HCAL No.29 of 2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATION REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 29 OF 2010

IN THE MATTER of decisions made under s. 64, s. 66 and s. 70A of the Inland Revenue Ordinance

AND

IN THE MATTER of the Inland Revenue Ordinance, Cap. 112

BETWEEN

MOULIN GLOBAL EYECARE TRADING LIMITED (IN LIQUIDATION) (formerly known as MOULIN OPTICAL MANUFACTORY LIMITED)	Applicant
and	
THE COMMISSIONER OF INLAND REVENUE	1st Respondent
THE INLAND REVENUE BOARD OF REVIEW	2nd Respondent

Court : Hon Reyes J in Court
Date of Hearing : 7 February 2011
Date of Judgment : 15 February 2011

JUDGMENT

I. INTRODUCTION

1. The Applicant (MGET) is wholly-owned, through intermediates, by Moulin Global Eyecare Holdings Ltd. (Holdings), a listed company. Holdings and MGET belong to the Moulin group of companies. On 23 June 2005 Holdings, MGET and Leadkeen (a Moulin group company) ceased trading. They went into provisional liquidation. Holdings and MGET were ordered to be wound up on 5 June 2006, the provisional liquidators being appointed as liquidators.

2. Following their provisional appointment, MGET's Liquidators discovered serious anomalies in MGET's accounts. In particular, the Liquidators found that certain Moulin group executives (Ma Bo Kee (Holdings' chairman), Cary Ma (Holdings' CEO) and Michelle Lam (group treasurer)) had falsified MGET's profits in a massive way through creation of fictitious sales. The executives had inflated MGET's profitability with false sale records to enable the group to continue trading when the group was in dire financial straits. I shall refer here to the executives as "the Ma family directors".

3. The Liquidators concluded that, contrary to the rosy outlook depicted in its accounts, MGET had sustained substantial losses and had actually made no profit in the tax years from 1998/99 onwards. To the Liquidators, this meant that in the relevant tax years MGET had been wrongly assessed for (and had wrongly paid) profits tax of nearly $89 million.

4. Consequently, shortly after their appointment in 2005, the Liquidators began a protracted correspondence with the Commissioner with the objective of securing a refund of the profits tax which (the Liquidators contend) MGET had wrongly paid.

5. By these proceedings, the Liquidators seek judicial review of 4 "decisions" made by the Commissioner in the course of the long correspondence. The 4 decisions are said to be evidenced by 4 letters from the Revenue to the Liquidators. Those letters are dated 20 December 2005, 16 April 2007, 4 December 2009, and 4 February 2010. For convenience, I shall refer to those letters as the 1st, 2nd, 3rd and 4th decisions. But it will be necessary when considering each "decision" to assess whether it amounts to a reviewable decision, as opposed to merely being an indication of the Commissioner's thinking at a given time.

6. The thrust of the Liquidators' case is that by the 4 decisions the Commissioner unreasonably:-

(1) refused to accept that MGET's accounts had been systematically falsified by the Ma family directors, such that MGET's profits were in fact non-existent at the material times and MGET should not have been liable for profits tax in the relevant years;

(2) refused to exercise the power under Inland Revenue Ordinance (Cap. 112) (IRO) s. 64 to extend the time for the Liquidators to object to MGET's profits tax assessments in relevant years; and,

(3) refused to exercise the power under IRO s. 70A to revise MGET's tax returns in relevant years.

7. The Liquidators also challenge the Commissioner's entitlement to claim profits tax of over $10 million which has been assessed against MGET, but which remains unpaid. The Commissioner has lodged a proof of debt in MGET's liquidation for that unpaid tax.

II. BACKGROUND

8. The Moulin group was established in 1960. It was a large multinational enterprise with assets in the US (such as a 56% interest in Eyecare Centres of America), the UK, continental Europe and the Mainland. At all material times, the Ma family (including Ma Bo Kee and Cary Ma) controlled a substantial block of Holdings' shares. That block ranged from around 40% in 1999 to 30% in 2004. MGET was the largest operating subsidiary of the Moulin group.

9. From 1998/99 to 2003/04 MGET paid a total of $88,972,757 in profits tax.

10. But $10,363,532 of additional or estimated profits tax remains outstanding. That extra amount consists of additional assessments of $424,864, $146,390 and $229,978 levied in August 2005 in respect of 1999/00, 2001/02 and 2002/03 and estimated assessments of $1,687,300 and $7,875,000 levied in August and November 2005 in respect of 2004/05 and 2005/06. The estimated assessments were raised pursuant to the Commissioner's power under IRO s. 59(3) to make assessments in the absence of returns from a person thought to be chargeable to tax. The Liquidators have not filed returns for MGET in respect of 2004/05 and 2005/06.

11. The unpaid additional and estimated profits tax assessments are the subject matter of the proof of debt lodged by the Commissioner in MGET's liquidation.

12. The winding up of the Moulin group has been characterised as "one of the most complex liquidations to have been conducted in Hong Kong, given the size of the Group's operations and the complexity of issues involved" (see Re Moulin Global Eyecare Trading Ltd. [2010] 1 HKLRD 851 (at para. 7) (Kwan JA)). Along with systematic falsification of the group's accounts went the "active destruction of the books and records of the Group before the appointment of provisional liquidators" (Ibid.). This meant that, in practical

terms, "it would take many years to fully investigate numerous irregular transactions and to restate the true financial position of the Group" (Ibid.).

13. In related proceedings, this Court recognised that the complexity of the fraud was such that "it is not realistic to expect or require the Liquidators to attempt a full reconstruction of the accounts" (see Re Moulin Global Eyecare Holdings Ltd. [2007] HKLRD 315 (at para. 22) (Barma J)). The time and cost involved in attempting a full reconstruction of the group's accounts would render such exercise counter-productive.

14. In June 2005 the Liquidators wrote to the Commissioner to enquire about MGET's tax position.

15. On 29 August 2005 the Revenue sent to the Liquidators estimated assessment for 2004/05 and a demand for the 3 additional assessments mentioned above. The Revenue also provided a 2005/06 tax return for completion by the Liquidators within a month.

16. The Liquidators did not respond to the letter of 29 August 2005. They say that this was because they had to focus at the outset on securing and realising the assets of MGET and the Moulin group. In any event, given the unreliability of MGET's accounts, the Liquidators had no information at the time on which to render meaningful tax returns.

17. On 25 November 2005, in the absence of a tax return from the Liquidators, the Revenue issued a demand for payment of an estimated assessment for the year 2005/06.

