

Case No. D1/23

Profits Tax – failure to file tax returns – whether the final and conclusive estimated assessments can be reopened under section 70A of the Inland Revenue Ordinance – whether certain expenses are deductible – section 70A of the Inland Revenue Ordinance.

Panel: Chui Pak Ming Norman (chairman), Hui Lap Tak and Seto Sing Tak.

Date of hearing: 5 October 2022.

Date of decision: 24 April 2023.

The Appellant did not file its Profits Tax Returns for the years of assessment 2007/08 to 2011/12 within the stipulated time. Consequently, the Assessor issued Estimated Assessments for those years, which the Appellant, through its former representatives, objected to on 6 December 2012.

The Appellant claimed that the assessments were excessive and that the estimated profits should be revised based on the actual tax returns filed later. However, the Commissioner of Inland Revenue rejected the objections, stating that the Estimated Assessments had become final and conclusive under section 70 of the Inland Revenue Ordinance ('IRO') because no objections were lodged within the statutory one-month period.

The Appellant then appealed to the Board of Review, arguing that the Estimated Assessments should be reopened under section 70A of the IRO due to errors made by its former tax representatives. The Appellant also contended that certain expenses in the 2008/09 tax year, such as entertainment and marketing expenses, should be deductible when computing its assessable profits.

Held:

1. The primary issue was whether the Estimated Assessments, which had become final and conclusive under section 70 of the IRO, could be reopened under section 70A. Section 70A allows for reopening assessments only in cases of clear errors or omissions, such as arithmetical mistakes or incorrect figures in returns or statements submitted by the taxpayer. In this case, the Appellant failed to file returns on time, and the assessments were based on estimates made by the Assessor. The Board held that section 70A applies only when there is an error or omission in the returns or statements submitted by the taxpayer. Since no returns were submitted at the time the assessments were made, there was no 'error or omission' in the returns or assessments that could satisfy the conditions of section 70A. Therefore, the Estimated Assessments were final and conclusive, and could not be reopened.

2. The Appellant argued that the delay in objecting to the assessments was due to the incompetence of its former representatives, who failed to act in a timely manner. However, the Board found that ignorance or negligence on the part of the taxpayer's representative does not constitute a valid reason to extend the objection period under the IRO. The Board noted that the Appellant had ample time to file objections but failed to do so within the statutory one-month period, and thus the Estimated Assessments became final under section 70.
3. The Appellant also claimed that certain expenses, including marketing, entertainment, and housing allowances, should be deductible when calculating its assessable profits for the year of assessment 2008/09. The Assessor had disallowed several of these expenses, citing lack of proper documentation and the personal nature of some of the expenses (eg credit card expenses of the director and staff quarters). After reviewing the evidence, the Board agreed with the Assessor, finding that the Appellant had failed to provide sufficient evidence to justify the deductibility of these expenses. The Board upheld the Assessor's adjustments, concluding that many of the claimed expenses were either personal in nature or inadequately documented, and thus not wholly and exclusively incurred for the purposes of the Appellant's business, as required under the IRO.
4. The Appellant argued that section 70A should apply to allow a revision of the Estimated Assessments based on the actual tax returns filed later. However, the Board noted that section 70A does not permit the reopening of assessments simply because a taxpayer later files returns showing a different amount of assessable profits. Section 70A only applies in limited circumstances where there is an error or omission in the taxpayer's submitted return or statement, which was not the case here. The Appellant's failure to file returns on time, combined with the lack of a valid objection within the statutory period, meant that the Estimated Assessments were conclusive, and section 70A could not be invoked to revise them after the fact.

Appeal dismissed and costs order in the amount of \$10,000 imposed.

Cases referred to:

Mok Tsze-fung v Commissioner of Inland Revenue [1962] HKLR 258
Sun Yau Investment Co. Limited v Commissioner of Inland Revenue 2 HKTC 17
Corpora Enterprises Limited v Commissioner of Inland Revenue 2 HKTC 656
Extramoney Limited v Commissioner of Inland Revenue [1997] HKLRD 387
Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218
Good Mark Industrial Ltd v Commissioner of Inland Revenue [2014] 2 HKLRD 981
B/R 5/71, IRBRD, vol 1, 30

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D40/91, IRBRD, vol 6, 159
D137/02, IRBRD, vol 18, 239
D3/15, (2015-16) IRBRD, vol 30, 338
D4/17, (2018-19) IRBRD, vol 33, 96

Appellant's Director appeared for the Appellant.
Wong Hoi Ling, Cheng Po Fung and Cheng Nga Man, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant did not file its Profits Tax Returns for the years of assessment 2007/08 to 2011/12 within the stipulated time. The Assessor was of the opinion that the Appellant was chargeable with Profits Tax and thus raised on the Appellant the estimated assessments (the Profits Tax Assessments, Additional Profits Tax Assessments and Second Additional Profits Tax Assessments for the years of assessment 2007/08 to 2010/11 and Profits Tax Assessment for the year of assessment 2011/12, collectively referred as '**the Estimated Assessments**') in the absence of the returns, full particulars of which are set out in paragraph 2 below.

2. On 6 December 2012 the Appellant, through its tax representative Messrs. Y. Wong Certified Public Accountant ('**Former Representatives**'), lodged its objection to the Profits Tax Assessments, Additional Profits Tax Assessments and Second Additional Profits Tax Assessments for the years of assessment 2008/09 to 2010/11 and Profits Tax Assessment for the year of assessment 2011/12 raised on it. The respective dates of issuance of the profits tax assessments are more particularly set out below:

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
<u>Profits Tax Assessment</u>					
Date of issue	27-11-2008	28-8-2009	6-9-2010	6-9-2011	6-9-2012
Assessable Profits	<u>350,000</u>	<u>670,000</u>	<u>1,020,000</u>	<u>3,150,000</u>	<u>7,700,000</u>
Tax Payable thereon	<u>36,250</u>	<u>110,550</u>	<u>168,300</u>	<u>519,750</u>	<u>1,258,500</u>
<u>Additional Profits Tax Assessment</u>					
Date of issue	12-2-2009	26-11-2009	25-11-2010	24-11-2011	
Additional Assessable Profits	<u>180,000</u>	<u>340,000</u>	<u>510,000</u>	<u>1,580,000</u>	
Tax Payable thereon	<u>31,500</u>	<u>56,100</u>	<u>84,150</u>	<u>260,700</u>	

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Second Additional Profits Tax Assessment

Date of issue	11-5-2009	30-4-2010	10-3-2011	14-2-2012
Additional Assessable Profits	<u>470,000</u>	<u>590,000</u>	<u>1,470,000</u>	<u>2,270,000</u>
Tax Payable thereon	<u>82,250</u>	<u>97,350</u>	<u>242,550</u>	<u>374,550</u>

Each of the notices of the Estimated Assessments were sent to the Appellant by post to its business address, with copies to the Former Representatives.

