HCIA3/2004

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

INLAND REVENUE APPEAL NO.3 OF 2004

BETWEEN

THE COMMMISSIONER OF INLAND REVENUE Appellant

and

YAU LAI MAN, AGNES trading as L.M. YAU & COMPANY Respondent

Before : Hon Yam J in Court
Date of Hearing : 7 September 2004
Date of Judgment : 7 September 2004
Date of Written Judgment : 24 June 2005

J U D G M E N T

Background

1. This is an appeal by the Commissioner of Inland Revenue ("the CIR") by way of a case stated ("the Case Stated") pursuant to section 69 of the Inland Revenue Ordinance, Cap.112 ("the IRO") against the decision of the Board of Review ("the Board").

2. The taxpayer was one Ms Yau Lai Man, Agnes ("the Taxpayer") who commenced her practice as a certified public accountant under the name of L.M. Yau & Company ("the Firm") on 20 October 1994.

3. On 18 October 1996, a tax assessor issued to the Firm the Computation of Loss for the year of assessment 1995/96, and on 26 February 1999 issued another Computation of Loss to the Firm for the year of assessment 1997/98. They are respectively called "the 1996 Computation of Loss" and "the 1999 Computation of Loss".

4. The Acting Deputy CIR, by the Determination dated 2 May 2003, confirmed the Profits Tax Assessments for the years 1995/96, 1996/97 and 1997/98 on the basis that the entire management fees paid by the Taxpayer and the Firm to Broad Wealth International Limited ("BWIL") were commercially unrealistic and were therefore disregarded under section 61 of the IRO.

5. On the other hand, the Taxpayer claimed that the entire management fees paid to BWIL should be deducted in ascertaining the assessable profits of the Firm.

6. The Taxpayer then appealed to the Board against the Determination on two grounds, namely:

(1) section 61 of the IRO did not apply because the transactions were not artificial or fictitious; and

(2) the Profits Tax Assessments for the years of assessment 1995/96 and 1997/98 had been regarded as final and conclusive under section 70 of the IRO and therefore should not be re-opened for the purpose of adjusting the management fee claims.

7. The Board rejected the Taxpayer' s 1st ground of appeal on section 61. In the appeal herein, the Taxpayer has not sought to challenge the Board' s conclusion on section 61. Therefore there is no issue in the present appeal on section 61.

8. On the Taxpayer' s 2nd ground of appeal on section 70, the Board found that the 1995/96 Assessment and the 1997/98 Assessment were *additional* assessments and the IRD was not entitled to issue such assessments for these two years of assessment. The Determination in respect of the assessments for these two years was accordingly set aside by the Board.

The case stated

9. By the Case Stated and the supplemental questions to the Case Stated, 11 questions of law have been stated by the Board for the opinion of the court, namely:

"(1) Whether the Board erred in law in coming to the view that the Computation of Loss issued to the Firm on 18.10.96 for the year of assessment 1995/96 ('the 1996 Computation of Loss') amounted to an 'assessment' for the purpose of sections 60 and 70 of the IRO.

(2) Whether the Board erred in law in coming to the view that the Computation of Loss issued to the Firm on 26.02.99 for the year of assessment 1997/998 ('the 1999 Computation of Loss') amounted to an 'assessment' for the purpose of sections 60 and 70 of the IRO.

(3) Whether on the facts found and in the light of the IRD's letter dated 31.07.01, the Board erred in law in holding that the IRD was not entitled to issue the 1995/96 Assessment on 19.01.01 on the ground that the assessment thereunder was or amounted to an additional assessment.

(4) Whether on the facts found and in the light of the IRD's letter dated 31.07.01, the Board erred in law in holding that the IRD was not entitled to issue the 1997/98 Assessment on 19.01.01 on the ground that the assessment thereunder was or amounted to an additional assessment.

(5) Whether the Board erred in law in failing to apply the proviso to section 70 of the IRO to hold that the IRD was entitled to issue the 1995/96 Assessment and the 1997/98 Assessment on 19.01.01.

