

DTC had first to sell the mortgaged properties (as required by the footnote to the guarantee) before it could ascertain the amount its losses on the further charge before it could call upon the Taxpayer to reimburse it? Mr. Chan replied that the DTC could have obtained a declaration of indemnity against the Taxpayer—but even if that is correct the indemnity would be for an unascertained amount. However we are not convinced that Lo and Lo supports the proposition that the accrued obligation needs to be an ascertained amount (at least for the purposes of the instant case).

- 4.3 In the event the third witness, Mr. W, a certified accountant who audited the Taxpayers' accounts gave evidence; which we accepted, that some properties were sold in 1981 and in November 1981 the remainder were valued at HK\$5.9 million versus a total of HK\$7.8 million due from F. HK\$1.9 million was uncovered. But because the Taxpayer could not control the sale of the properties and because interest would accrue on F's overdraft with the DTC it was decided as prudent and in accordance with accepted principle of commercial accountancy practice to make a provisions of HK\$3.5 million plus HK\$0.5 million for legal and other costs. Mr. W's evidence was not challenged in cross-examination.
- 4.4 In the light of the foregoing we are of the opinion that it was proper to make the 1981 provision to the extent mentioned and would allow the same but recognizing that in the event the figure was HK\$3 million, \$1 million would have to be written back. We think that as of now the provision for tax purposes should be taken to be \$3 million for the tax year 1982/83 (in the basis year ending 31.12.81).

Case No. D8/87

Board of Review:

Henry Litton, *Chairman*, N. J. Gillanders and Roland K. C. Chow,
Members.

18 May 1987.

Profits Tax—Section 70A of the Inland Revenue Ordinance—Late submission of the tax return and supporting documents.

The Appellant is a private company carrying on business as manufacturer of electrical products. In the absence of a duly completed 1983/84 profits tax return from the Appellant the Assessor made an estimated assessment in respect of the assessable profits of the Appellant. An objection against the estimated assessment was lodged but this was not accepted as a valid notice under S. 64(1) of the Inland Revenue Ordinance on the grounds that the Appellant's profits tax return had still not been submitted. The Assessor told the Appellant that the objection would be validated provided that a properly completed return was lodged within a specified time. This was not done and the Assessor subsequently told the Appellant that the assessment had become final and conclusive in terms of section 70 of the Inland Revenue Ordinance. The Appellant applied under section 70A of the Inland Revenue Ordinance to re-open the assessment.

Held:

The company not having lodged a return which complied with the requirements of Section 51 of the Inland Revenue Ordinance within the time as extended by the Assessor, the estimated assessment became final and conclusive. There was no error or omission in any return within the meaning of Section 70A of the Inland Revenue Ordinance.

Appeal dismissed.

WONG Chi-wah for the Commissioner of Inland Revenue.
LI Wai-chi of Li Wai Chi & Company for the Appellant.

Reasons:

1. The Appellant W Ltd. (the Company) is a private company carrying on business in Hong Kong as a manufacturer of electrical products.
2. In the absence of a duly completed 1983/84 profits tax return from the Company, the assessor made an estimated assessment on 19 April 1985 in respect of the assessable profits of the Company for the year of assessment 1983/84 in the sum of \$600,000.
3. By a letter dated 16 May 1985 the Company's representatives lodged an objection against the estimated assessment, but this was not accepted by the assessor as a valid notice of objection under section 64(1) of the Ordinance on the ground that the Company's profits tax return had still not been submitted. In a letter dated 27 May 1985 the assessor told the Company that the objection would, however, be validated if a properly completed return was lodged by not later than 3 June 1985.
4. On 3 June 1985 the Company submitted a profits tax return (Form BIR51) which was duly filled in, showing that the assessable profits of the Company for the year of assessment 1983/84 were in the sum of \$143,069. The form was accompanied by unaudited accounts for the year ending 31 March 1984, supporting schedules and a proposed tax computation. The audited accounts and the

auditors' report for the year ending 31 March 1984 were however not included and were subsequently submitted on 26 June 1985. The auditors' report contained a number of qualifications.

5. By a letter dated 16 July 1985 the assessor told the Company that as the company had failed to submit a properly completed return by 3 June 1985, the assessment for 1983/84 had become final and conclusive in terms of section 70 of the Ordinance.

6. By a letter dated 12 September 1985 the Company's representatives made an application under section 70A of the Ordinance to reopen the 1983/84 assessment. We note in passing that the application was erroneously addressed to the Commissioner, when it should have been made to the assessor in whom the discretion to reopen the assessment is vested, but nothing turns on this point. On the assessor's refusal to correct the 1983/84 profits tax assessment in the estimated sum of \$600,000, the representative lodged an objection to the Commissioner.

7. The Commissioner made his Determination on 21 February 1986, upholding the assessor's refusal to correct the 1983/84 assessment, and it is against that Determination that the Company has now brought this appeal before us.

8. The argument of the Company as presented by the representatives, is in essence as follows:

- (i) By lodging the profits tax return form BIR51 within the time limit set by the assessor (namely by 3 June 1985) and by lodging at the same time the unaudited accounts for the relevant period, together with supporting schedules and the proposed tax computation, the Company had complied with the requirements, under section 64(1)(b) of the Ordinance.
- (ii) In so far as the *audited* accounts and the auditors' report were necessary for the assessor's exercise of judgment in making a proper assessment of the Company's liability for profits tax, these were mere matters of omission in the return, which the assessor could have corrected under the provisions of section 70A of the Ordinance.
- (iii) Accordingly, the assessor should have exercised his discretion under section 70A, on the Company's application made through its representatives by letter dated 12 September 1985.

9. We cannot accede to the Company's arguments. In our judgment, the provisions of section 70A cannot apply to the circumstances of this case. Section 70A empowers the assessor to reopen an assessment if it is established to his satisfaction that the tax charged is excessive "by reason of an error or omission in any return": this is the only portion of section 70A with which we are concerned.

10. The question then arises: has there been an error or omission in the return lodged by the Company? The representatives say Yes, pointing to the omission of the audited accounts and the auditor's report, when form BIR51 was lodged on 3 June 1985.

11. The Commissioner's representative counters this argument by saying: in the case of a limited company, the requirements of audited accounts and an auditor's report are mandatory; they are so specified in form BIR51; without these accompanying documents a return which complies with the statutory requirements of section 51 of the Ordinance has not been lodged.

12. In our judgment, the arguments put to us by the Commissioner's representative are plainly correct. Section 51(1) of the Ordinance gives to the Board of Inland Revenue the power to specify a form of return which must be made. BIR51 is the form so specified, and it states that the Company, in lodging the form, must also lodge amongst other documents an auditors' report within the time limit. We note in passing that BIR51 also refers to "other supporting documents required" in rather ambiguous terms, and makes reference to a note on the reverse side of the form which lists a number of other requirements; nothing turns on this point in this case, since the question of "other supporting documents" is not in issue.

13. The Company, not having lodged a return which complied with the requirements of section 51 within the time as extended by the assessor (namely 3 June 1985), the estimated assessment became final and conclusive. There was no error or omission *in any return* within the meaning of that expression in section 70A of the Ordinance. The Company's application to reopen the assessment, as contained in the letter of 12 September 1985, was misconceived. This appeal accordingly fails.