18. On 30 November 2005, the Liquidators wrote to the Revenue about the fraud perpetrated by Holdings' officers. The Liquidators explained that, in their view, MGET's profits for the years 1998/99 to 2004/05 had been grossly over-stated. The Liquidators noted that they were attempting to quantify the extent of overstatement with a view to eventually obtaining a refund of overpaid profits tax.

19. The Liquidators observed, however, that the task of reconstructing MGET's accounts was "a significant and time consuming undertaking due to the complexity of the group structure and the number of transactions involved". The exercise required time.

20. The Liquidators said that they intended to lodge revised returns "as soon as possible". But "[i]n the interim, I [that is, Mr Sutton on behalf of the Liquidators] am seeking your views in relation to the prospects of a reassessment of the returns for the years ended 31 March 1999 to 31 March 2005".

21. The Revenue replied by letter dated 20 December 2005 (the 1st decision). This letter stated that, in light of the time limits in IRO ss. 64, 70 and 70A, the assessments issued for 1998/99 to 2004/05 "must be regarded as final and conclusive and no revision can be made". The Liquidators did not respond to this 1st decision.

22. Between April and July 2006 there was further correspondence between the Liquidators and the Revenue. This time the Liquidators sought an extension of 1 year in

which to file profits tax returns in respect of 2004/05 and 2005/06. The Liquidators justified the requested extension by the anticipated length of their continuing investigations into the affairs of the Moulin group. The Liquidators enclosed a report with their letter to highlight significant anomalies in the sales records of 4 alleged MGET debtors.

23. The Commissioner agreed to an extension, but only until 30 December 2006. The Liquidators not being in a position to comply with that deadline, no tax returns were filed for 2004/05 and 2005/06.

24. On 15 August 2006 the Commissioner lodged her proof of debt in MGET's liquidation.

25. On 18 January 2007 Mr Sutton on behalf of the Liquidators wrote to the Commissioner. The letter stated:-

> "I refer to your Proof of Debt filed against the Company [MGET].
>
> After reviewing the corresponding demand notices for the profits tax for each of the years of assessment from 2000 to 2006, I object to the assessments on the basis that they were calculated with the use of financial records supplied by the Company that misstated the Company's true financial performance.
>
> As detailed previously, our investigations have indicated that the Company may have been involved in a series of questionable transactions that inflated the Company's profits.
>
> We are in the process of restating the financial records of the Company to more accurately reflect the true financial performance. The result of the restated financial records will be forwarded to your office for your further attention in due course.
>
> Should you have any questions in relation to the above, please contact Mr Joe Ng of this office on 2820 5620."

26. On 6 February 2007 the Liquidators rejected the Commissioner's proof of debt. The reason given was that MGET's profits had been inflated in its accounts prior to provisional liquidation.

27. On 7 February 2007 the Commissioner replied to the Liquidators' letter of 18 January 2007 in essentially the same terms as the 1st decision.

28. On 26 February 2007 the Commissioner appealed to this Court against the rejection by the Liquidators of her proof of debt.

29. By letter dated 29 March 2007 the Liquidators repeated the request in their letter of 30 November 2005 that the Commissioner "provide [her] views on the prospect of

a reassessment of the returns from [Holdings] and MGET for the tax years ended 31 March 1999 to 31 March 2005". The letter concluded:-

> "For the avoidance of doubt, this letter, and my preceding letter of 30 November 2005, should be treated by you as an application pursuant to section 70A of the Inland Revenue Ordinance to correct an error in each of the years of assessment identified above and/or as application under section 64(1)(a) for an extension of time to object."

30. When writing on 29 March 2007, the Liquidators mistakenly believed that the Revenue had not replied to the Liquidators' letter of 30 November 2005. The Revenue responded on 16 April 2007 (the 2nd decision) by noting that it had answered the letter of 30 November 2005. It enclosed a copy of the 1st decision.

31. On 13 November 2009 the Liquidators wrote to the Commissioner referring to the evidence filed in the proof of debt appeal. The Liquidators stated that, in light of that material, they wished "formally [to] object pursuant to s. 64(1)(a) of the [IRO] to the assessments for the years of assessment upon the ground that [MGET] made no assessable profits in each of those years". The Liquidators explained that MGET was prevented from giving notice of objection within 1 month of the date of the respective notices of assessment because MGET's affairs were then in the hands of the directors perpetrating the fraud against MGET.

32. In the 13 November 2009 letter, the Liquidators also formally claimed repayment of the tax wrongly paid. Insofar as necessary for such claim, they relied on IRO s. 70A (allowing revision of tax returns for error or omission) and the law of restitution.

33. The evidence relied upon in the 13 November 2009 letter was principally the 10th Affidavit of Roderick John Sutton (Sutton 10) in the proof of debt proceedings. Sutton 10 described 3 major respects in which MGET's accounts had been falsified. Those respects were:-

> (1) the accounting of fictitious sales to 5 major North American customers from 1999 or before;
>
> (2) the accounting of fictitious cash advances to supposedly independent third parties that led to non-existent "interest" as being earned; and,
>
> (3) the accounting of fictitious cash advances in relation to "Frame Board Space Agreements" (purportedly made to secure future sales) resulting in "amortisation" of non-existent assets.

34. Sutton 10 further deposed that the Liquidators had prepared a model which reversed the effect of the false sales to the 5 major North American customers. The Liquidators thought that this was a cost-effective and commonsense alternative to a

complete reconstruction of MGET's accounts. The model indicated that MGET had made substantial losses between 1998/99 and 2004/05.

35. The 13 November 2009 letter bore the heading "1998/99 to 2002/03". The Liquidators say that this was a typo for "1998/99 to 2003/04". This must have been the case. It is apparent from the correspondence between the Commissioner and the Liquidators that the Liquidators all along intended to include the tax paid for 2003/04 in their claims.

36. By letter dated 4 December 2009 (the 3rd decision) the Commissioner rejected the Liquidator's application of 13 November 2009. The Commissioner wrote that there was no valid reason for extending the time for lodging an objection under IRO s. 64. Nor did the Commissioner think that there was a basis for revising MGET's tax assessments (including the assessment for 2003/04) under IRO s. 70A. The assessments for 1998/99 to 2003/04 were instead to be regarded as "final and conclusive".

37. On 17 December 2009 Kwan JA ordered the Liquidators to admit the Commissioner's proof of debt. But this was "without prejudice to any application that has been brought or may be brought by the [Liquidators] to challenge the assessments in accordance with the procedure laid down in the [IRO]" (at para. 96 of Kwan JA's judgment). The Liquidators appealed. But their appeal was dismissed by the Court of Appeal on 19 July 2010.