(6) Whether the Board erred in law in applying the test suggested in PG Willoughby and AJ Halkyard, Encyclopaedia of Hong Kong Taxation, vol 4, para [18543], namely 'whether a reasonable man, looking objectively, would conclude from all the circumstances that the matter in dispute had been sufficiently brought to the assessor's attention that one assumes the assessor had decided the matter in favour of the taxpayer' ('the Reasonableness Test') in construing the proviso to section 70 of the IRO.

(7) Whether the Board erred in law in setting aside the Determination in respect of the assessment issued pursuant to the 1995/96 Assessment and whether such part of the Determination should be restored.

(8) Whether the Board erred in law in setting aside the Determination in respect of the assessment issued pursuant to the 1997/98 Assessment and whether such part of the Determination should be restored.

(9) Whether the Board should have considered the 1995/96 Assessment as not validly issued and void on the ground that the income assessed thereby had already been assessed under previous valid personal assessment.

(10) Whether the Board should have considered the 1997/98 Assessment as not validly issued and void on the ground that the income assessed thereby had already been assessed under previous valid personal assessment.

(11) Whether the Board erred in law not to order the CIR to refund the tax paid in its Decision to set aside the Determination in respect of the 1995/96 Assessment and 1997/98 Assessment."

Questions (1) to (8) were posed by the Board at the invitation of the CIR and Questions (9) to (11) were posed at the invitation of the Taxpayer.

10. The aforesaid 11 questions posed by the Board are concerned with whether it had misdirected itself in law. They are answered hereinbelow in the appropriate groupings.

Questions (1) and (2) – whether the 1996 and 1999 computations of loss were the "assessments" for the purposes of sections 60 and 70 of the IRO

11. The CIR submitted before the Board that the 1996 Computation of Loss and the 1999 Computation of Loss were *not* assessments within the meaning of section 70, and therefore the 1996/96 Assessment and the 1997/98 Assessment issued in January 2001 were not additional assessments within the meaning of section 60. However the Board rejected this submission of the CIR. In respect of *additional assessment*, section 60(1) provides as follows:

> "Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, and the provisions of this Ordinance as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder …."

12. Further, section 70 provides that assessments or amended assessments are final as follows:

> "Where no valid objection 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 section 68(1A)(a) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 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 or 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 making 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."

13. The first question to decide is what is the meaning of the word "assessment" in section 70 of the IRO.

"Assessment"

14. The statute does not define the word "assessment" at all. It has been said in the case of *Medical Council of Hong Kong v. Chow Siu Shek* (2000) 3 HKCFAR 144, at 154, that:

> "…. When the true position under a statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting. Furthermore it is necessary to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them." (*per* Bokhary PJ)

15. Thus in order to construe the word "assessment" in the context of the statute, certain relevant provisions must be considered which I shall state hereinbelow.

16. Under section 51(1) of the IRO, an assessor may give notice in writing to any person requiring him within reasonable time stated in such notice to furnish any return for tax chargeable under the IRO.

17. Section 59 of the IRO provides for the making of assessments. If an assessor is of the opinion that a person is chargeable with tax under the IRO, section 59(1) imposes a statutory duty on the assessor to make an assessment on that person "as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1)".

18. Under the same section 59, an assessment may be made in one of the following three ways, namely:

(1) where a person has furnished a return in accordance with the provisions of section 51, the assessor may accept the return and make an assessment accordingly under section 59(2)(a);

(2) where a person has furnished a return in accordance with the provisions of section 51, if the assessor does not accept the return, the assessor may estimate the sum in respect of which the taxpayer is chargeable to tax and make an assessment accordingly under section 59(2)(b); or

(3) where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, the assessor may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly under section 59(3).

19. Mr Eugene Fung, counsel for the CIR thus submitted that in this statutory context, an "assessment" is the administrative act or process of assessor's ascertainment of the *positive* amount of tax chargeable to a particular taxpayer. It is not a piece of paper in which there was an "assessment". This meaning is consistent with the meaning of "assessment" as decided in an Australian case — *The King v. Deputy Federal Commissioner of Taxation (SA), ex parte Hooper* (1926) 37 CLR 368. At p.373 Issacs J said:

> "An 'assessment' is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes in his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment.' … But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the Commissioner."

