

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D40/91

Profits tax – failure to file return – estimated assessment – failure to file notice of objection in time – whether section 70A of the Inland Revenue Ordinance applies.

Panel: Howard F G Hobson (chairman), Calvin Fung Chor Hang and Michael A Olesnicky.

Date of hearing: 8 July 1991.

Date of decision: 29 July 1991.

The taxpayer was a private company which failed to file its profits tax returns as a result of which the assessor issued a number of estimated assessments. The taxpayer failed to file a valid notice of objection under section 64 of the Inland Revenue Ordinance and the assessments became final subject only to the provisions of section 70A of the Inland Revenue Ordinance. The taxpayer made application under section 70A to re-open one of the estimated assessments. The assessor refused to re-open the estimated assessment and the matter was appealed to the Board of Review.

Held:

Section 70A had no application because no return had been filed and no arithmetical error or omission had been made.

Appeal dismissed.

[Editor's note: The taxpayer has filed an appeal against this decision.]

Cases referred to:

MOK Tsze Fung v CIR 1 HKTC 166  
Sun Yau Investment Co Ltd v CIR 2 HKTC 17

Lee Kang Bor for the Commissioner of Inland Revenue.  
A P Fahy of A P Fahy & Co for the taxpayer.

Decision:

The Taxpayer having failed to give a valid notice of objection pursuant to section 64(1) of the Inland Revenue Ordinance ('the Ordinance') to an estimated

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assessment for the year of assessment 1988/89 purported to invoke section 70A of the Ordinance.

The following facts, which were largely extracted from the determination of the Deputy Commissioner of Inland Revenue, are not in dispute.

### 1. PRIMARY FACTS

1.1 The Taxpayer was incorporated as a private company in Hong Kong in 1972.

1.2 In the absence of profits tax returns for the years of assessment 1985/86, 1986/87 and 1987/88, the assessor raised the following estimated assessments on the Taxpayer pursuant to section 59(3) of the Ordinance. Valid objections were subsequently lodged and the assessments were revised as indicated below:

	<u>Estimated</u> \$	<u>Revised</u> \$
1985/86	250,000	196,128
1986/87	250,000	233,753
1987/88	<u>300,000</u>	<u>246,769</u>
	800,000	676,650

1.3 In the absence of a 1988/89 profits tax return the assessor raised a section 59(3) estimated assessment on the Taxpayer for the year of assessment 1988/89. Details of the assessment, which was issued on 20 November 1989 and copied to its tax representative are as follows:

Estimated assessable profits	<u>\$400,000</u>
Tax payable thereon	<u>\$68,000</u>

1.4 By letter from the tax representative dated 19 November 1989 the Taxpayer objected against the above assessment. The letter was not, however, accompanied by a profits tax return as required by proviso (b) to section 64(1). The letter mentioned that 'The audited accounts to validate the objection will be submitted shortly'.

1.5 The tax representative's letter was not accepted by the assessor as a valid notice of objection under section 64 due to the absence of the profits tax return. In a letter dated 12 January 1990 addressed to the tax representative, the assessor extended until 22 January 1990 the period (which would otherwise have expired on 20 December 1989) in which the Taxpayer's objection would

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be validated. The Taxpayer however did not file the 1988/89 return and accounts within the stipulated extended time.

- 1.6 On 5 March 1990 the tax representative submitted, without further comment, a 1988/89 profits tax return together with a copy of its audited accounts for the year ended 31 December 1988.
- 1.7 In a letter dated 27 March 1990 the assessor informed the Taxpayer that as the requirements of the extended objection period (refers to fact 1.5 above) had not been met, the year of assessment 1988/89 must be regarded as final and conclusive in terms of section 70 of the Ordinance.
- 1.8 On 12 April 1990 the tax representative lodged application under section 70A to re-open the year of assessment 1988/89.
- 1.9 On 4 May 1990 the assessor issued to the Taxpayer a refusal to correct the year of assessment 1988/89 pursuant to section 70A of the Inland Revenue Ordinance.

### 2. GROUND OF APPEAL

The grounds of appeal furnished by the Taxpayer's tax representative are rambling and include issues not directly relevant to the appeal. However it would seem that the main objection is that on raising the \$400,000 estimate at fact 1.3 above the assessor should have been mindful of the fact that the 1987/88 revised assessment of \$246,769 carried with it the 1988/89 provisional assessment of the same amount and ought therefore to have set the 1988/89 estimate at \$246,769. Alternatively the assessor should have adopted the average, namely \$225,550, of the three revised assessments (refers to fact 1.2 above). In either event, so the grounds go on to argue, the assessor made an error since, so the tax representative inferred, she divided \$800,000 by 2 instead of by 3 and made the further error of using \$800,000 instead of \$676,650. The tax representative went on to maintain that the decision in MOK Tsze Fung v CIR 1 HKTC 166 was not applicable since 'At that time there were no estimated assessments contemplated'. Regarding this last assertion the Chairman referred the tax representative to the following passage taken from page 180 of the judgment of Mills Owens, J in the MOK case:

'In my view the scheme of sections 59 and 60 is perfectly intelligible and logical. Section 59 is aimed at first assessments. Sub-section (2) contemplates the case where the return is made and then makes the distinction between the circumstance where the return is accepted and the circumstance where it is not accepted; in the former event the assessor will make his assessment in the amount disclosed by the return and in the latter event will make an estimate. Sub-section (3) then proceeds to deal with the third possibility, the case where no return is made, when again the assessor will estimate.'

