", as we see it, is opposed to a situation where an appellant 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 ...'.*

21. In D11/89, IRBRD, vol 4, 230 a differently constituted Board further pointed out that:

> *'... The provisions of section 66(1A) are very clear and restrictive. As was pointed out by the Commissioner's representative, an extension of time can only be granted where the Taxpayer has been "prevented" from giving notice of appeal within the prescribed period of one month. In this case, it cannot be said that the Taxpayer was prevented from appealing. He could well have appealed with the time prescribed. He was in no way prevented from so doing by the fact that he did not have evidence to prove his case.*
>
> *Furthermore, even if he had been prevented, he had no reasonable excuse because he had had more than sufficient time to put his house in order.'*

22. In D3/91, IRBRD, vol 5, 537 the taxpayer was 1 day late. The Board emphasised that:

> *' The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension of time.'*

23. Whilst we are sympathetic to the stance of Mr A, we find it difficult on the facts to conclude that he was ' prevented' from giving the requisite notice of appeal. There is little doubt that the Determination had come to his notice by 9 June 1999. He was able at that juncture to give the notice of appeal but he chose instead to embark upon negotiations with the Revenue. There

was no inability to give the relevant notice. The excuse proffered by Mr A, whilst not unreasonable given his personal circumstances, is unrelated to any inability.

24. For these reasons, we reluctantly refuse to extend time in favour of Mr A.

On liability

25. In deference to the efforts made by Mr A in returning to Hong Kong for the purpose of this appeal, we would like to express our views (*obiter*) on the issue of liability.

26. Mr A told us in evidence that he had grown tired living in Property 1. It's in a dilapidated state and his neighbours were reluctant to contribute towards its maintenance. In casual conversations with Ms F, he expressed a desire to switch to new accommodation. Ms F purchased Property 2 on his behalf as Ms F herself selected another unit in the same complex with the hope that Mrs A would help in the care of Ms F's child. The purchase was made at a time when it was uncertain whether a visa would be granted for immigration to Country H. He also wanted to make provision in the event of the family finding life in Country H unacceptable. Those items of furniture were given to Ms F on sale of Property 2. He relied on the express reference to the 'queuing fee' in the agreement of 31 March 1991. He laid considerable emphasis on the fact that he had no other property deal in the material period.

27. Had we exercised our discretion to extend time, we would have accepted the evidence of Mr A and hold that he is not liable to profits tax. He is a witness of truth. We are satisfied that his intention in acquiring Property 2 was to provide for his family as opposed to embarking upon a trade for gains. On that basis there would be no issue as to the extent whereby various disputed items are deductible from the profits arising from the sale.

28. Given our decision on the extension point, we do not have any power to discharge the assessment. We do however urge the Revenue to give this case their sympathetic consideration bearing in mind that the assessment was made in October 1997 and the Determination was issued in May 1999.