

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D98/98

Penalty tax – taxpayer appealing the Commissioner’s findings – date of receipt of appeal notice by the Board – whether within time limit as prescribed by section 82B(1) of Inland Revenue Ordinance (‘IRO’) – sections 8(1) and 71 of Interpretation and General Clauses Ordinance (‘IAGCO’) – whether the Board has jurisdiction to entertain appeal.

Penal: Ronny Wong Fook Hum SC (chairman), David Lam Tai Wai and John Lee Luen Wai.

Dates of hearing: 29 November, 11 December 1997 and 13 June 1998.

Date of decision: 20 October 1998.

The taxpayer received, from the Commissioner, five notices of additional tax (‘Imposition Notices’) dated 8 August 1997. They had been dispatched by registered post and were received on 9 August 1997. By appeal notice dated 8 September 1997, the taxpayer sought to challenge the said imposition of additional tax. The appeal notice was received by the Inland Revenue Department (‘IRD’) by fax on 8 September 1997 but was only received by the Board on 10 September 1997. The Commissioner argued, *inter alia*, that the appeal notice was not received within the one month time limit as prescribed by section 82B(1) of the IRO hence there was no jurisdiction on the part of the Board to entertain the appeal.

It was argued by the taxpayer that:

- (1) since the Imposition Notices were received on 9 August 1997, by virtue of section 71 of the IAGCO, Chapter 1, the one month period expired on 10 September 1997;
- (2) Since the IRD had received the appeal notice on 8 August 1997 by fax, this was sufficient as the IRD ought to be regarded as agent for the Board;

Held:

- (1) The Board was wholly independent of the IRO and the IRD did not act as agent for the Board;
- (2) The word ‘give’ in section 82B(1) of the IRO should be construed as ‘served’ by virtue of section 8(1) of the IAGCO. Further, a ‘month’ was to mean a ‘calendar month’ as set out by Brett L J in Migotti v Colvill (1879) 4 CPD 233, 238.

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- (3) Consequently, even though time was to begin running on 10 August 1997, by virtue of section 71 of the IAGCO, the time period expired on 9 September 1997, hence the appeal notice was one day late. The Board, therefore, had no jurisdiction to entertain the appeal.

Per Curiam

The Board was dissatisfied with the lack of power given to it by the IRO to extend time for meritorious appeals against imposition of additional tax. In its view, the current procedural rules were too rigid.

Appeal dismissed.

Case referred to:

Migotti v Colvill (1879) 4 CPD 233

Jenny Fung of Department of Justice for the Commissioner of Inland Revenue.
Nelson Miu instructed by Messrs Siao, Wen & Leung, Solicitors for the taxpayer.

Decision:

The issue

1. By 5 notices of additional tax dated 8 August 1997 [‘the Imposition Notices’], the Taxpayer was assessed a total of \$1,530,000 for the years of assessment 1990/91 to 1994/95.
2. Those Imposition Notices were sent by the Commissioner to the Taxpayer by registered post. The ‘delivery receipt’ in respect of such posting referred to ‘date of first delivery, 9 August 1997’. According to the Senior Controller of Posts, ‘The exact date of receipt by the addressee was 9 August 1997’.
3. By notice dated 8 September 1997 [‘the Appeal Notice’], the Taxpayer sought to challenge the imposition of additional tax. The Taxpayer despatched by fax on the 8th a copy of the Appeal Notice to the Inland Revenue Department. The Appeal Notice was however not received by this Board until 10 September 1997.
4. Section 82B(1) of the Inland Revenue Ordinance (chapter 112) provides:

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'Any person who has been assessed to additional tax under section 82A may, within 1 month after notice of assessment is given to him, give notice of appeal to the Board; ...'

5. The issue before us is whether the Appeal Notice is within the time limit as prescribed by section 82B(1).

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6. There is no conclusive evidence that the Imposition Notices were received by the Taxpayer on 9 August 1997. The words 'date of first delivery' on the delivery receipt suggest that there might have been a second delivery.

7. On the assumption that the Imposition Notices were given to the Taxpayer on 9 August 1997, by virtue of section 71 of the Interpretation and General Clauses Ordinance (chapter 1), the 1 month period expired on 10 September 1997. It is common ground that the Appeal Notice was received by this Board on 10 September 1997.

8. The Inland Revenue Department should be regarded as agent of this Board in relation to receipt of the Appeal Notice.

Arguments of the Commissioner

9. The word 'give' in section 82B(1) should be construed as 'serve'.

10. Section 8 of chapter 1 makes provisions for service by post. It provides as follows:

'Where any Ordinance authorises or requires any documents to be served or any notice to be given by post or by registered post, whether the expression "serve" or "give" or "send" or any other expression is used, the service or notice shall be deemed to be effective by properly addressing, pre-paying the postage thereon and dispatching it by post or by registered post, as the case may be, to the last known postal address of the person to be served or given notice, and, unless the contrary is proved, such service or notice shall be deemed to have been effected at the time at which the document or notice would be delivered in the ordinary course of post.'

11. It is accepted that 9 August 1997 is the triggering date for computing the 1 month period. That day is to be excluded by virtue of section 71 of chapter 1.

12. Month however means calendar month and the 1 month period expired on 9 September 1997. The Appeal Notice was 1 day late.

Our decision

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13. We accept the evidence of the Commissioner and the intimation of the Senior Controller of Posts that the Imposition Notices were received by the Taxpayer on 9 August 1997.

14. We further accept the contention of the Commissioner that the word 'give' should be construed as 'served'.

15. We refute the argument of the Taxpayer that the Inland Revenue Department should be regarded as agent of this Board. No authority has been cited in support of this bold proposition. We would like to state in emphatic terms that this Board is wholly independent of the Inland Revenue Department.

16. What remains to consider is the proper construction of section 71 of chapter 1 which provides:

'(1) In computing time for the purposes of any Ordinance –

(a) a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done'

It is common ground between the parties that the computation of the 1 month period starts on 10 August 1997.

17. Chapter 1 defines the word 'month' to mean 'calendar month'. As pointed out by Brett L J in Migotti v Colvill (1879) 4 CPD 233 at page 238:

'The term a calendar month is a legal and technical term... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to that day in the following month less one.'

The Commissioner is therefore plainly right in his contention that the period expired on 9 September 1997. The Appeal Notice is therefore 1 day late. We have no jurisdiction to entertain the appeal.

18. This case highlights the unsatisfactory state of the Inland Revenue Ordinance which confers no power on this Board to extend time for appeal against imposition of additional tax. We would urge the Department of Justice to take remedial action so as to ensure that cases of merits are not turned away from this Board by virtue or rigid procedural rules.