38. By letters dated 31 December 2009 and 18 January 2010 the Liquidators appealed to the Board of Review against the 3rd decision. However, by letters dated 5 and 25 January 2010 the Board refused to hear the proposed appeal. The Board stated that it lacked jurisdiction, as the Commissioner had not provided a statement of reasons when making the 3rd decision.

39. By letter dated 18 January 2010 the Liquidators made further submissions to the Commissioner in relation to the 3rd decision. The Liquidators stressed that, before their investigation of the fraud perpetrated by MGET's officers, it would not have been possible to lodge any meaningful objection against the Commissioner's profits tax investments.

40. The Commissioner replied by letter dated 4 February 2010 (the 4th decision). The letter argued that the fraud by MGET's former directors had not yet been proved. The Commissioner added that, even if proved, the "fraud would be regarded as being filed with knowledge of MGET of the alleged fraud and MGET cannot now argue that it was prevented from lodging an objection within time under s. 64(1)(a)".

41. The Liquidators took out judicial review proceedings on 10 March 2010.

42. The Notice of Application for Judicial Review was amended by my Order of 26 January 2011. Originally, the Liquidators had sought review of the 4th decision alone. By their amendment, the Liquidators widened the scope of these review proceedings to include the 1st, 2nd and 3rd decisions and the validity of the assessments underlying the Commissioner's proof of debt. In relation to the attack on the assessments underlying the

proof of debt, leave to amend was granted without prejudice to the Commissioner's submission that the matter was now res judicata.

43. On 19 November 2010 Ma Bo Kee, Cary Ma and Michelle Lam were convicted on charges relating to fraud at MGET. They were sentenced on 2 December 2010. Before their trial, they had admitted that the sales to the 5 major North American customers were fictitious.

III. DISCUSSION

44. This section has 5 parts.

45. First, I consider to what extent the 1st to 4th decisions were "decisions" amenable to review as opposed merely to indications of the Commissioner's thinking. That will define the ambit of this review.

46. Second, I consider the extent to which it is open in this judicial review for the Liquidators to complain that the Commissioner has been unreasonable in her refusal to accept that MGET's accounts have been tainted by fraud and that, far from having made profits, MGET sustained heavy losses in the relevant tax years.

47. Third, I consider the Liquidators' argument that the Commissioner wrongly refused to extend time under IRO s. 64 for objecting to the Revenue's tax assessments.

48. Fourth, I consider the Liquidators' argument that the Commissioner wrongly refused to consider whether MGET's returns should be revised for error or omission under IRO s. 70A.

49. Fifth, I consider the Liquidators' case against the tax assessments underlying the Commissioner's proof of debt.

A. Nature of the 1st to 4th decisions

50. Mr Roger Beresford (appearing for the Commissioner) observes that the 1st decision "cannot properly be characterised as a decision" at all. I agree.

51. Nothing in the Liquidators' 30 November 2005 letter (prompting the 1st decision) suggests that the Liquidators were applying for an extension of time to object to assessments under IRO s. 64 or for a revision of erroneous returns under IRO s. 70A. All the Liquidators were asking from the Commissioner by their 30 November 2005 letter was an advance view of their prospects of success in the event that applications under ss. 64 or 70A were made.

52. An advance view was precisely what the Commissioner gave in her reply. The 1st decision indicated that, in the Commissioner's view, the contemplated applications were likely to fail. Nothing in the 1st decision precluded the possibility (however remote) of the

Commissioner coming to some other view in the event of an actual application by the Liquidators.

53. Consequently, I do not think that the 1st decision can be treated as a determination by a public authority susceptible of judicial review.

54. Mr Beresford submits that the first adverse "decision" against the Liquidators is to be found in the Commissioner's letter of 7 February 2007 (in response to the Liquidator's letter of 18 January 2007). That 7 February 2007 is not the subject of challenge in these proceedings.

55. I disagree with Mr Beresford.

56. Reading the letter of 18 January 2007 (set out in full above), it is plain that the Liquidators were simply reacting to the Commissioner's having recently lodged a proof of debt. The Liquidators were foreshadowing their rejection of the proof of debt on the basis spelled out in the 18 January 2007 letter.

57. The Commissioner's 7 February 2007 letter was a response to the Liquidators' points. I do not read the 7 February 2007 letter as a substantive decision to an application by the Liquidators.

58. I do not think that the 7 February 2007 letter amounted to a decision amenable to judicial review. The Liquidators have rightly not sought to portray it as such in these proceedings.

59. The Liquidators' 29 March 2007 letter (which precipitated the 2nd decision) requested that, for the avoidance of doubt, both it and the Liquidators' letter of 30 November 2005 should be treated as applications under ss. 64 and 70A.

60. Here I agree with Mr Beresford that the 30 November 2005 letter could not retrospectively be characterised by the Liquidators as an application when it fact, at the relevant time, nothing signified that it was. Thus, 29 March 2007 is the earliest date from which the Liquidators can be regarded as applying for an extension of time to object under s. 64 or for a revision of MGET's returns under s. 70A.

61. The complication arises from the circumstance that, when writing to the Commissioner on 29 March 2007, the Liquidators wrongly believed that the Commissioner had not responded to their 30 November 2005 letter. The Commissioner's response of 16 April 2007 (the 2nd decision) then consisted of a terse statement that the 30 November 2005 letter had been answered. A copy of the 1st decision was enclosed as verification.

62. If the 1st decision was only an indication of the Commissioner's thinking, it is hard to see how the Revenue's re-sending of the 1st decision in April 2007 could have transformed the 1st decision into an actual determination. Nothing in the Commissioner's covering letter of 16 April 2007 suggests that the Commissioner regarded the 1st decision as

having become more than the indication of an advance view. All the Commissioner did was to correct the Liquidators' mistaken belief that the Revenue had failed to respond in 2005.

63. Thus, even if the Liquidators' letter of 29 March 2007 can be regarded as a formal application under ss. 64 and 70A, the 2nd decision cannot be treated as a determination by the Commissioner amenable to judicial review.

64. It is not until the 3rd decision (in answer to the Liquidators' letter of 13 November 2009 claiming a refund of profits tax) that there is anything like a decision by the Commissioner susceptible to judicial review.

65. The 3rd decision is contained in a letter of 4 December 2009. But judicial review proceedings were not commenced until 10 March 2010. Given that the 3rd decision is a reviewable administrative decision, the Liquidators' application is about a week outside the normal 3 month time limit for bringing a judicial review.