3. None of the Estimated Assessments were objected to by the Appellant nor its Former Representatives until 6 December 2012.

4. By a letter dated 6 December 2012, the Appellant, through the Former Representatives, objected to the Estimated Assessments (but not including those of 2007/08 assessment year) claiming that they were excessive. About the same time, the Appellant filed the Profits Tax Return for the years of assessment 2008/09 to 2011/12. The tax returns were supported by the Appellant's audited financial statements for the respective years ended 31 December 2008 to 2011 and tax computations.

5. (a) In the tax returns, the Appellant reported the following assessable profits:

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
Assessable Profits	<u>74,768</u>	<u>988,825¹</u>	<u>182,746</u>	<u>226,527</u>	<u>224,157</u>

(b) The Appellant's assessable profits stated in (a) above were arrived at after deducting, among others, the salary charged in relation to its director, Mr A, and other expense items as shown below:

<u>Year of assessment</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
Salary	550,000	7,847,500	1,050,000	3,200,000	1,200,000
Housing allowance	198,000	235,000	-	-	-
Entertainment and / or marketing	178,615	2,636,936	588,308	643,864	861,825

(c) The detailed income statements disclosed, among others, that the Appellant's turnover for the year ended 31 December 2008 was \$14,155,170.

¹ after donations of \$1,045,000 with its deduction capped at \$532,444, ie 35% of the adjusted profits before the donations.

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6. By a letter dated 19 December 2012, the Assessor informed the Appellant *inter alia* that she could not accept the Former Representative's letter dated 6 December 2012 as a valid notice of objection under section 64 of the Inland Revenue Ordinance, chapter 112, laws of Hong Kong ('IRO') because it was not received within one month after the dates of the notices of assessment. The Assessor further advised that she had duly considered the circumstances described in the Former Representative's letter and was not satisfied that the Appellant had been prevented from lodging an objection in time owing to absence from Hong Kong, sickness or other reasonable cause. The assessments in question must be regarded as final and conclusive in terms of section 70 of the IRO.

7. By a letter dated 28 January 2013 from the Appellant to the Respondent, the Appellant claimed that the Estimated Assessments should be revised in accordance with the tax returns filed, *inter alia* on the following grounds:

- (a) Its management accounts were ready all the time for calculating the salary and commission shared with agents. The Appellant however did not have organized evidence for audit purpose.
- (b) Its major expenses were staff costs. The Appellant's profits were marginal after deducting rent, operational costs and director's remuneration.
- (c) It used to pay commission to the director at year end based on the annual performance. When the performance was good, the salary would be substantial whereas the Appellant's profits were insignificant. Personal tax rate was lower than that of profits tax by 1.5%.

8. By another letter of 19 March 2013 from the Appellant to the Respondent, the Appellant followed up the request for re-assessment.

9. By a letter dated 27 March 2013, the Respondent informed the Appellant *inter alia*:

- (a) Except an enquiry made in February 2010 about a surcharge notice for the year of assessment 2008/09, no enquiry has been raised by the Appellant regarding any of the Estimated Assessments;
- (b) It was not disputed that the Appellant had duly received the Estimated Assessments;
- (c) It was noted that the Appellant had been represented by certified public accountant over the relevant years and the Appellant should be informed properly of its rights and obligations under the IRO;
- (d) After expiry of the objection period and in the absence of any valid objection, the Estimated Assessments had become final and

conclusive under section 70 of the IRO; and

- (e) In view of the foregoing, the Respondent maintained its view as expressed in its letter dated 19 December 2012. The Respondent was not satisfied that the Appellant had been prevented from lodging objections to the Estimated Assessments in time owing to absence from Hong Kong, sickness or other reasonable cause which extended the objection period. Accordingly, the Estimated Assessments had to be regarded as final and conclusive in terms of section 70 of the IRO.

10. The Estimated Assessments were raised on the Appellant consequent upon the Appellant's failure to file its Profits Tax Returns for the years of assessment 2007/08 to 2011/12 within the stipulated time and upon the Assessor's opinion that the Appellant was chargeable with Profits Tax.

11. On 25 June 2013, the Appellant through its tax representatives, Louis Leung & Partners CPA Limited now known as A Golden Champion CPA Limited ('**Tax Representatives**') lodged a claim for revision of the Estimated Assessments *inter alia* on the grounds that (a) the tax levied is excessive; (b) there have been errors on the part of the Former Representatives in handling the tax affairs of the Appellant thus causing repeated estimated assessments issued and huge amount of tax paid – (i) the sole director of the Appellant is a foreigner who has little knowledge of Hong Kong tax and has relied totally on the service of the Former Representatives in dealing with the Appellant's tax affairs; and (ii) the Former Representatives were incompetent and ignorant on taxation matters and has been giving wrong advices to the Appellant all the times.

12. By its letter of 10 July 2013, the Assessor informed that Appellant that after due consideration, she was not satisfied that the tax as charged for the years of assessment were excessive by reason of errors or omissions as prescribed by section 70A of the IRO. In particular she did consider that there had been an overcharge of tax by reason of (a) an error or omission in any return or statement submitted for the years of assessments; and (b) any arithmetical error or omission in the calculation of the amount of the assessable profits or in the amount of tax charged.

13. On 8 August 2013, the Appellant, through the Tax Representatives formally filed a notice of objection against the Assessor's notice of refusal to correct the Estimated Assessments.

14. In 2014, the Assessor commenced a tax audit on the Profits Tax Returns filed by the Appellant. On 6 February 2015 and pending the outcome of the tax audit conducted on the Appellant in 2014, the following Additional Profits Tax Assessment for the year of assessment 2008/09 (ie the 2008/09 Third Additional Assessment):

Additional Assessable Profits	<u>500,000</u>
Tax Payable thereon	<u>82,500</u>

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15. The Appellant, through its tax representative, objected to the 2008/09 Third Additional Assessment claiming that it was excessive.

16. Having reviewed the Appellant's books and records for the year ended 31 December 2008, the Assessor observed, among others the following:

- (a) The turnover of \$14,155,170 for the year ended 31 December 2008 was arrived at after debiting an audit adjustment in the sum of \$1,060,742.30 ('Sum A') which comprised of marketing expenses of \$1,000,000 ('Sum A1') and 'amount due to director' in the sum of \$60,742.30 ('Sum A2');
- (b) According to the trial balance, audit adjustments and general ledger provided by the Appellant, the entertainment and marketing expenses of \$2,636,936 for the year ended 31 December 2008 comprised of:

Operation (ie Petty Cash)	495,395.41	('Sum B')
Marketing	926,470.86	('Sum C')
Staff quarters	941,832.60	('Sum D')
Costs by auditor	157,237.13	('Sum E')
Co agent fee	<u>116,000.00</u>	
	<u>2,636,936.00</u>	

- (c) Sum C included Mr A's monthly credit card expenses for January to December 2008, with the corresponding credit entries made to the ledger account of 'Amount due to director'. The credit card expenses included various expenses charged in total sum of \$116,640.41 ('Sum C1');
- (d) Sum D represented various expenses paid by the Appellant in relation to a property located at Address B;
- (e) Sum E represented an audit adjustment of \$210,751.61 after netting off by the various items:

	\$
Cost by auditor	210,751.61
<u>Less: Audit fee</u>	<u>8,000.00</u>
Bank charges	10.00
Salary – others	45,504.96
Others	<u>(0.48)</u>
Sum E	<u>157,237.13</u>

The corresponding credit entry was made to the ledger account of 'Amount due to director'. No supporting documents were available.