Apparently at the time of the case of *Hooper*, there was no statutory definition of the word "assessment" in the relevant Australian tax legislation.

20. The contention that an "assessment" is only concerned with a *positive* amount of tax to be payable is supported by the express wording of sections 59(1), 59(1A), 62, 70 and 70A of the IRO as follows:

(1) Section 59(1) expressly imposes a statutory duty on the assessor to make an assessment only where the assessor is in the opinion that a person is chargeable with tax under the IRO. Accordingly, the assessor shall be under no statutory

duty under section 59(1) to make any assessment if he is of the opinion that a person is not chargeable with the tax under the IRO, as for instance, the business is suffering a loss in the relevant period of assessment.

(2) Section 59(1A) provides that an assessor is not obliged to proceed to make an assessment in certain circumstances where there is no tax liability, namely: where the taxpayer has elected personal assessment under section 41 on his total income which would result in a refund becoming due of the whole of the amount which he might lawfully be assessed for property tax if such an amount were paid.

(3) Section 62 expressly refers to the words "due date for payment" in the context of a notice of assessment. This suggested that an assessment is only concerned with positive amount of tax which is payable.

(4) Section 70 expressly refers to, *inter alia*, "an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby". Accordingly, an "assessment" will only be made where there is in existence "assessable income or profits or net assessable value assessed thereby". There is no reference to "assessable loss".

(5) Section 70A(1) expressly refers to "net assessable income or profits assessed.

21. Thus, I accept the submission of the CIR that there is no "assessment" if the taxpayer has suffered a loss and has no assessable income or profits. A "nil assessment" is a contradiction in terms which was decided in the case of *Littman v. Barrow* [1951] Ch 993 at 1002, *per* Cohen LJ:

> "… although the Inland Revenue authorities may at times issue a 'nil assessment', that is merely a convenient method of informing the taxpayer that no charge is being made. In its literal meaning 'nil assessment' is a contradiction in terms."

22. Authorities in support of the meaning of assessment requiring a *positive* amount of tax to be payable are quite numerous and they are summarized as follows:

(1) In *D2/82* (1982) 1 IRBRD 410, the Board of Review held that assessor's computation of loss was *not* an assessment, but an indication of what view the assessor took.

(2) In *D5/88* (1988) 3 IRBRD 144, the Board of Review held that the word "assessment" connoted a liability to tax and a "loss computation" implied that there was no liability to tax and hence no assessment could be made.

(3) In Australia, three cases supported the aforesaid notion. In *Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243, Kitto J said at p.252:

> "… the definition of 'assessment' means, in my opinion, the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that *a specified amount of money will become due and payable as the proper tax* in that case … nothing done in the Commissioner's office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment." [*emphasis added*]

(4) In *Deputy Commissioner of Taxation v. Sheehan* (1986) 18 ATR 194, Tadgell J said at 201:

> "The imposition of a liability is a necessary feature of an assessment under Pt IV of the Act, and a nil assessment is an impossibility."

(5) The majority of the High Court of Australia in *Federal Commissioner of Taxation v. Ryan* (2000) 201 CLR 109, it was held that a "nil tax notice" or other document indicating that there was no tax payable was *not* an assessment for the purposes of the relevant tax legislation.

23. The Privy Council's decision on appeal from New Zealand in the case of *Lloyds Bank Export Finance Ltd v. CIR* [1991] 2 AC 427 appears to decide to the contrary. This is relied on by the Taxpayer. However, the issue in the *Lloyds Bank* case was "whether the determinations … by the commissioner … that no tax was payable by the taxpayer constituted assessments for the purposes of section 25(1)" in the New Zealand tax legislation. Lord Jauncey in the judgment of the Privy Council said at p.437 that:

> "Their Lordships have no doubt that the arguments for the taxpayer are to be preferred and that the commissioner's statutory duties under section 19 in relation to a taxpayer's return extend not only to the production of a result which produces taxable income but also to results which produce a nil return or a loss. Any other construction would produce the anomalies and illogicalities already referred to."

