



Commissioner of Inland Revenue again fails to act within a reasonable time

The Court of First Instance in *Kong Tai Shoes Manufacturing Company Limited v CIR* [2011] HKCAL 34/2011 held that there had been an inordinate delay on the part of the Commissioner of Inland Revenue (the Commissioner) in determining the taxpayer's objections.

Background

The taxpayer sought judicial review of the Commissioner's profits tax assessments for the years of assessment 1998/99 to 2008/09 on the basis that the assessments were *ultra vires* and should be quashed; or in the alternative, asked for an order of mandamus requiring the Commissioner to determine the objections to the assessments within one month.

The Commissioner issued profits tax assessments for the years of assessment 1998/99 to 2003/04 in January 2005, March 2006, March 2007, March 2008, March 2009 and January 2010 respectively. For the years of assessment 2004/05 to 2008/09, the assessments were issued in March 2011. The assessments for 1998/99 to 2003/04 were issued just before the deadline had expired.

The Commissioner refused unconditionally to hold over the tax assessed and required the taxpayer to purchase Tax Reserve Certificates (TRCs) in lieu of paying the tax assessed. As of the date of handing down the Court's decision, the Commissioner had yet to issue a determination in respect of any of the taxpayer's objections.

Following the grant of leave to apply for judicial review on 24 May 2011, the Commissioner had stated that determinations for 1998/99 to 2002/03 would be issued by 22 January 2012. In relation to 2003/04 to 2008/09, the Commissioner denied that there had been a delay in making the determination. In particular, for 2003/04, the Commissioner said that the taxpayer had not provided all relevant information requested.

The Decision

In respect of the taxpayer's submission that the assessments were *ultra vires*, the Court held that the grounds advanced were untenable. The Court was unable to infer that there was a systemic and wilful culture of delay within the Revenue of which the taxpayer complained and considered that this allegation was unwarranted. Further, there was no evidence that the revenue had acted capriciously or irrationally in exercising its discretion to require the taxpayer to purchase TRCs.

That said, on the question of whether there was mandamus, the Court held that there had been an inordinate delay on the part of the Commissioner.

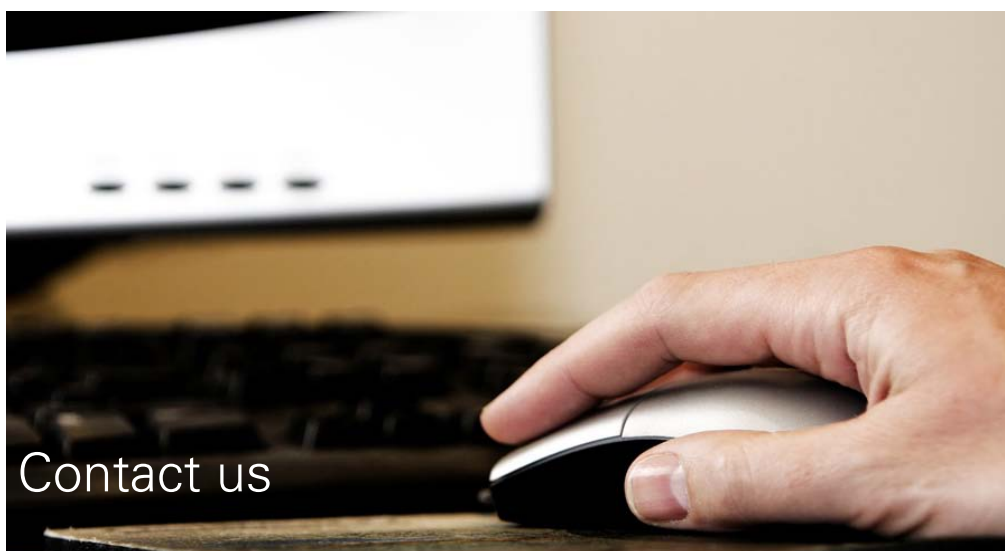
For the assessments for 1998/99 to 2002/03, the Commissioner had failed to respond to the respective objections for periods of between 3.5 and 6.5 years. By any measure, delays of such magnitude must be unacceptable. The Revenue had not drawn the Court's attention to any exceptional features in the case, justifying the time taken so far to make determinations. The Revenue said that it is in a position to come to determinations for these years by 22 January 2012. The Court noted that this was too generous a deadline.

Given that leave for judicial review was given on 24 May 2011, the Commissioner should have given the matter a greater sense of urgency. In light of the decision in *Yue Yuen Marketing* (see [Tax alert issue 11 – May 2010](#)) the Commissioner should have proceeded with greater alacrity to ensure that determinations for 1998/99 to 2002/03 were at least ready within six months after the grant of leave. An order of mandamus was, therefore, made requiring the Commissioner to determine the objections as soon as possible and, in any event, at the latest by 30 November 2011.

For 2003/04 to 2008/09 the Revenue submitted that there had been no delay as the assessment for 2003/04 was only objected to on 9 February 2010 and the other assessments were objected to on 7 April 2011. The Court was not persuaded and made a further order of mandamus, directing the Commissioner to determine the objections for the later years as soon as possible and, in any event, by 31 March 2012.

Comment

The Court was unable to infer from the two discrete cases before it (this case and that of *Yue Yuen Marketing*) that there was a systemic and wilful culture of delay within the Revenue. However, practical experience indicates that this is not the case. Too often, taxpayers are subjected to long and protracted queries from the Revenue over long periods of time. The situation faced by the taxpayer in this case seems, unfortunately, all too common.



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