- (f) The donation of \$1,045,000 in footnote 1 to paragraph 4 hereof

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included a sum of \$39,000 ('**Sum F**') remitted to Mr C.

17. In response to the Assessor's enquiries on the Sum A to Sum F, the Tax Representatives or the Appellant provided further information or documents to the Assessor for her consideration. After considering the representations both made by the Appellant or its Tax Representatives by correspondence and at interview with the Assessor, the Assessor still considered that certain items should be adjusted when computing the Appellant's assessable profits for the year of assessment 2008/09 in relation to the Appellant's objection lodged against the 2008/09 Additional Assessment.

18. The Assessor maintained the view that Sum A, Sum B, Sum C1, Sum E and Sum F are not deductible. She considered that the 2008/09 Additional Assessment should be revised as follows:

	\$
Profits per return [Paragraph 5(a) hereof]	988,825
<u>Add: Donation [Footnote 1 to Paragraph 5(a) hereof]</u>	<u>532,444</u>
Sum A [Paragraph (16)(a) hereof]	1,060,742
Sum B [Paragraph 16(b) hereof]	495,395
Sum C1 [Paragraph (16)(c) hereof]	116,640
Sum E [Paragraph (16)(b) hereof]	<u>157,237</u>
	3,351,283
<u>Less: Donation (\$1,045,000 [Footnote 1 to Paragraph 5(a) hereof]</u>	
<u>– \$39,000, ie Sum F [Paragraph 16(f) hereof]</u>	<u>1,006,000</u>
Assessable Profits	2,345,283
<u>Less: Profits already assessed [Paragraph 2 hereof] –</u>	
Original Assessment	670,000
Additional Assessment	340,000
Second Additional Assessment	<u>590,000</u>
Additional Assessable Profits	<u>745,283</u>
Tax Payable thereon	<u>122,971</u>

19. The Appellant, through the Tax Representatives, disagreed that its assessable profits for the year of assessment 2008/09 should be adjusted whereas the Estimated Assessments would not be re-opened to reflect the Appellant's correct tax positions for the other years.

20. The objections were considered by the Respondent. By its determination issued on 4 January 2022 ('**the Determination**'), the Acting Deputy Commissioner of Inland Revenue made *inter alia* the following determinations on the Appellant's objections:

- (a) No valid objections had been lodged in respect of the Estimated Assessments within the time limit against the estimated assessments regarding the amount of assessable profits assessed thereby under

section 70 of the IRO by the Appellant, the Estimated Assessments shall be final and conclusive for all purposes of the IRO as regards the amount of such assessable profits.

- (b) The Estimated Assessments were issued in the absence of any returns filed by the Appellant. There was no error or omission in any return or statement submitted in arriving at the assessable profits under the Estimated Assessments. Section 70A of the IRO is not satisfied and cannot be invoked. The Assessor did not commit any error of an arithmetical nature simply because his assessment did not coincide with a figure he would have reached had the Appellant's returns been available to him.
- (c) The Assessor's re-computation of the Appellant's assessable profits for the year of assessment 2008/09 as set out in paragraph 18 hereof was endorsed.
- (d) The Assessor's refusal to correct each of the Estimated Assessments set out in paragraph 2 hereof was confirmed.

21. The Appellant was not satisfied with the Determination. By its letter of 4 February 2022, the Appellant filed a Notice of Appeal together with the requisite documents with the Board of Review ('Board') under section 66 of the IRO appealing against the Determination.

Grounds of Appeal

22. The Statement of Grounds of Appeal is consisted of 6 pages but major points can be summarized as follows: -

- (a) Mr A is a Country D citizen with no Hong Kong tax knowledge and relied 100% on his tax representative to advise him on how to handle his tax affairs.
- (b) While the Commissioner narrowed down the issues to the following:
 - (i) Whether the Estimated Assessments which have become final and conclusive can be re-opened by virtue of section 70A of the IRO; and
 - (ii) Whether certain expenses are allowable for deduction when computing the Appellant's assessable profits for the year of assessment 2008/09;

the Commissioner did not look at the substance of the fact.

- (c) Mr A was a victim of the unprofessional service offered to him by an

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incompetent and ignorant accountant who has handled his tax affairs badly.

- (d) There are defects in the provisions of the Inland Revenue Ordinance which traps the small companies easily.
- (e) There is no definition of 'Estimated Assessment' in the IRO. The meaning of 'estimated' assessment has different meaning in the different countries. The description in the estimated assessment is confusing and not clear enough to the taxpayer.
- (f) The Appellant had not yet agreed the facts relating to the 2008/09 additional assessment. They had bundles of vouchers relating to the operational expenses. There were supporting documents, but the auditor considered them to be troublesome for working out the breakdown, so she just used the original payments as the cost of the expense.
- (g) It has taken nearly six years for the officers to consider the application and he presumed that they must have had too many discussions, but no solid conclusion could be reached. They have therefore blimpishly rejected the application and made a vague determination and shifted the responsibility of determination to the Board.

There are other grounds or reasons set out in 'Statement of Grounds of Appeal' but we consider them as submissions. Nevertheless, in considering the appeal, we take into account all the matters stated in the 'Statement of Grounds of Appeal' carefully and thoroughly.

Issues

23. Having considered the background of the case and the grounds of appeal relied on by the Appellant, the Board feels that the issues for the Board to determine are therefore:

- (a) whether the Estimated Assessments which have become final and conclusive can be re-opened by virtue of section 70A of the IRO;
- (b) whether certain expenses are allowable for deduction when computing the Appellant's assessable profits for the year of assessment 2008/09.

Undisputed Facts of the Case

24. The statements made in paragraph 1 to paragraph 18 hereof were from the section 'Facts upon which the Determination was arrived at' of the Determination or from the correspondences exchanged between the Appellant or its tax representatives with the

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Respondent or documents submitted by the Appellant or its tax representatives. The documents or correspondence were not objected to nor disputed by the Appellant.

25. In respect of paragraph 4, paragraph 6, paragraph 13 and paragraph 14 of the Determination, Mr A said he objected thereto. However, after hearing his reasons for objections, such reasons were meant to give us some background or explanations. Taking into account of his explanations, the paragraphs in the Determination not disputed by him and the contemporaneous documents in the bundles, we find paragraph 1 to paragraph 18 hereof part of the facts of the Appeal.