66. Nonetheless, in the scale of things, such period of a week may be treated as de minimis. It would be wrong to refuse a hearing of the Liquidators' substantive complaints arising out of the 3rd decision by reason only of a delay of less than a week.

67. The 4th decision is similar to the 3rd decision. To all intents and purposes, the 3rd and 4th decision can be treated as one and the same. It will be useful at times to look at the 4th decision, because it specifically explains why by the 3rd decision the Commissioner rejected the Liquidators' application for an extension of the time under s. 64 to object to assessments.

68. I conclude from the foregoing that the proper ambit of this judicial review is a determination of the reasonableness of the 3rd decision.

B. Refusal to accept MGET's accounts as tainted by fraud

69. Mr Ashley Burns SC (appearing for the Liquidators) contends that, by the 3rd decision, the Commissioner unreasonably refused to accept that MGET's accounts were tainted.

70. Mr Burns says that the Commissioner was unreasonable given the following:-

(1) Sutton 10;

(2) the sworn evidence of the Liquidators as officers of the Court to the effect that the their investigations into the Moulin group revealed widespread fraud; and,

(3) the Commissioner was in a position of conflict since an admission of fraud in relation to MGET's accounts would prejudice the proof of debt claiming tax assessed by reference to the very same tainted accounts.

71. Mr Burns submits that, in light of the "overwhelming evidence of fraud," the only rational course was for the Commissioner to have accepted the Liquidators' case. The Commissioner (Mr Burns argues) should then have immediately directed a nil assessment of profits tax and refunded all payments by MGET.

72. However, Mr Burns acknowledges that, in actuality, the 3rd decision makes no reference to the Commissioner's position on the falsity of MGET's accounts.

73. Nevertheless, Mr Burns suggests that the 3rd decision should be read in light of the Affirmation of Mak Kwok Wing Sidney (Mak 2009) filed in the proof of debt proceedings. That stated:-

> "Those charges [against Ma Bo Kee, Cary Ma and Michelle Lam] however have not yet been proved, it is therefore premature to conclude at the present stage that a substantial portion of the Moulin Group's sales is fictitious for the purpose of calculating the assessable profits or adjusted loss of [MGET]."

74. I do not think that this Court should speculate about what possible unarticulated reasons the Commissioner might have had for rejecting the Liquidators' application. In evaluating the 3rd decision, I should confine myself to the reasons apparent from that document and the 4th decision, both read in the context of the 1st and 2nd decisions. Those reasons are either valid or not. If they are invalid, the judicial review succeeds and the matter should simply be remitted to the Commissioner for re-consideration.

75. By the 3rd decision the Commissioner refused to re-open the existing assessments of MGET's profits tax. She stated that this was because, on her understanding of the law, she saw no basis for extending the time to lodge objections under s. 64 and no basis for revising MGET's returns under s. 70A. The proper course then is for this Court to review whether the Commissioner was right in her application of ss. 64 and 70A.

76. If I conclude that the Commissioner was wrong in law, I cannot on that ground alone proceed to determine how the Commissioner ought to have treated the evidence of fraud adduced by the Liquidators. It is not for this Court to state an opinion on whether the evidence means that the assessments raised against MGET are wrong and (if so) by what amount. That is a task which the Legislature by the IRO has reserved to the Commissioner.

77. In particular, on the issue of the extent (if at all) to which each disputed assessment or returns needs to be varied, there are likely to be several arguable outcomes. I do not believe this to be a case which so plainly admits of only one possible result, namely, a nil (or negative) return and a nil profits tax assessment in relation to all disputed tax years. If an extension of time under s. 64 or a revision under s. 70A is appropriate, I will not be in a position to say that a rational Commissioner properly advised will arrive at one and only one conclusion on the quantum to which assessments or returns should be revised.

78. All I can do, if I find for MGET, is to remit the Liquidators' case back to the Commissioner with a direction that she reconsider whether to extend time for objecting to

the relevant assessments under s. 64 or allow revision of MGET's returns under s. 70A. If the Commissioner then decides that there is a basis for extending time, she would do so and deal with the objections in due course. If she considers that there is a basis for amending MGET's returns, she would then have to determine the extent to which the relevant returns need to be revised.

79. Mr Burns attempts to short circuit the process which I have just described. That would be a dangerous course to take. I would be substituting my views, inevitably based on only a summary consideration of evidence, for the more detailed and experienced scrutiny of the Revenue. Such mode of proceeding would be inappropriate in a judicial review.

80. I decline to hold that the Commissioner was unreasonable in the manner that Mr Burns has contended.

C. Extension of time under IRO s. 64

C.1 Commissioner's grounds for refusing to extend time

81. IRO s. 64 provides:-

> "(1) Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment; but no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within 1 month after the date of the notice of assessment:--
>
> Provided that:--
>
> (a) if the Commissioner is satisfied that owing to absence from Hong Kong, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving such notice within such period, the Commissioner shall extend the period as may be reasonable in the circumstances;
>
> (b) where any assessment objected to has been made under section 59(3) in the absence of any return required under section 51, no notice of objection against such assessment shall be valid unless, in addition to such notice being valid in accordance with the foregoing provisions of this subsection, the return required as aforesaid has been made within the period provided by this subsection for objecting to the assessment or within such further period as the Commissioner may approve for the making of such return;
>
> (c) where the assessment is a reassessment of the tax due from a person having the effect of either increasing or reducing that person's

> liability to tax, the person so reassessed shall have no further right of objection that he would have had if the reassessment had not been made except to the extent to which, by reason of the reassessment, a fresh liability in respect of any particular is imposed on him or an existing liability in respect of any particular is increased or reduced."

82. The Liquidators argue that the Commissioner should have increased the time for objecting to all assessments between 1998/99 and 2003/4. This is because (the Liquidators say) MGET could not have objected to those assessments within a month after those assessments were made.

83. Since the Ma family directors were in de facto control of MGET, it was not until after their removal and replacement by the Liquidators, that MGET would have been in any position to object. Even after the Liquidators' appointment, it was still necessary (the Liquidators add) to carry out time-consuming investigations into the affairs of the Moulin group before MGET's financial position could be fully understood. No meaningful objection against MGET's profits tax assessments could be launched until those investigations were well-advanced.

84. In those premises, according to the Liquidators, there was "reasonable cause" within the terms of s. 64(1)(a) for extending the time for making objection until at least 13 November 2009 (when the Liquidators wrote the letter which led to the 3rd decision).

85. The Commissioner by the 3rd decision refused an extension of the time to object. She did so on the basis that there was no "reasonable cause" within s. 64(1)(a). The 4th decision explains in more detail why the Commissioner concluded that there was no "reasonable cause".