24. The Privy Council's decision was based on a proper interpretation of section 19 of the New Zealand Income Tax Act 1976, which imposed a statutory duty on the commissioner to make assessments. However, section 19 of this Act is fundamentally different from section 59(1) of our IRO, which is the relevant provision dealing with the assessor's statutory duty to make assessment. The assessor's statutory duty to make assessment under section 59(1) of the IRO only arises where the assessor is in the opinion that a person is chargeable with tax under the IRO.

25. Further, section 25 of the New Zealand Income Tax Act 1976, which deals with the finality of the assessment, is also fundamentally different from section 70 of the IRO. Thus it cannot be said that the *Lloyds Bank* case is authority to suggest that new assessment is an assessment and it is applicable to the context of assessment in Hong Kong.

26. I have not lost sight of the fact that the words "assessed loss" appeared several times on the 1996 and 1999 Computations of Loss. However, I accept the CIR's submission that these words cannot affect the proper interpretation of the word "assessment".

27. Section 62(1) provides for the issuing of notice of assessment as follows:

> "The Commissioner shall give a notice of assessment to each person who has been assessed stating the amount assessed, the amount of tax charged, and such due date for payment thereof as may be fixed by the Commissioner."

28. There is, therefore, a distinction between a computation of loss and a notice of assessment. The 1996 and 1999 Computations of Loss cannot be notices of assessment because a notice of assessment must be issued by the CIR, under section 62(1), or a Deputy or Assistant Commissioner under section 3A(1). However, the 1996 and 1999 Computations of Loss were only issued by an assessor. Further, the 1996 and 1999 Computations of Loss do not state "the amount of tax charged, and such due date for payment thereof" as stipulated in section 62(1).

29. The IRO expressly recognizes the distinction between an "assessment" and a "computation". Section 19D(1) is concerned with computation of losses after 1 April 1975 and provides as follows:

> "For the purposes of section 19C, the amount of loss incurred by a person chargeable to tax under this Part for any year of assessment shall be *computed* in like manner and for such basis period as the assessable profits for that year of assessment would have been *computed*." *(emphasis added)*

The word "computed" is used and not the word "assessed".

The board's decision and its errors

30. The Board rejected the CIR's contention that a computation of loss cannot amount to an "assessment" by the following three reasons, namely:

(1) If the CIR's contention were correct, the Taxpayer would not have any statutory right to object to the computation of loss.

(2) If the CIR's contention were correct, the IRD would have unlimited time for review in case of a loss and not limited to six years under section 60.

(3) The loss of the Firm stated in the 1996 and 1999 Computations of Loss had been incorporated in the Notices of Personal Assessment for the Taxpayer for the years of assessment 1995/96 and 1997/98, which had become final and conclusive by virtue of section 70. Therefore, if the 1996 and 1999 Computations of Loss were open to review, the Notices of Personal Assessment would implicitly have to be reopened.

31. I shall deal with the rationale of the Board's decision as follows:

(1) No statutory right to object

32. If the CIR's contention that a computation of loss cannot amount to an "assessment" is correct, it follows that a taxpayer would have no statutory to object to anything stated in the computation of loss. This was made clear by Godfrey J (as he then was) in *CIR v. Malaysian Airline System Bhd* [1992] 2 HKC 468. At page 469, Godfrey J said:

> "… the Taxpayer had no right or need to challenge ... the loss calculations made by the assessor…"

33. This result is clear from section 64(1) which provides, *inter alia*, that the objection must be made "within 1 month after the date of the notice of assessment". Since the computation of loss simply cannot constitute a notice of assessment which is defined in section 62, a taxpayer who receives a computation of loss cannot make any objection against that computation pursuant to section 64. However, he can object to a notice of assessment when it incorporated the "loss" of the previous year(s).

(2) Unlimited time for review

34. If the CIR's contention that a computation of loss cannot amount to an "assessment" is correct, it also follows that the IRD would have an unlimited time for review in case of a loss. The Board's objection of this result is that it would be contrary to the "rationale behind Section 70", namely, "finality".