26. For completeness, we also find the following facts as undisputed facts of the case:

- (a) The Appellant was incorporated as a private company in Hong Kong in 2003. It closed its accounts in December annually.
- (b) At the relevant times, the Appellant's directors were Mr A and Company E, who were also the Appellant's shareholders.
- (c) In the directors' reports, the principal activities of the Appellant were described as follows:

<u>Year ended</u>	<u>Principal activities</u>
31 December 2007	Acting as a property agent
31 December 2008 to 2011	Providing property-consulting services

- (d) The Appellant's business address was Address F.

The testimony of Mr A

27. The Appellant called only one witness to testify under oath on its behalf, that was Mr A, its sole director at the hearing.

28. The following is the summary of Mr A's testimony given at the hearing:

- (a) He agreed that the Appellant did not object to the Estimated Assessments within one month of their issuance but he did not know he had to object with one month's time.
- (b) He got totally 26 estimated assessments but he did not know whether they were final tax, that was the reason why he did not object within the time limit.
- (c) Mr A confirmed that the first date of lodging the objections to the Estimated Assessments was 6 December 2012. Then he objected to each of the estimated assessments for the financial year 2007/08 to 2011/12.

- (d) The Former Representatives did not know the estimated assessments became final and conclusive if the Appellant did not object within the one-month time limit. He counted on the lady accountant, Ms G, as she was a certified public accountant. She majored accounting at the HKU. He guessed that she practiced as CPA for at least about 10 years at the time so he just counted on her.
- (e) He was a foreigner and did not have the tax law knowledge of Hong Kong systems. He could only depend on her one hundred percent. That was the reason why he did not know the Estimated Assessments became final and conclusive. That was why he did not object within the time limit.
- (f) When he received the last estimated assessment 1-1044404-12-2, which was issued on 6 September 2012, Ms G was not in Hong Kong. He could not contact Ms G properly. He was thinking he could challenge the estimated assessment as his tax representative was not in Hong Kong. In fact, the Appellant was prevented from giving its notice of objection against the estimated assessment in time owing to her absence from Hong Kong. He thought that was a good reason that the Appellant did not lodge the objection in time.
- (g) He submitted the tax returns for assessment years 2007/08 together with the audited report on 29 January 2010. For the four years of assessments from 2008/09 to 2011/12, he submitted them together with the audited reports on 4 December 2012.
- (h) After receipt of the reply from the assessor that the Estimated Assessments were final and conclusive, Ms G of the Former Representatives was not willing to help him.
- (i) Regarding the calculations made by the assessors in respect the financial year 2008/09 which is set out in paragraph 16 hereof, Mr A said the assessor made the calculations on the basis of the documents submitted by him on 3 May 2016. He submitted the documents without the audit adjustment from the Former Representatives. He could not match the figures in the Excel file with the figure in the audited report. The Excel file contained only the bank statements downloaded by him. The assessor made the calculation based on the trial balance and the general ledger that he submitted. But they were without the audit adjustment from the Former Representatives. He could not figure them at especially the revenue part.
- (j) In respect of the tax returns and the proposed profits tax computations, Mr A said the practice was that he just signed the blank form and Ms G filled up the tax returns and the proposed profits tax computations

later.

- (k) Ms G did not give him a copy of the tax returns and the proposed profits tax computations for year of assessment 2008/09. He just saw this document about 10 days ago when the Respondent sent him the R1, R2 and R3 bundle. Before that, he did not know there was such kind of document. He did not agree with the operation expenses stated on the 'Detailed Income Statement', because Ms G added back the salary of director (in the sum of \$7,847,500) without his approval.
- (l) Mr A did not agree with the observations made by the assessor, which are set out in paragraph 16 hereof, in respect of Operation cost (Sum B), Marketing (Sum C), Staff quarters (Sum D) and Costs by Auditors (Sum E). He said basically Sum B and Sum D had been added back to the director's account and the balance sheet. So, there should be no such costs in the tax return. In respect of costs by auditors (Sum E), he tried to match but he could not do that. That was why he just put the name as 'Costs by Auditors'. He guessed that there was no such term in accounting.
- (m) Regarding the Marketing (Sum C), Mr A said although the number was correct but the breakdown as wrong. The breakdown was made by the assessor based on the first set of trial balance submitted in 2016.
- (n) Regarding the Costs by Auditors (Sum E), the assessor should give a breakdown and a group of transactions. It was not only the numbers. The Inland Revenue Department was correct, they should be able to show the breakdown. As to him, the first set of documents sent in 2016 was not correct and they gave the figure based on the wrong figures.
- (o) He could prove that the subsequent journal, trial balances etc. sent later was correct.
- (p) On 3 May 2016 he sent the first set of documents (ie accounting records for Years 2007,2008, 2009, 2010, 2011 and 2014 which comprised of:

Documents	Hard copy	Softcopy
General ledger (journal)	In audit file	Excel
Trial balance	In audit file	Excel
Audit adjustments	In audit file	Excel
Bank statement- Company H	In audit file	Excel
Bank statement- Mr A	In audit file	Scanned copy
Invoices/bank-in slip	Document boxes	

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Expenses receipts
Payroll & MPF

Document boxes

Excel & Pay slip

- (q) In respect of the documents sent, Mr A said for the fiscal year, the Excel file that he submitted was wrong. It did not match with the audit report. The general ledger and the trial balance were also wrong. He did not know the CPA used the first version. Mr A discovered the error last year. After his discovery, he submitted the second version of the trial balance to the Inland Revenue Department on 20 July 2021. When he was asked if he contacted his auditors informing her the error, his reply was negative. When he was asked why he did not do so, Mr A said he did not know he had the right to do so. Further he thought that Ms G was no longer his auditor and his confidence on her was not high at that moment.
- (r) When Mr A was asked without contacting his auditors, how could we know which version of trial balance was correct and which version was not correct, he replied that the third version sent on 22 June 2022 was correct because he could break down everything and could give breakdown of the marketing expenses. He agreed that it was sent after the Determination was issued. He thought there was something wrong with the procedures. The Determination came out suddenly without any discussion. He was surprised that how came there were 26 times of estimated assessments without any warning or notice.
- (s) In the course of giving evidence, Mr A thought that the Appellant could have extension to file objection to the Estimated Assessments after the Appellant paid the taxes. Upon cross-examination, Mr A agreed that there was nothing in the Estimated Assessments saying the Inland Revenue Department would give the Appellant more time after the Appellant paid the taxes.
- (t) Regarding the 'Operation' expenses, in the trial balance submitted in 2016, the 'Operation' expenses meant petty cash. In the Appellant's tax representative's reply to the Inland Revenue Department, the tax representative said the petty cash was charged as expenses. In the trial balance submitted in 2022, the Appellant said the petty cash was adjusted to the director's current account. Mr A agreed in the cross-examination that the replies are contradictory. He explained that there were discrepancies because the version of trial balance sent in 2016 was not correct. He maintained that the trial balance sent in 2021 and 2022 were correct. Mr A said the previous assessors were not diligent enough. He believed that they could verify his first trial balance was wrong. He stressed that the Determination was based on wrong fact.
- (u) Mr A was referred to several entries in the journal which were related to balance sheet but they were not as items charging as expenses. In

respect of these allegations, Mr A maintained that the discrepancies were due to the incorrect information in the journal sent in 2016.