86. First, the Commissioner asserted that the Ma family directors' fraud had not yet been proved at the time of the 3rd or 4th decision.

87. Second, the Commissioner reasoned that, if fraud was proved, the fraud would have been:-

> "perpetrated by the former directors of MGET and as such the tax returns allegedly tainted by fraud would be regarded as being filed with knowledge of MGET of the alleged fraud and MGET cannot now argue that it was prevented from lodging an objection within time under s.64(1)(a) of Cap. 112".

88. Had the outcome of the criminal proceedings been a material factor in the Commissioner's deliberations on whether to grant an extension, then (as Mr Burns suggests) the Commissioner should have delayed making a decision pending the outcome of those proceedings.

89. In any event, the Commissioner's first ground for a refusal has been overtaken by events. Since the 3rd and 4th decisions, the Ma family directors have been found guilty and sentenced in relation to falsification of the Moulin group's accounts. The Ma family directors' involvement in fraud has been established beyond a reasonable doubt.

90. It follows from the foregoing that the Commissioner's first ground cannot have been a valid ground for refusing an extension under s. 64.

91. The Commissioner's second ground hinges on the attribution of the Ma family directors' guilty mental state to MGET.

92. The Ma family directors (the Commissioner's argument runs) knew that they were committing fraud by deliberately inflating MGET's sales records. The knowledge of their fraud being attributed to MGET, the company must be regarded as having known that it was proffering wrong tax returns. MGET thus deliberately refrained from questioning the assessments raised on its returns by the Revenue. Knowing what it did and having consciously opted to act as it did, MGET cannot now claim to have been in no position to object to the assessments within the 1 month deadline in s. 64.

93. I am unable to accept the Commissioner's second ground as valid for the reasons which I set out below.

C.2 Meridian Global and attribution

94. Not being a natural person, the state of a company's knowledge at any specific time can only be determined by attributing the knowledge of a relevant natural person to the company. For the purpose of such attribution, who is a relevant natural person?

95. In Meridian Global Funds Management Asia Ltd. v. Securities Commission [1995] 2 AC 500 (PC, New Zealand) (at 506-11), Lord Hoffmann discussed how "rules of attribution" are ascertained.

96. Lord Hoffmann observed (at 506) that "a company's primary rules of attribution will generally be found in its constitution, typically the articles of association". These primary rules will normally state whose decision (for example, a decision of a director, of the board, or of a company in general meeting) is to be treated as that of the company in a given scenario.

97. Such primary rules in the articles will often not be sufficient. One may need to supplement those rules by (say) the principles of agency and vicarious liability. But even those principles may not cover all situations.

98. In some cases, a statute may require that the knowledge of a particular person within a company is to be treated as the knowledge of a company. Special rules of attribution will then have to be inferred from the objectives and text of the statute. In other words, one needs to construe the statute (using ordinary canons of statutory interpretation)

to determine whose mental state was intended by the Legislature to be treated as the knowledge of the company.

99. Applying the foregoing principles here, Mr Beresford submits that the Ma family directors were MGET's "directing mind and will" (an expression used by Hoffmann LJ in El Ajou v. Dollar Land Holdings plc [1994] BCC 143 (at 159) following Viscount Haldane in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum [1915] AC 705 (HL) (at 713)).

100. This must be the position (Mr Beresford stresses) at least insofar as the presentation of MGET's financial accounts and tax returns was concerned. Attribution of the Ma family directors' mindset to MGET would (Mr Beresford observes) be consistent with what Lord Hoffmann has identified as "primary rules of attribution". This is because, in keeping with the Companies Ordinance (Cap. 32) and what is typically found in a company's articles, persons in the position of the Ma family directors would be responsible for signing off a company's accounts.

101. Mr Beresford might be correct in his analysis in the ordinary course of events. But, where fraud or a knowing breach of duty is concerned, there is a well-recognised exception to the conventional rules of attribution.

C.3 Hampshire Land and fraud

102. In my view, Mr Burns rightly answers Mr Beresford by referring to what is sometimes known as the Hampshire Land principle. See [1896] 2 Ch 743. It is an exception to the application of the normal rules of attribution.

103. Under the principle, where a company's agent defrauds that company or knowingly acts in breach of a duty owed to that company as principal, the agent's knowledge will not be attributed to the company. The rationale behind the principle is that it would be fanciful to expect an agent to disclose to (rather than conceal from) the company that agent's deliberate act of fraud or breach of duty aimed at harming the company.

104. The principle has been applied with approval by the Court of Final Appeal in China Everbright-IHD Pacific Ltd. v. Ch'ng Poh (2002) 5 HKCFAR 630 (at para. 84).

105. Applying the principle here, Mr Burns submits (and I agree) that, since the Ma family directors were defrauding MGET, their knowledge (to the effect that MGET's accounts and the returns based on them were false) cannot be attributed to MGET.

106. However, Mr Beresford says that that Hampshire Land does not apply in the present situation.

107. That is because (Mr Beresford suggests) MGET was not the "target" of the Ma family directors' fraud. The target of the fraud was (Mr Beresford contends) MGET's banks which were duped by the false accounts into maintaining MGET's credit lines.

Hampshire Land only applies (Mr Beresford notes) when a fraud is aimed at the company of which the fraudster is the human agent.

108. In support of his contention, Mr Beresford relies on dicta from the decisions of the Court of Appeal and House of Lords in Stone & Rolls Ltd (in Liquidation) v. Moore Stephens (a firm) [2009] 1 AC 1391.

C.4 Stone & Rolls and victims

109. Stone & Rolls concerned a one-man company (S & R) run by S. S & R was S' alter ego.

110. S fraudulently induced banks to lend money to S & R on the basis of false commercial documents. S then siphoned off the monies which S & R received to associated third parties. The banks having obtained judgment against S & R, the company went into liquidation. S & R's liquidators sued the company's auditors for negligently failing to detect (and warn the company of) S' fraud.

111. By way of defence, the auditors argued that S' knowledge of his own fraud should be attributed to S & R. Given such attributed knowledge on S & R's part, the company must be deemed as having itself defrauded the banks. The company would in effect be relying on the consequences of its own fraudulent act as the basis for an action against the auditors. That (the auditors submitted) was impermissible. It violated the maxim ex turpi causa non oritur actio ("a claim based on a plaintiff's own wrongful act does not give rise to a cause of action").

112. S & R's liquidators countered with the Hampshire Land principle. Since the fraudster S was in control of S & R at the relevant time, it was contended that S' knowledge of his own fraud should not be attributed to S & R.