35. However, on a proper interpretation of section 70, the provision is only intended to achieve finality where the taxpayer has taxable income. This is plain for the following words from section 70:

> "… the assessment as made or agreed to or 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…" (emphasis added)*

36. It is therefore a matter for the legislature and not for the court to decide whether there should be finality in relation to a computation of loss. However, if a computation of loss had never been incorporated in the ensuing years in the calculation of profits by setting off losses in the previous years, one would wonder why the question of finality is important to the taxpayer. If it is so incorporated in the ensuing years, then the assessment of profits by taking into account of the losses in the previous year could be a subject matter of objection once the notice of assessment is issued to the taxpayer.

(3) Notices of Personal Assessment

37. It is clear that the 1996 and 1999 Computations of Loss had been incorporated in the Notices of Personal Assessment for the Taxpayer for the years of assessment 1995/96 and 1997/98 and they were issued on 18 October 1996 and 16 April 1999. However, the Taxpayer did not object to them within one month. Accordingly, it is accepted that these Notices of Personal Assessment had become final and conclusive pursuant to section 70 subject to the proviso in section 70. In other words, the finality was not achieved because the Taxpayer had no right to object to the Computations of Loss. The finality was because the Taxpayer did not object to the Notices of Personal Assessment within one month after they were issued.

38. Thus the Board could not rely on the aforesaid facts to say that the 1996 and 1999 Computations of Loss have also become final and conclusive.

39. In other words, the Board erred in considering whether the Notices of Personal Assessment have become final and conclusive under section 70 and then reached its conclusion that the Computations of Loss were "assessments". The fact that the Notices of Personal Assessment have become final and conclusive does not affect the aforesaid analysis of whether the 1996 and 1999 Computations of Loss were "assessments" for the purpose of section 70.

Conclusion on questions (1) and (2)

40. For the aforesaid reasons, the Board did err in law in coming to the view that the 1996 and 1999 Computations of Loss amounted to an "assessment" for the purpose of sections 60 and 70 of the IRO. My answers to Questions (1) and (2) would therefore be in the affirmative.

Questions (3) and (4) – whether the board erred in law in holding that the IRD was not entitled to issue the 1995/96 and 1997/98 assessments on the ground that they were or amounted to additional assessments

41. The Board concluded that they were additional assessments and the IRD was accordingly not entitled to issue them. The CIR's case is that the two assessments were *not* additional assessments. They were original assessments, and not additional assessments, for the simple reason that there was no previous assessment for the relevant year of assessment.

42. It also follows from the CIR's contention that the 1996 and 1999 Computations of Loss were not assessments and therefore the two assessments were not *additional* assessments.

43. The Board observed that the two assessments were marked with the word "Additional". However, the mere label on the tax computations given rise to the notices of assessment cannot determine the true nature of the notices of assessment. By virtue of section 63 of the IRO, the validity of the notices of assessment should not be affected by any mistake or defect in the tax computation.

44. In any event, the following should be noted, namely:

(1) the first page of the two assessments described the assessments as "Notice of Assessment", and not "Notice of Additional Assessment"; and

(2) the assessable profits as computed in the Profits Tax Computations were adopted and shown in the first page of the two assessments.

45. In any event, even if the CIR's contention that the 1996 and 1999 Computations of Loss were not assessments is wrong, this would only make the 1995/96 and the 1997/98 Assessments additional assessments. These additional assessments would have been validly issued on 19 January 2001 pursuant to section 60 of the IRO because they were issued "within 6 years after the expiration" of the relevant year of assessment. It is unclear why the Board concluded that the IRD was not entitled to issue the 1995/96 and 1997/98 Assessments on the ground that they were or amounted to additional assessments.

46. For the aforesaid reasons, the Board, in my opinion, did err in law in holding that the IRD was not entitled to issue the two assessments on the ground that they were or amounted to additional assessments. Accordingly, Questions (3) and (4) should be answered in the affirmative.

47. As a last resort under these two questions, the Taxpayer submitted that they have a "legitimate expectation" that there would not be any further assessment on the two relevant years of assessment after they received the computation of loss. However, this is an appeal by way of Case Stated and not judicial review of the Board's decision. This issue has never been part and parcel of the Case Stated.