- (v) Mr A was referred to the statement of his Dah Sing Bank credit card submitted. When he asked to agree or not agree that no other document was provided to the Inland Revenue Department to prove the deductibility of the expenses, he commented that he had all the credit card receipts but his CPA was satisfied with statements without the detailed evidence. He thought the Respondent was not serious to charge the Appellant the additional tax on financial year of 2008/09. If so, he would be ready to fight for that.
- (w) Mr A was referred to an outward remittance issued to the bank, with the beneficiary being Company J in country D. When Mr A was asked to agree that there was no other document to prove the deductibility of this remittance, he replied that he did not have to attach all the document at the moment because this was the service contract. Company J was a website company so they provided services. That was why he did not have to provide additional document to prove.
- (x) In respect of another outward remittance, Mr A was asked to agree that there was no other document provided apart from the remittance note. He said the beneficiary was his sister-in-law who supported him in the previous years after he started business. This was just like a pay back to him. He agreed that it should not be incurred for the Appellant's chargeable profit.
- (y) In respect of another outward remittance for the sum of HK\$1.0 million, Mr A said he had provided explanations many times in his previous letter. He referred to the one being page 222 of the R1 Bundle.
- (z) Mr A was referred to the 'turnover' of the Appellant submitted in 2016, 2021 and 2022, which was summarized in the Respondent's letter to the Appellant of 13 July 2022. He was asked to confirm whether the 'turnover' was calculated with reference to the same bank statement. He replied in the positive but the 3 different figures were due to the fact that there were errors in the entries in the trial balance and journals prepared in different years. He commented that he had no idea how his auditors made the turnover in the audited report. So Appendix 1 (submitted in 2016) was based on his calculation, or assessment after reviewing the bank statement. So, Appendix A did not match the audited report. Appendix 6 (submitted in 2021) was done on the basis of Appendix 1. At that time, the item of revenue was missing, so he made it as the suspense payment. So, there should be something wrong in Appendix 6. The auditors just set off in the balance sheet account and the trial balance. He maintained that the

last version sent in 2022 was the correct one as they matched the bank statements and the audited reports.

The Statutory Provisions relating to Profits Tax

29. The following provisions of the IRO are relevant in determining the Appeal taken by the Appellant:

Section 16(1)

'In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period.'

Section 17(1)(b)

'For the purpose of ascertaining profits in respect of which a person is chargeable to tax under this Part no deduction shall be allowed in respect of ... any disbursements or expenses not being money expended for the purpose of producing such profits.'

Section 51(1)

'An assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish any return which may be specified by the Board of Inland Revenue for ... profits tax ...'

Section 59(3)

'Where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly, but such assessment shall not affect the liability of such person to a penalty by reason of his failure or neglect to deliver a return.'

Section 60(1)

'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 ...'

Section 63

'No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason

of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.'

Section 64(1) proviso (b)

'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—

(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 ...'

Section 70

'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, ... the assessment as made ... shall be final and conclusive for all purposes of [the IRO] as regards the amount of such assessable income or profits or net assessable value ...'

Section 70A(1)

'Notwithstanding the provisions of section 70, if, upon application made within 6 years after the end of a year of assessment ... 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 ... assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment ...'

Section 80(2)(d)

'Any person who without reasonable excuse fails to comply with the requirements of a notice given to him under section 51(1) ... commits an offence and is liable on conviction to a fine at level 3 and a further fine of treble the amount of tax which has been undercharged...'

30. The onus of proof in an appeal before the Board and the Board's discretion to award costs are provided in section 68 of the IRO as follows:

(a) *Burden of Proof*

Section 68(4) provides *inter alia*:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

(b) *Costs*

Section 68(9) provides *inter alia*:

‘Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5², which shall be added to the tax charged and recovered therewith.’

Legal Authorities submitted by the Respondent

31. The Respondent submitted the following authorities, which illustrate the well-established legal principles relating to the scope of application of section 70 and 70A of the IRO.

Court Decisions

- (a) Mok Tsze-fung v CIR [1962] HKLR 258;
- (b) Sun Yau Investment Co. Limited v CIR 2 HKTC 17;
- (c) Corpora Enterprises Limited v CIR 2 HKTC 656;
- (d) Extramoney Limited v CIR [1997] HKLRD 387;
- (e) Moulin Global Eyecare Trading Ltd v CIR (2014) 17 HKCFAR 218;
- (f) Good Mark Industrial Ltd v CIR [2014] 2 HKLRD 981.

Board Decisions

- (g) B/R 5/71, IRBRD, Vol.1, 30;
- (h) D40/91, IRBRD, Vol.6, 159;
- (i) D137/02, (2003-04) IRBRD, Vol.18, 239;
- (j) D3/15, (2015-16) IRBRD, Vol.30, 338;
- (k) D4/17, (2018-19) IRBRD, Vol.33, 96

The aforesaid decisions were placed in the R2 Bundle. The Respondent submitted no

² The amount specified in Part 1 of Schedule 5 of the IRD is HK\$25,000.

legal authorities.

The Applicable Legal Principles.

32. The scope of section 70A is restricted and it has been intended to have a narrow coverage. It is restricted by the need for an error in a return or accompanying statement.

- (a) In Moulin Global Eyecare Trading Ltd v CIR (2014) 17 HKCFAR 218, the Court of Final Appeal said:

‘119. For any government, faced with ever-increasing financial responsibilities and obligations, it is of the highest importance to have a fair and efficient tax system which can be expected, year on year, to produce public revenue to a more or less predictable level. Annual taxes should be levied so as to ensure prompt payment and so as to achieve finality within a reasonably short time ...’

‘126. ... [S.70A’s] scope is restricted by the need for an error in a return or an accompanying statement, by the proviso for an error which was nevertheless “the practice generally prevailing at the time”, and by the six-year time limit, which is a reasonably generous one. These restrictions represent the legislature’s striking of the balance between finality and fairness.’

- (b) In Good Mark Industrial Ltd v CIR [2014] 2 HKLRD 981, it was held that:

‘39. ... s.70A(1) must have been intended to have a narrow coverage ...’

‘42. ... s.70A(1) should be read in the context of a tax regime in which ‘finality’ is an important feature ...’