113. The Court of Appeal held in the auditors' favour.

114. Rimer LJ (with whom Keene LJ and Mummery LJ agreed) stressed that S & R was a one-man company. He pointed out (at para. 73 of the Court of Appeal's judgment) that, given the identity between S & R and S, it was "not a case in which the company was the target, or the victim, if its agent's dishonesty". On the contrary, the company must be regarded as having itself been the fraudster.

115. S & R had argued that the company was itself a victim of S' fraud since, as a result of what S had done, S & R was left "holding the baby" in that by S' acts it became exposed to a claim by the banks.

116. But the Court of Appeal thought that S & R was no more than a "secondary victim". Inevitably, any company used to perpetrate a fraud on a third party would be a secondary victim, once the fraud has been discovered and the fraudster has dissipated the fruits of the crime. The Court of Appeal reasoned that, in judging whether a company is to

be regarded as a primary or secondary victim of a fraud, one needs to consider the effect of the fraud itself and not "the adverse consequences to the company when and if the fraud is found out". See the judgment of the Court of Appeal at paras. 48-74.

117. The House of Lords upheld the Court of Appeal by a majority (Lords Phillips, Brown and Walker). Lords Scott and Mance dissented.

118. Lord Phillips did not think that Hampshire Land was relevant to the outcome of the case on a true analysis. He held that the auditors' duty to warn of fraud was owed to the company. Since S and the company were effectively the same, even if the auditors were in breach of their duty, such breach could not be actionable. This is because the auditors cannot be held liable for having failed to warn the company (that is, S) of a fraud which the company (that is, S) must have been fully aware.

119. Lord Walker "limited [his] ground of decision ... to the proposition that one or more individuals who for fraudulent purposes run a one-man company ... cannot obtain an advantage by claiming that the company is not a fraudster, but a secondary victim" (at para. 174). By the expression "one-man company," Lord Walker meant "a company which has no individual concerned in its management and ownership other than those who are, or must (because of their reckless indifference) be taken to be, aware of the fraud or breach of duty with which the court is concerned" (at para. 161).

120. Lord Brown upheld the Court of Appeal's judgment "on this basis and this basis alone -- the one-man company or sole actor basis" (at para. 201).

121. Lord Scott dissented for 2 reasons (see paras. 113-123). First, he was not satisfied that S was the sole beneficial owner of S & R. Second, given the company's insolvency, he did not think that the ex turpi causa rule was applicable as a matter of policy. Any recovery from the auditors would only benefit the company's creditors, not S. Lord Scott asked rhetorically, "why ... should public policy require the auditors to be relieved of liability for their breach of duty?"

122. Lord Mance noted that S & R was insolvent on relevant audit dates. He thought (at para. 275) that the appeal should be allowed on the ground that the auditor's duty was owed to "the company" and there was no basis in the circumstances of S & R's insolvency to treat "the company" as wholly synonymous with S.

123. In Lord Mance's view, in light of S & R's insolvency, it "was not sufficient for [the auditors] to argue that every relevant emanation of the company consisted of [S] as its directing mind and sole shareholder" (at para. 275). In particular, since S & R was insolvent, the auditors fell under wider duties "to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing" (at paras. 268 and 270, quoting Lord Oliver in Caparo Industries plc. v. Dickman [1990] 2 AC 605 (at para. 214)). These wider duties existed, regardless of whether S & R was or was not a one-man company.

124. For instance, under the applicable accounting standards, the auditors (Lord Mance pointed out) were under a duty to report suspected fraud on the part of a director to an appropriate authority, regardless of whether S was the sole beneficial owner of the company. The auditors may even have had a duty under applicable accounting standards and statute to resign as auditors and to report suspected fraud to S & R's creditors.

125. The auditors failed in relation to their duties owed to the company understood widely, not just in relation to some narrow duty allegedly owed solely to S as beneficial owner of S & R. As a result, the auditors should not (Lord Mance concluded) be allowed to invoke the maxim ex turpi causa to escape liability for the breach of their wider duty.

126. Lord Mance (at para. 227) did not think that Hampshire Land was essential to his reasoning. But he believed that the principle "pointed towards the same result".

127. Contrary to the Court of Appeal's view, Lord Mance saw no difficulty in regarding S & R as a primary victim of S' fraud. He stated (at para. 231):-

> "In this context, there is no difficulty about characterising the whole scheme as one of fraud on the company. The scheme treated the company as a mere tool or conduit and left it at the end with a large deficit, in complete disregard of [S'] duty to respect its separate identity and property. This is in no way to suggest that S & R did not incur liability to the banks. On the contrary, it is because [S] quite wrongly involved it in a scheme of fraud of which this was one aspect that S & R is entitled to claim against him. (In fact of course, the liability which S & R incurred to its banks in deceit did not lead to S & R incurring the loss, or anything like the loss, it claims against [S] -- [S'] abstraction of the money from S & R did that.) I note that, in a passage)para. 5_ with a biblical echo (1 Timothy ch 6, v 7), my noble and learned friend Lord Phillips of Worth Matravers, suggests that S & R started life with nothing, never legitimately acquired anything and cannot realistically be said to have suffered any loss. This either ignores the abstraction of S & R's assets or wrongly assumes that a deficit rendering a company insolvent is not a loss."

128. Here I am unable to hold that MGET was a "secondary victim" (whatever that expression might mean). If the Liquidators are right, a direct consequence of the Ma family directors' scheme of inflated accounts was that MGET paid out nearly $89 million in profits tax which it ought not to have incurred. Even worse, the payments would have been made when MGET was in dire financial straits (if not already insolvent).

129. I do not think that the "loss" of $89 million can be characterised as a mere "adverse consequence" arising out of the discovery of the Ma family directors' fraud. On the contrary, the payment of tax by MGET strikes me as an important component of the alleged fraud. Payment was necessary to imbue the Moulin group with an aura of success in the eyes of the world at large. No doubt the banks with whom MGT dealt were also targets of the fraud. There is nothing inconsistent or improbable about there being more than one "primary" victim to a fraud.

130. I add that I share Lord Mance's scepticism over the distinction between "primary" and "secondary" victims. The distinction (I think) is too vague to be useful in practice.

131. In any event, I do not read the outcome of Stone & Rolls as depending on whether S & R was or was not a primary victim or target.

132. At the end of the day, the majority in Stone & Rolls appear to have decided against S & R's liquidators on the limited basis that S & R was a one-man company. Where the frauster was the "one-man" behind a company, the exception in Hampshire Land was not applicable. This meant that the fraudulent knowledge of S as the "one-man" behind S & R could be attributed to the company.