Question (5) – whether the proviso to section 70 applied to the issue of the 1995/96 and 1997/98 assessments

48. This question would only apply if the 1996 and 1999 Computations of Loss were assessments for the purposes of sections 60 and 70, and the two assessments were additional assessments.

49. However, even these two assessments were validly issued pursuant to:

(1) section 60 because they were issued within the six-year time limit; and

(2) the proviso to section 70.

50. Section 70 provides, *inter alia*, that an assessment will become final and conclusive:

(1) if no valid objection or appeal is lodged within the relevant time limit; or

(2) where an appeal against an assessment has been withdrawn or dismissed; or

(3) when agreement is reached between the taxpayer and the assessor upon the raising of an objection; or

(4) where the amount of assessable income or profits or net assessable value has been determined on objection or appeal.

51. The Taxpayer did not make any objection against the assessments, whether under section 64 or otherwise. Accordingly, they would be deemed, under section 70, to be final and conclusive after the time limit for raising objections had expired pursuant to section 64(1), namely, 18 November 1996 and 26 March 1999 respectively.

52. However, the finality and conclusiveness of the assessment is subject to the proviso set out in section 70, which provides that:

> "… nothing in this Part shall prevent an assessor from making 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."

53. According, the proviso allows an assessor to make an additional assessment which does not involve re-opening any matter which has been determined on objection or appeal for the years of assessment 1995/96 and 1997/98. Thus:

(1) The two assessments would have been validly issued on 19 January 2001 under section 60 as additional assessments because they were issued "within 6 years after the expiration" of the relevant year of assessment.

(2) Moreover, the two assessments did not involve re-opening of any matter which has been determined on objection or appeal for the years of assessment 1995/96 and 1997/98. The Taxpayer did not object or appeal against the two Computations of Loss.

54. For the aforesaid reasons, the Board did err in failing to apply the proviso to section 70 of the IRO to hold that the IRD was entitled to issue the two assessments and Question (5) would be answered in the affirmative.

Question (6) – whether the board erred in appllying the reasonableness test to construe the provision to section 70

55. The Board stated that the proviso to section 70 must be read together with section 60 and the common law. By the common law, the Board referred to the following passage in (P.G. Willoughby and A.J. Halkyard), *Encyclopaedia of Hong Kong Taxation*, Vol.4, para. [18543]:

> "[*Scorer v. Olin Energy System Ltd*] is authority for the proposition that where one assessor allows a claim to tax relief after all material information has been made available to him, it is not open to another assessor to take a different view at as later date, perhaps because the first assessor overlooked the existence of or significance of information supplied by the Taxpayer, and raise an additional assessment. The test appears to be whether a reasonable man, looking objectively, would conclude from all the circumstances that the matter in dispute had been sufficiently brought to the assessor's attention that one assumes the Assessor had decided the matter in favour of the Taxpayer…. In short, where all relevant facts have been disclosed and an Assessor makes a possibly incorrect assessment in the Taxpayer's favour because he did not check the tax return and supporting accounts with sufficient care, it will not be possible to raise an additional assessment based on the discovery of new facts because there were none."

56. In *Scorer v. Olin Energy Systems Ltd* [1985] AC 645, the taxpayers in support of an appeal against an estimated assessment had submitted computations which showed losses brought forward set off against the profits of the year under consideration. It was apparent that the losses deducted were those which had arisen, in recent years, in a trade which had been discontinued. Such losses therefore should not have been allowed as a deduction from the profits of another trade in a later year. The inspector accepted the computations and appeal was determined by agreement accordingly.

57. However, subsequently the file was passed to another inspector who spotted the error in the computation and raised an additional assessment, on the grounds that he had "discovered" an error in the computation and that it was not covered by agreement because the first

inspector had not had his attention particularly drawn to this issue, and no mention of the losses and their offset had been mentioned in correspondence.