33. Regarding the meaning of ‘error and omission’ in section 70A, in Extramoney Ltd v CIR [1997] HKLRD 387, Patrick Chan J (as he then was) considered in Extramoney Ltd v CIR [1997] HKLRD 387 that:

‘ ... for the purpose of s.70A, the meaning of “error” ... is ‘something incorrectly done through ignorance or inadvertence; a mistake’. I do not think that 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 than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within s.70A. ... if there is a change of opinion of the auditors or accountants in respect of the accounts, the first opinion cannot be regarded as an error or omission within the section. Similarly, if there is a change of mind of the directors of the company in connection with how any part of the accounts should be made up, the

previous decision will not be regarded as an error or omission. Nor is it an error or omission if it is merely a difference in the treatment of certain items in the accounts by those preparing or approving the accounts. If this were permitted, the director or officer of a company will be tempted at a later stage to try and 'improve' the company's accounts or change his own decisions if this is to his advantage. This would be contrary to the spirit of the [IRO] that there should be finality in taxation matters.'

34. Regarding the meaning of 'return' and 'statement' in section 70A, in D137/02, (2003-04) IRBRD, vol 18, 239, the Board agreed that B/R 5/71, IRBRD, vol 1, 30 had stated the correct approach and held that the word 'return' in section 70A means a return which a person is required to furnish to the Revenue under the IRO whereas the word 'statement' in section 70A is restricted to statement submitted in respect of a return and further that the word 'statement' means a statement which a person is required to furnish to the Revenue under the IRO. The exact wording as stated in B/R 5/71 read as follows:

'There is no doubt in our mind that in all these provisions, the words 'return' and 'statement' refer to any return or statement submitted by a taxpayer or private individual required to furnish the same and that they cannot possibly mean any return or statement submitted by an assessor to the Board of Review. It follows, therefore, that errors and omissions of the first type which can be rectified under section 70A, must be confined to errors or omissions contained in any return or statement submitted by a taxpayer to an assessor. No other returns or statements could have been contemplated by the legislature.'

35. Section 70A of the IRO is not applicable to an estimated assessment raised in the absence of a tax return.

- (a) In Sun Yau Investment Co Limited v CIR 2 HKTC 17, the appellant did not object to the estimated assessment raised in the absence of tax return. Subsequently, the appellant filed its tax return together with the audited accounts and applied under section 70A of the IRO to correct the estimated assessment. In dismissing the appeal, the court held that:

'Section 70A did not apply in this case: the Assessor had not committed any error or arithmetical error simply because his estimated assessment did not coincide with a figure he would have reached had other information been available to him.'

- (b) In Corpora Enterprises Limited v CIR 2 HKTC 656, the appellant did not file a return for its first year of business and an estimated assessment was issued. The appellant did not object and the assessment became final and conclusive under section 70 of the IRO. The court said at page 674:

‘what is it that shall be final and conclusive? It is expressly provided that it is the amount of the assessable profits which shall be forever binding. In what way shall the amount be so binding? It shall be irreversible ‘for all purposes of [the] Ordinance’. If a taxpayer company made an error or omission in its return or statement, then the assessment would be liable to be re-opened but not beyond a fixed limitation period. See section 70A. ... Corpora did not file a return for its first tax year’s operation in time, hence it cannot invoke section 70A with a view to correcting any error in the notice of assessment.’

- (c) In D3/15 (2015-16) IRBRD, vol 30, 338, the appellant failed to furnish the returns for a number of years and estimated assessments were issued in the absence of returns. The appellant did not object within the time limit and the assessments became final and conclusive. Later, the appellant applied under section 70A of the IRO to correct the estimated assessments. The appellant contended that his honest and mistaken belief through his former tax representatives’ advice that he only needed to submit tax return when there was a profit was a mistake and an ‘error’ within the meaning of the first limb of section 70A. Also, there was an arithmetical omission in the calculation of the amount of the profits tax charged due to the Commissioner’s omission of facts under the second limb of section 70A. The Board held that:

‘In any event, the Appellant’s reason for not furnishing tax returns could not qualify as an “error ... in any return or statement submitted in respect thereof”, since the alleged error could not possibly be an error in that return. The error or omission had to be one that lied in the tax return submitted; it could not be one in respect of whether the tax return should be submitted.’

‘The assessment was a bare figure based on the Assessor’s estimation. No calculation was involved. Hence, it could not be an “arithmetical error or omission” in the “calculation of the amount of the assessable profits”. The second limb could not be invoked.’

- (d) in D4/17, (2018-19) IRBRD, vol 33, 96 and D40/91, IRBRD, vol 6, 159 the appeals were dismissed and the Board held that section 70A was not applicable to re-open the estimated assessments that were issued in the absence of returns.

36. An assessor is not required to prove correctness of the estimate he made. In Mok Tsze Fung v CIR [1962] HKLR 258, Mills Owens J said:

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

Submission of the Appellant and the Respondent

37. Before and after the hearing, Mr A totally filed 3 written submissions, which are respectively dated 8 September 2022, 5 October 2022 and 28 October 2022 to the Board for its consideration. The submissions were served with the A1 Bundle which contained the documents relied on by the Appellant.

38. The Respondent filed an Opening Submission and a Closing Submission with the Board for its consideration. The Respondent filed and relied on the documents in B1 and B2 Bundles.

39. In deliberating its decision, the Board has amongst others duly and carefully considered, (a) the oral testimony of Mr A, (b) the written submissions and the oral submission made by Mr A at the hearing, (c) the Respondent’s Opening and Closing Submission, (d) the documents in bundles filed by them; and (e) and the B1 bundle, the bundle of documents for the Board.

Discussion and Analysis

40. It is not disputed by the Appellant that the Appellant had not filed tax returns for financial years 2007/08 to 2011/12 within the stipulated time. Under section 59(3) of the IRO, if the assessor is of the opinion that a taxpayer is chargeable to tax, he may estimate the taxpayer to tax.

41. Pursuant to section 60(1) of the IRO, 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.

42. It is the Appellant’s complaint that the Appellant was a victim of the tax legislation which allowed the tax officer to raise estimated assessments without enquiring the reasons for non or late filing of tax return. We do not feel the complaint is justified for two reasons. First, nothing in the legislation requiring the assessor to enquire the reasons for non or late filing of tax return. Secondly, if what the Appellant submitted was correct, that means everybody could refuse to file annual tax return until the assessor makes an enquiry as to the reasons for non or late filing. This is certainly not the intention of the legislature.

43. As a matter of fact, Hong Kong's tax basis is narrow. In order to meet the government's financial responsibilities and obligations to support the general expenditures, Hong Kong needs an efficient and smooth system to collect revenue. Filing tax returns by the taxpayers on time and prompt payment of assessed taxes are integral parts of the system. It may afford the Government to produce public revenue in a more or less predictable level to serve the general public. If assessors were required to make an enquiries as to reasons why the taxpayers filed late tax returns or did not file the tax return, our tax collecting system should be slowed down, not only by the delay caused by the enquiries, but also by the lack of manpower to make them.