133. In contrast, although the Ma family directors controlled MGET's board, MGET cannot be described as a one-man company. MGET was instead held, through intermediaries, by a listed company with numerous shareholders among the public. Nothing in Stone & Rolls militates against the application here of the Hampshire Land exception.

134. It follows that, on her second ground the Commissioner wrongly attributed the Ma family directors' mindset to MGET. There was no basis for so doing as a matter of law.

C.5 Conclusion on IRO s. 64

135. The Commissioner erred in refusing to extend time to object under s. 64. The Liquidators' application for an extension of the time in which to object to the Revenue's assessments for the years 1998/99 to 2003/04 should be remitted to the Commissioner for reconsideration.

D. Revision of erroneous returns under IRO s. 70A

D.1 Commissioner's grounds for refusing to revise

136. IRO ss. 70 and 70A provide:-

> "70. Where no valid objections or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under s. 68(1A)(a) or dismissed under sub-s. (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under s. 64(3) or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal, the assessment as made or agreed to be determined

on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value:--

Provided that nothing in this Part shall prevent an assessor from maklng an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year.

70A. (1) Notwithstanding the provisions of s. 70, if, upon application made within 6 years after the end of a year of assessment or within 6 months after the date on which the relative notice of assessment was served, whichever is the alter, it is established to the satisfaction of an assessor that the tax charged for that year of assessment is excessive by reason of an error or omission in any return or statement submitted in respect thereof, or by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value (within the meaning of s. 5(1A), assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment:--

Provided that under this section no correction shall be made to any assessment in respect of an error or omission in any return or statement submitted in respect thereof as to the basis on which the liability to tax ought to have been computed where the return or statement was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return or statement was made...."

137. The Liquidators contend that MGET's returns contained serious error in that the profits stated therein were overstated.

138. In light of my conclusion on IRO s. 64, it is strictly unnecessary to deal with this ground of judicial review.

139. My decision on the extension of time under s. 64 means that the Commissioner has to re-consider whether to grant time for objecting to the assessments of 1998/99 to 2003/04.

140. In contrast, in the case of IRO s. 70A, the 3rd decision was prompted by the Liquidators' letter of 13 November 2009. By that time, the 6 year time limit stipulated in s. 70A meant that the Liquidators were out of time for the years 1998/99, 1999/00, 2000/01, 2001/02 and 2002/03. Even if the Liquidators succeed on s. 70A, the Commissioner would only be required to assess whether the return for 2003/04 should be revised on account of error. Any relief consequent upon an extension under s. 64 would be potentially more wide-ranging in effect than any relief in connection with s. 70A.

141. Mr Burns submits that the Liquidators' s. 70A application made by letter dated 29 March 2007 remained extant, since (as discussed above) the application had not been conclusively answered by the 2nd decision. Mr Burns suggested that, in consequence, only a revision of the returns for 1998/99, 1999/00, 2000/01 should be time-barred under s. 70A.

142. But this seems artificial. Having received the 2nd decision, the Liquidators did not pursue the s. 70A application made by their 29 March 2007 letter. It was not until after more than 2 years that the application was resurrected by the Liquidators' 13 November 2009 letter. In those circumstances, I find it difficult to treat the 2007 application as remaining alive all the way through to 2009.

143. Nonetheless, in deference to counsel's arguments, I shall briefly discuss the validity of the Commissioner's refusal to revise MGET's returns under s. 70A. The Commissioner's reasoning is not actually elaborated in the 3rd or 4th decisions. But the reasoning is clear enough if one reads the 3rd decision in the context of the 1st and 2nd decisions.

144. The Commissioner's case is that there was "no error" in the 2003/04 tax return. This was because according to Extramoney Ltd. v. CIR [1997] HKLRD 387 (Patrick Chan J) (at 396) the word "error" in s. 70A does not encompass "a deliberate act in the sense of a conscientious choice of one out of two or more courses which subsequently turns out to be less advantageous or which does not give the desired effect as previously hoped".

145. According to the Commissioner, if the Ma family directors' mindset is attributable to MGET, then the latter must be treated as having deliberately chosen to overstate profits in its returns. That deliberate choice could not be an "error" on an application of Extramoney.

146. However, given (as I have held) that Hampshire Land is applicable, the Ma family directors' guilty knowledge should not be attributed to MGET. The Commissioner was wrong in law to have made such attribution. MGET cannot be deemed to have deliberately chosen to overstate its returns. Chan J's dictum in Extramoney is inapposite in the present context.

147. By way of footnote, I make 2 further observations on Extramoney.

148. First, Extramoney was a subsidiary of Carrian Holdings Ltd. T and W (who together controlled the Carrian group) attributed certain profits to Extramoney and caused Carrian Holdings to pay tax on those profits. The profits appear to have been made by some other entity (not Extramoney) within the Carrian group. It was unclear why T and W had attributed the profits to Extramoney. There was an allegation that T and W had done so fraudulently in order to give the illusion that Carrian Holdings was profitable. But there was no finding of fraud.

149. The liquidators of Carrian Holdings sought a refund of the tax paid pursuant to s. 70A. The Board of Review held that there was no evidence to explain why the attribution had been made. The Board observed that it was common for a group to transfer profits from one subsidiary to another for taxation purposes. There could be genuine reasons for such treatment and the onus was on the taxpayer to establish that an error had truly been made. The Board did not find on the limited evidence adduced by the liquidators that the taxpayer's burden had been discharged.

150. Chan J held that there could be no error where a deliberate choice had been made to prefer one method of treating tax over another. He added cryptically (at 50): "It is even worse if the deliberate act is motivated by fraud or dishonesty". But Chan J also said (at 51):-

> "I accept that in some cases where it can be proved that the profits stated in the accounts of a taxpayer had in fact not been made, this may be sufficient to show that there has been an error justifying a correction in the assessment."

151. In Extramoney profits had been made and, for some reason, possibly genuine, had been transferred to one subsidiary rather than another. Here the Liquidators' allegation is that MGET has not made any profits at all, precisely the circumstance mentioned in Chan J's dictum (at 51) just quoted.

152. Second, there is no discussion in Extramoney of the rules of attribution, especially when fraud is involved. It appears to have been simply assumed that the relevant state of mind for the purposes of assessing whether there had been a deliberate choice of tax treatment was the knowledge of T and his close associate W.

153. In conclusion, in my judgment, the Commissioner wrongly refused to consider whether MGET's returns for 2003/04 ought to be revised by reason of error. To that extent, the Liquidators' application should be remitted to the Commissioner for reconsideration in connection with s. 70A.