58. A majority of the Court of Appeal and a unanimous House of Lords upheld the taxpayers' appeal on the ground that the issue was covered by the earlier agreement. The following passage from the judgment of Fox LJ was specifically approved by Lord Keith of Kinkel (at p.658D-G):

> "It is true that the actual point of law was never formulated. But I do not think that can be necessary. The section is dealing with agreements as to how an assessment shall be dealt with. It is not dealing with the formulation of points of law. We do not know why the inspector agreed the computation. He may have made an error of law or he may have misunderstood the facts or he may have failed to think about the matter at all. Subject to the question, which I mention later, as to whether the taxpayer has provided misleading information, I do not see why the circumstances that the inspector has made a mistake either at law or fact should take the case outside s.510. Essentially the question is not why he agreed but whether he agreed. The purpose of the section must be to protect the taxpayer by producing finality, the Parliament, I would suppose, must have contemplated that the taxpayer would be protected, even though the inspector made some error in his view of the facts or the law. That is a likely, if not the most likely, event in which the question of going back on the agreement would ever arise at all."

59. Lord Keith formulated the principle (at p.658A-B) in the following way:

> "The situation must be viewed objectively, from the point of view of whether the Inspector's agreement to the relevant computation, having regard to the surrounding circumstances including all the material known to be in his possession, was such as to lead a reasonable man to the conclusion that he had decided to admit the claim which had been made. In my opinion that question falls to be answered in the affirmative."

60. Thus, *Scorer* was concerned with whether an agreement had been reached between the Revenue and the taxpayer under section 510 of the UK Income Tax Act 1952 ("the Act"), which provided as follows:

> "Subject to the provisions of this section, where a person gives notice of appeal to the general commissioners, the special commissioners or the board of referees against an assessment to, or a decision of any kind with respect to, income tax other than surtax or surtax, and, before the appeal is determined by the commissioners or board, the surveyor or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision should be treated as upheld without variation, or as varied in a particular manner or

> as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the commissioners or board had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be." (quoted at [1985] AC 656C-F)

61. The Reasonableness Test propounded by Lord Keith was for deciding whether inspector had, objectively viewed, accepted the claim of the taxpayers. The crucial fact in *Scorer* was that the first inspector had agreed the computations and issued a revised assessment showing the taxpayers' liability as nil. This agreement was reached pursuant to section 510(1) of the Act. The position in the UK was that once an agreement had been reached pursuant to section 510(1) of the Act, it was not open to make an additional assessment. As Lord Keith said at pp.656F-657B:

> "It was settled by *Cenlon Finance Co Ltd v. Ellwood* [1961] Ch 50; [1961] Ch 634 that where an agreement has been arrived at under section 510 of the Act of 1952 it is not open to the inspector to make an additional 'discovery' assessment under section 5(3) of the Act of 1964 (the material provisions of which were at that time to be found in section 41(1) of the Act of 1952)."

62. Accordingly, the only reason why the second inspector could not make an additional assessment in *Scorer* was because of the existence of the agreement under section 510 of the Act.

63. Thus, *Scorer* is not an authority for the propositions set out in the passage in P.G. Willoughby and A.J. Halkyard, *Encyclopaedia of Hong Kong Taxation*, Vol.4, para.[18543] as cited hereinbefore.

64. In fact an agreement pursuant to section 510 of the Act is similar to an agreement pursuant to section 68(1C) of the IRO. However, in the present case, there is simply no agreement between the CIR and the Taxpayer pursuant to section 68(1C) of the IRO. Accordingly, the principles laid down in *Scorer*, in particular the Reasonableness Test, are not applicable at all in the present case.

65. In the end the Board did err in law in applying the Reasonableness Test to construe the proviso to section 70, and Question (6) would be answered in the affirmative.

Questions (7) and (8) – whether the determination in respect of the 1995/96 and 1997/98 assessments should have been set aside

66. These questions mean whether the Board erred in setting aside the two assessments. For the aforesaid reasons as stated under Questions (1) to (6), the Board did err in setting aside the two assessments.

67. The primary case of the CIR is that the 1996 and 1999 Computations of Loss were not "assessments". Accordingly:

(1) The Taxpayer could not have lodged a valid objection or appeal pursuant to section 64 within one month after the date of notice of assessment, as a computation of loss is not a notice of assessment within the meaning of section 62.