44. The Appellant also complained that the assessor made use of section 59(3) and 70 of the IRO as a trap for those taxpayers who failed to file their tax returns. We do not agree that there is any trap for the Appellant. We do not understand why there was a trap. A 'trap' is a devise or plan made by someone to induce others to fall into the devise or plan. Accordingly, if there was a 'trap', the assessor had to do something to trap the Appellant. As a matter of fact, there was no device or plan made by the assessor. The assessor did not do anything which caused the Appellant to fall into a 'trap'. The assessor just performed his duty as required of him under section 59(3) to make the estimated assessments so long as the Appellant has not furnished a return and the assessor is of the opinion that the Appellant is chargeable with tax. If he did not do so, there might be a dereliction or neglect of duty on his part. The estimated assessments could be avoided had the Appellant filed the tax returns on time. If there was a trap, the trap was created by the Appellant itself by not fulfilling its duty of making prompt and timely annual tax return.

45. It is the Appellant submission that there was no definition of 'estimated assessment' in the IRO. The Appellant said that the description in the estimated assessment is confusing and not clear. We do not agree with the Appellant's suggestion. Section 59(3) of the IRO provides *inter alia* '...he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly...'. The provision is quite clear that the assessor may estimate the taxpayer's tax liability and make an assessment of the tax payable. We do not agree with the Appellant in this respect.

46. The Appellant submitted *inter alia* that the Appellant was the victim of the unprofessional service offered to him by an incompetent and ignorant accountant who has handled its tax affairs badly. In the absence of evidence, we do not know whether the Former Representatives were ignorant or incompetent as alleged and simply ignore such unilateral comments.

Did the Estimated Assessments become final and conclusive under section 70 of the IRO?

47. The wordings of section 70 of the IRO are plain and easy to understand. Section 70 of the IRO provides *inter alia*:

'Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment....., shall be final and conclusive for all purposes of the Ordinance as regards the amount of such assessable income or profits or net assessable value.'

48. Section 64, section 70 and section 70A of the IRO belong to Part 11 of the IRO (ie the same part). The time limited by Part 11 (which is applicable to section 70 of the IRO) is stated in section 64(1) of the IRO which provides inter alia that ‘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 ... is received by the Commissioner **within 1 month** (emphasis added) after the date of the notice of assessment’.

49. In each of the Estimated Assessments sent to the Appellant, it was written clearly on the first page the following notice:

‘We have raised an estimated assessment as you have not yet filed your tax return. If you wish to object to this estimated assessment, please refer to your rights below. Your objection must be accompanied by a completed tax return. Even if you do not object to this estimated assessment, you still need to file your tax return as soon as possible.’

Your rights

*‘1. Objection. If you wish to object to this assessment, you must give us written notice stating precisely the grounds of objection. **We must receive** (emphasis added) your written objection notice **within 1 month** (emphasis added) after the date of this notice of assessment. Even if you object, you must still pay the tax due unless we agree to hold over the tax.’*

50. Each of the Estimated Assessments was also sent to the Former Representatives. It is not disputed by the Appellant that the Appellant commenced to file the objections to the Estimated Assessments from 6 December 2012, which was one month later than the date on which the last estimated assessments was sent to the Appellant; and was against the warning notice stated in the Estimated Assessment or the provision of section 70 of the IRO.

51. Accordingly, the Estimated Assessments should become final and conclusive for the purpose of the IRO.

Can the Estimated Assessments be re-opened pursuant to section 70A of the IRO?

52. It is the Appellant’s contention that its application to correct the Estimated Assessments, pursuant to section 70A of the IRO, should be accepted because section 70A of the IRO is a mechanism to rectify any mistake. The mere contention of the Appellant would not entitle the Estimated Assessment to be rectified under section 70A of the IRO. Its contention should be viewed or tested against the provisions of section 70A of the IRO.

53. A taxpayer who wishes to invoke section 70A must satisfy the following conditions stated therein:

- (a) The tax charged for that year of assessment is excessive; and
- (b) The excessiveness is by reason of an error or omission in **any return or statement** (emphasis added) submitted in respect thereof; or by reason of an arithmetical error or omission in the calculation of the amount of the assessable profits assessed or in the amount of the tax charged.

Is the excessiveness by reason of an error or omission in any return or statement submitted in respect thereof?

54. It is not disputed by the Appellant that it did not file any tax return at the time the Estimated Assessments were issued. Since the Appellant did not object to the Estimated Assessments within the time limit, they became final and conclusive.

55. At the time of issuance of the Estimated Assessments, the Appellant did not make any return or statement to the Respondent. If it objected to the Estimated Assessments and did file the return within one month of the dates of their issuances, then we could have a look on the return or statement so filed to see if there was any error or omission. Since the Estimated Assessments became final and conclusive before the Appellant filed any return or statement, it follows that the Appellant could not meet the condition of excessiveness by reason of an error or omission in **any return or statement submitted** (emphasis added).

Is the excessiveness by reason of an arithmetical error or omission in the calculation of the amount of the assessable profits assessed or in the amount of the tax charged?

56. It is not the Appellant's case that there was an arithmetical error or omission in the calculation of the amount of the tax charged for a particular financial year based on the estimated assessment of profit for that year. Accordingly, we are not required to make any arithmetical calculation to see if there was any error or omission which caused excessiveness.

57. The Appellant contended that the Estimated Assessments were excessive when one compared the same with the assessments based on the tax returns and the audited accounts filed. In our view, it is a misconception on the part of the Appellant. The assessor is required to correct its own mathematical error or omission if there was such an error or omission under section 70A. The assessor is not required to compare the estimated assessment with the assessment based on tax returns.

58. As held by Mantell J. at page 21 in Sun Yau Investment Co Ltd v CIR, 2 HKTC 17: -

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

Owens J. in Mok Tsze Fung v CI (1962) H.K.L.R p.166 at p.183/184,

'It might well be impossible for the assessor to prove facts justifying his assessment in the precise amount thereof, or, indeed, in any particular amount. The law allows him to "estimate", or, as the case may be, to assess "according to his judgment", and if he were to be required to prove his assessment strictly his powers would, for practical purposes, be nullified.'

The object of the Ordinance is to achieve finality within the timetable and procedures laid down. Various safeguards and appeal procedures are provided. One of those safeguards is provided by Section 70A where in a proper case, the Assessor is required to correct his own arithmetical error. That is not this case. I agree not only within the findings of the Commissioner of Inland Revenue but also with his reasons. This appeal is dismissed with costs.'

59. By reason of the aforesaid, we have to reject the Appellant's contention in this regard.

60. The Appellant contended that Mr A is a foreigner and has no knowledge of the local tax law. We do not feel this is a valid ground because he could and did engage a professional accountant or auditors firm to assist the Appellant.

61. The Appellant also contended that the Former Representatives was incompetent and ignorant because she had not acted appropriately in response to the Estimated Assessments. We do not know whether the Former Representatives was incompetent or ignorant. However, for discussion purpose, even if we assumed that the Former Representatives did not render adequate professional advice to the Appellant which led to errors in objecting the Estimated Assessments in time, such error would not be within the meaning of 'error' in section 70A of the IRO as the 'error or omission' has to be 'error or omission' in the return or statements submitted or the arithmetical error or omission.