154. I note Mr Beresford's submission that the expression "error or omission" in s. 70A refers to matters requiring a purely "mechanical" revision.

155. I am unsure what purely "mechanical" revisions might be. Mr Beresford said that, by "mechanical" revisions, he meant corrections "which did not require the exercise of a discretion" or "which were capable of being performed by a computer". But those glosses seem to me just as unhelpful as "mechanical".

156. In Extramoney Chan J stated (at 50) that "it would be unwise to attempt to give a comprehensive definition of what is or is not an error or omission which can cater for all situations [falling within s. 70A]". Instead, "[i]t would be easier to identify cases in which it is not". I agree. I see no basis for reading the word "mechanical" (or any other gloss) into s. 70A to limit the scope of the provision.

E. Proof of debt

157. The proof of debt relates to additional assessments for 1999/00, 2001/02 and 2002/03 and estimated assessments for 2004/5 and 2005/6.

158. My conclusion on IRO s. 64 may have a direct impact on the additional assessments.

159. If the Commissioner (upon remittal of the Liquidators' application to her) extends the time for objecting to the Revenue's assessments for the years 1998/99 to 2003/4, she will have to consider the Liquidators' objections in due course. If she afterwards accepts those objections in whole or part, the Revenue's assessments for those years (including the additional assessments) would have to be revised significantly downwards in consequence. For example, if she accepted that MGET made no profits in the relevant years, the initial assessments and additional assessments would have to be revised to nil.

160. On the other hand, my conclusion on IRO s. 64 may have an indirect impact on the estimated assessments.

161. By s. 64(1)(b), the Commissioner is not bound to consider objections in relation to the years 2004/05 and 2005/06 unless the Liquidators file returns for those years within any extended time allowed by the Commissioner. Nonetheless, because the assessments for 2004/05 and 2005/06 would have been based on the Commissioner's assessments of MGET's profits tax for the years 1998/99 to 2003/04, any revision in the assessments for those latter years could have a knock-on effect on the estimated assessments.

162. Thus, subject to one matter, there is nothing that I need to order at this stage in connection with the assessments underlying the Commissioner's proof of debt. In light of my conclusion on s. 64, one has to "wait and see" what happens as a result of the Commissioner's reconsideration of the Liquidators' application for an extension of the time in which to object to the 1998/99 through 2003/04 assessments.

163. There is, in particular, no need for me to order a stay of any payment obligation arising from the filing of the proof of debt. If (on the Commissioner's reconsideration) MGET's profits tax liability is found to be nil, then the Government would simply come under an obligation to refund to the Liquidators any monies paid to the Revenue on the proof of debt.

164. The one outstanding issue is whether a consideration of the assessments underlying the proof of debt is precluded by the doctrine of res judicata, as a result of the decisions of Kwan JA and the Court of Appeal. Those decisions set aside the Liquidators' rejection of the proof of debt. But there was a proviso. The outcome in the proof of debt proceedings was qualified by Kwan JA as being "without prejudice to any application that ... may be brought by the [Liquidators] to challenge the assessments in accordance with the procedure laid down in the [IRO]."

165. In my view, there is no res judicata which bars the Liquidators from now challenging the assessments underlying the proof of debt by recourse to the procedures in IRO ss. 64 and 70A. Kwan JA expressly acknowledged that the Liquidators could mount such a challenge. The Court of Appeal did not suggest otherwise in affirming Kwan JA's judgment.

166. The present situation is analogous to that where P obtains a default judgment against D and (the judgment remaining unsatisfied) P takes out a bankruptcy petition against D. In the bankruptcy proceedings, it is not open to D to argue the merits of the default judgment. This is because the default judgment is valid unless and until set aside. It is, however, open to D to mount a collateral attack by applying in separate proceedings for the default judgment to be set aside. D can then resist a bankruptcy order, if D manages to set aside the default judgment in the separate proceedings.

167. Here, the proof of debt was based on assessments which have not to date been set aside. Unless successfully challenged within a stipulated period, the law treats the Revenue's assessments as final and conclusive. On that premise, the Court could only regard the proof of debt as effective.

168. But it is different issue whether the assessments underlying the proof of debt are or are not still susceptible of being set aside in collateral proceedings before the Commissioner pursuant to ss. 64 and 70A or before this Court by way of judicial review. The upholding of the proof of debt does not imply that the assessments underlying the proof were validly made in the first place and cannot now be re-opened under IRO ss. 64 or 70A. The latter issues were not before Kwan JA. She went out of her way to observe that she should not be regarded as having determined them.

169. Mr Beresford faintly argues that, because the formal Order drawn up following Kwan JA's judgment does not mention her proviso, I must ignore the proviso. I am unable to accept this. There was no need to include Kwan JA's qualification in the Order. Instead Kwan JA's Order has to be read in the context of what is stated in her judgment and with common sense.

170. I conclude that, following Kwan JA's judgment and that of the Court of Appeal in the proof of debt proceedings, it remained open to the Liquidators to challenge the assessments underlying the Commissioner's proof of debt.

IV. CONCLUSION

171. The 3rd and 4th decisions are quashed.

172. The Liquidators' application for an extension of time under IRO s. 64 is to be remitted to the Commissioner for reconsideration.

173. The Liquidators' application for a revision of MGET's return for 2003/04 under IRO s. 70A is to be remitted to the Commissioner for reconsideration.

174. There will be a Declaration that the Liquidators are not presently barred from challenging the assessments underlying the Commissioner's proof of debt by way of procedures laid out in the IRO or by way of judicial review.

175. The Liquidators did not pursue their claim for relief against the Board. In the circumstances, the Liquidators' claim against the Board is dismissed. In my view, it was unnecessary to have joined the Board to these proceedings.

176. There will be no order in relation to the costs incurred by the Liquidators or the Board in relation to the judicial review against the Board. I envisage that the costs incurred by the Liquidators or the Board in relation to the judicial review against the Board would be minimal.

177. There will be an Order Nisi that the Commissioner pay the Liquidators' costs of the judicial review proceedings against the Commissioner. I anticipate that the latter costs constitute the bulk of the Liquidators' costs in these proceedings.

178. All costs are to be taxed if not agreed.

179. There will be liberty to apply.

(A T Reyes)
Judge of the Court of First Instance
High Court

Mr Ashley Burns, SC, instructed by Messrs Karas Lawyers, for the Applicant
Mr Roger Beresford, instructed by the Department of Justice, for the 1st Respondent
The 2nd Respondent, in person, absent