(2) In the absence of a statutory right to lodge a valid objection or appeal, section 70 does not apply. Section 70 would only apply to render an assessment final and conclusive in certain defined circumstances as stated in para. 50 hereinbefore. Unless section 70 is satisfied, no assessment would become final and conclusive: *CIR v. Nina T.H. Wang* [1993] 1 HKLR 7 at 22 (*per* Fuad VP).

(3) There were no restrictions imposed by any statutory provisions in the issue of the two assessments, which means that they were validly issued.

68. Alternatively, the CIR's case which is accepted by this court is that:

(1) If the two Computations of Loss were "assessments" and the two assessments were additional assessments, they were in any event validly issued pursuant to section 60 of the IRO.

(2) The two assessments were validly issued pursuant to the proviso to section 70 of the IRO.

69. Accordingly, the two assessments were, in any event, validly issued, and Questions (7) and (8) would be answered in the affirmative, i.e. the Board did err in setting aside the two Determination.

Questions (9) and (10) – whether the two assessments were invalidly issued and void on the ground that the income assessed thereby had already been assessed under the previous personal assessment

70. In this respect the Taxpayer had never argued before the Board, whether in her written submissions or orally, that the two assessments were invalidly issued and void on the ground that there were previous personal assessments. In para.7.4 of the Case Stated, the Board noted that this new point was only raised by the Taxpayer in a letter dated 24 December 2003, which was after the Board had delivered its Decision.

71. Accordingly, since this point has not been argued before the Board, it can hardly be said that the Board erred in law in failing to decide it in favour of the Taxpayer.

72. In any event, the CIR submitted that the Taxpayer's contention is misconceived. I entirely agree. The Taxpayer, in fact, submitted that her income for the years 1995/96 and 1997/98 were assessed under personal assessment and they should not be subject to the subsequent two assessments which dealt with the same income and, accordingly, the two assessments should be held to be invalidly issued and void.

73. However, profits tax and personal assessments were separate matters governed by different parts of the IRO: Part IV and Part VII of the IRO. Section 41(1) of the IRO gives a taxpayer a choice to elect for personal assessment, which may give certain fiscal advantages to the taxpayer. To ascertain the total income of the taxpayer, section 42(2)(b) allows deduction from the total income "the amount of the individual's loss or share of loss for that year of assessment computed in accordance with Part IV".

74. Accordingly, personal assessment does not affect the making of a profits tax assessment for the following reasons:

(1) section 42 of the IRO, *inter alia*, makes it clear that personal assessment will follow a profit tax assessment;

(2) section 64(7)(c) of the IRO, *inter alia*, provides that no objection by a person to a personal assessment on his total income shall authorize the revision of any amount which has been included in his total income pursuant to section 42(1), where such amount has been the subject of, or formed a part of, any assessment made under profits tax which has become final and conclusive under section 70.

75. Accordingly, Questions (9) and (10) would be answered in the negative.

Question (11) – whether the board erred in law not to order the CIR to refund the tax and in respect of the two assessments

76. Section 68(8)(a) of the IRO provides as follows:

> "After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon."

77. It does not appear that the Board after hearing the appeal has the power to order the CIR to refund the tax paid by the taxpayer even if the taxpayer becomes successful in the appeal.

78. In the present case, the Taxpayer did not in any event ask the Board at the hearing to make an order for the refund of the tax.

79. However, I was told by counsel for the CIR that he is not taking this technical point and if the appeal fails before me they will certainly refund the tax paid. For the aforesaid reasons that the two assessments were not invalidly issued, there is no question of any refund by the CIR to the Taxpayer.

Final conclusion

80. For the aforesaid reasons, my answers to the 11 questions are as follows:

(1) Questions (1) to (8) are answered in the affirmative; and

(2) Questions (9) to (11) are answered in the negative.

81. In the end, I accepted the submissions of Mr Fung entirely. I m grateful for his detail and well presented submissions. This appeal is allowed with costs to the appellant.

(D. Yam)
Judge of the Court of First Instance
High Court

Mr Eugene Fung, on fiat, for Secretary for Justice, for the Appellant

Respondent in person