The tax representative retorted that he did not agree with that judgment.

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The tax representative claimed that the 12 January 1990 letter (see fact 1.5 above) should have been addressed to the Taxpayer and moreover that he did not receive it. The Commissioner's representative was able to produce evidence from the post office that the letter (registered) was collected by one of the tax representative's staff: it was also clear that the tax representative had not bothered to file a notice with the Business Registration Office on changing its address. The point however has no bearing on the appeal since the letter extended the time for producing the return – without the extension the Taxpayer was out of time on 20 December 1989.

### 3. SUBMISSIONS

3.1 We see no value in attempting to make sense here of the confused written submissions put before us by the Taxpayer's tax representative. Suffice it to say that it contains an unaccountable reference to Colonial Regulation 59 (which is concerned with forceable retirement of civil servants), mention of civil proceedings for recovery of tax and irrelevant complaints about administration by the Inland Revenue Department. The only potentially relevant submission was that an assessor when exercising the power to raise an estimated assessment for a year for which there already existed a provisional assessment was bound to confine the estimate to the figure in the provisional assessment.

3.2 The Commissioner's representative first made the point that there was no evidence to indicate what led the assessor to estimate profit for the year of assessment 1988/89 at \$400,000 but even if she had made it by reference to the previous estimates that would certainly not indicate an 'arithmetical' error (or omission). He then referred us to Sun Yau Investment Co Ltd v CIR 2 HKTC 17 and the following passages therein by Martell J which we repeat with our own comments in square brackets.

At page 19:

'It is not said here that the tax charged for the year of assessment is excessive by reason of an error or omission in any return or statement submitted but it is said that it is excessive by reason of an arithmetical error or omission in the calculation of the amount of the assessable income or profits assessed. It is said, therefore, that the assessor was bound to correct his assessment.

Now of course, had the assessor been possessed of the profits tax return [which we take to mean the return for the year in question, not the preceding year upon which the provisional tax was based] and audited accounts, the figure which would have been arrived at both in the way of assessable profits and the amount of tax to be charged would have been very different from the assessment. In fact, whereas under the assessment a substantial sum is said to be owing by way of profits tax in the light of the contents of the late profits tax return, there

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would have been none. That fact alone, says Mr Tang [Counsel for the taxpayer], bespeaks an arithmetical error or omission within the terms of section 70A.’ [The judge did not accept this argument.]

At page 21:

‘In my judgment, the wording of 70A is perfectly plain. It covers the case where there has been a miscasting by the assessor on the material available to him. The assessor is not in error, let alone arithmetical error, simply because his assessment does not coincide with a figure he would have reached had other information been available to him. As was said by Mills Owens J in MOK Tsze Fung v CIR:

“It might well be impossible for the assessor to prove facts Justifying his assessment in the precise amount thereof, or, indeed, in any particular amount. The law allows him to ‘estimate’, or, as the case may be, to assess ‘according to his judgment’ [this is a reference to section 60], and if he were to be required to prove his assessment strictly his powers would, for practical purposes, be nullified.”

#### 4. CONCLUSION

The facts of this case are indistinguishable in any material respect from those of Sun Yau Investment and we respectfully adopt the ratio decidendi in that case and hold that section 70A cannot be invoked the circumstances of the case before us. Nevertheless we feel we should set out our own approach to the foregoing facts. Because it lacked the appropriate return, the 19 December 1989 notice of objection was invalid and consequently, by virtue of the combined effect of sections 64(1) and 70, the year of assessment 1988/89 became final and conclusive on 20 December 1989, subject only to the invocation of either of the limbs of section 70A. The first limb refers to assessments which are excessive by reason of an error or omission in any return, but, there being no such return that limb is inapplicable. The second limb applies to assessments which are excessive by reason of any arithmetical error or omission in the calculation of (a) the amount of the assessable ... profit assessed or (b) in the tax charged. As to (a) the unqualified estimated assessment of a bare figure of \$400,000 set out in the estimated assessment cannot of itself involve any ‘calculation’: there could not therefore be any error. As to (b) the tax rate for the year concerned was 17% and \$68,000 is a correct arithmetical result of the application of that percentage to \$400,000: in the calculation there was no error.

Having decided that section 70A cannot be invoked in this case this appeal is dismissed. It follows that it is not strictly necessary for us to comment on any argument concerning the appositeness of the amount of the estimated assessment or consider speculations as to how the figure was arrived at or any other extraneous issues. The following remarks therefore have no direct bearing on the decision. It is obvious that the attempt to invoke section 70A was made solely to overcome the Taxpayer’s failure (for

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what reason we do not know) to file a timely and proper notice of objection under section 64(1).

The only novel (obiter) argument introduced in the case before us is whether an assessor in the exercise of the power under section 59(3) to raise an estimate is any way bound to have regard to the provisional tax assessment for the year in question. We do not think an assessor is so inhibited because it may well be that assessors arrive at their estimates by reference to comparable businesses for the year concerned, or reports that they receive from outsiders or other justifiable reasons. In this respect Mills Owens J made the following comment in the MOK Tsze Fung case at page 183:

‘It might well be impossible for the assessor to prove facts justifying his assessment in the precise amount thereof, or, indeed, in any particular amount. The law allows him to “estimate”, or, as the case may be, to assess “according to his judgment”, and if he were to be required to prove his assessment strictly his powers would, for practical purposes, be nullified. He is, in the words of Vaisey J quoted above, not required to prove the exact quantity or quality of the profits or other income not disclosed by the taxpayer.’