62. It was also contended by the Appellant that neither the Former Representatives nor the Appellant had the idea that the Estimated Assessments would become final and conclusive after the expiry of the time limit to lodge objections. Even if they had no idea, such error would not be within the meaning of section 70A of the IRO which could re-open the case. Such error, if any, could not be an error in the return or statement submitted by the Appellant. If an estimated assessment could be re-opened and be re-assessed whenever a taxpayer filed its return, there is no purpose of setting a time limit for objection under the IRO. We agree with the Respondent's submission that finality is important for an efficient tax system.

63. By reason of aforesaid, it is our conclusion that the Estimated Assessments become final and conclusive under section 70 of the IRO and cannot be re-opened by virtue of section 70A of the IRO.

Deduction of expenses for the year of assessment 2008/09

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64. The Appellant appealed against the Third Additional Profits Tax Assessment 2008/09 as confirmed by the Determination, claiming that it was excessive.

65. It is noted that in its notice of appeal, the Appellant claimed that it had bundles of vouchers for its operational expenses. Upon enquiries, the Appellant however said that it cannot explain further about the marketing expenses since all vouchers had been kept by the Revenue Department. The Appellant was then invited to review the vouchers. In response, the Appellant clarified that its vouchers kept only related to petty cash (ie Sum B), and a photo was attached.

66. At the hearing Mr A said that all relevant information was in the Excel file and he could open the Excel to explain the discrepancies in case of needs. In our view, the discrepancies had been known to Mr A for quite a long time as the requests for clarification were done by way of correspondence far earlier than the hearing of the appeal. Had he been serious in the appeal, the Board would have thought that he prepared a short statement or table or chart together with supporting documents dealing with the points or discrepancies previously raised by the Respondent. It is undesirable that Mr A discussed a lot of accounting entries without producing relevant documents for the parties' consideration at the hearing.

67. The Appellant claimed that petty cash (ie Sum B), staff quarters (ie Sum D) and costs by auditor (ie Sum E) had not been charged as its expenses, but debited to the director's current account in the balance sheet. However, no such debit entries were found among the journal entries related to the director's current account, as extracted from the Appellant's ledger. In fact, when replying to earlier enquiries, the Tax Representative only said the staff quarters (ie Sum D) were incurred as staff benefit and should be tax deductible (as opposed to the claim that Sum D had not been charged as the Appellant's expenses). The trial balance for the year ended 31 December 2008 (ie Appendix 1 of the Determination) showed that petty cash and staff quarters had been charged as the Appellant's expenses. We agree with the Respondent's observations that the Appellant's account later provided about how petty cash (ie Sum B), staff quarters (ie Sum D) and costs by auditor (Sum E) had been recorded in its financial statements is unreliable.

68. In support of its contention, the Appellant provided the journal entries of the entertainment and marketing expenses charged in its accounts. As pointed out to the Appellant by the Respondent's letter dated 13 July 2022, the descriptions of some journal entries therein differed from the ones first provided in 2016. In its reply of 4 August 2022, the Appellant alleged that the original entries were 'errors' without offering any further explanation or document.

69. In any event, by reference to the journal entries last provided by the Appellant on 22 June 2022, the relevant vouchers were located but two vouchers relating to items 230 and 501 were not found. Among the vouchers located, the Respondent had the following observations:

- (a) Some journal entries for cheque withdrawals and outward remittance

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were described (in the Appellant's ledgers first provided in 2016) as ones related to the director's current account or receivables (in the balance sheet), rather than being part of the marketing expenses. Details of the related withdrawals recorded in the Appellant's ledgers (with cross reference to the marketing expenses last provided) are provided by the Respondent as follows:

	Date	Slip no.	Amount	AC level 1	AC level 2
(i)	03-07-2008	2008-233	200,000	Balance sheet	Director account
(ii)	08-08-2008	2008-292	74,000	Balance sheet	Director account
(iii)	06-11-2008	2008-415	100,000	Balance sheet	Director account
(iv)	30-12-2008	2008-495	64,000	Balance sheet	Other receivables
(v)	31-12-2008	2008-508	175,450	Balance sheet	Director account

The Respondent contended that if the withdrawals actually represented part of the Appellant's marketing expenses (as alleged), then they should not have been so described in the Appellant's ledgers first provided in 2016. Alternatively, if such journal entries were described correctly in the Appellant's ledgers provided, then no deduction should be allowed. More importantly, from the vouchers provided (ie pages 359, 415, 446, 508 and 510), one cannot ascertain the details of the circumstances under which the payments were made and why they were tax deductible.

- (b) The aggregate of the expenses paid by Mr A's personal credit cards (Dah Sing Bank and HSBC) were \$689,675.6. Except for the credit card statements kept, no other details had been provided. Such credit card statements can be found in pages 302-303, 356 to 357, 386 to 388 and 512 to 538 of the R1 Bundle.
- (c) Bank remittance of \$1,000,000 (ie Sum A1) were made to Mr A's bank account in Country D. In the trial balance first provided in 2016, Sum A1 was debited to 'Revenue' and reducing it by the same amount (see audit adjustment k), but did not form part of the Appellant's marketing expenses. If such remittance had actually been debited and charged as the Appellant's marketing expenses, then the Appellant's actual turnover (referred to in paragraph 68 hereof) should have been adjusted upward by \$1,000,000 accordingly.
- (d) Total bank remittances of \$116,160 were made to various entities in Country D. Except for the bank confirmations, no further details

were provided.

70. It is the Respondent's submission that in any event, the Appellant did not provide sufficient or credible documents to substantiate the deduction claim of entertainment and marketing expenses. Neither did the Appellant explain why the expenses should be allowed for deduction. To be fair to Mr A, he did explain at the hearing that he had all the credit receipts but his CPA was satisfied with the statements without asking for detailed evidence. Whether Mr A's auditors required further evidence to prove the expenses was a matter for his auditors. However, if he wished to substantiate the deduction claim of entertainment and marketing expenses, he needed to provide credible documents or evidence with the Respondent to support his claim. We are satisfied there were no sufficient or credible documents or evidence to substantiate the deduction claim of entertainment and marketing expenses.

71. Apart from the expenses, it was also the Respondent's contention that the amount of the Appellant's turnover as shown in the three versions of trial balance respectively submitted in 2016, 2021 and 2022 differed from each other:

	<u>Appendix 1</u>	<u>Appendix 6</u>	<u>Provided on</u> <u>22 June 2022</u>
	\$	\$	\$
Turnover (per bank statement)	15,215,912.30	10,584,632.30	15,441,546.30
<u>Add/(Less): Net audit adjustment</u>	<u>(1,060,742.30)</u>	<u>3,570,537.58</u>	<u>(1,286,375.97)</u>
Audit balance	<u>14,155,170.00</u>	<u>14,155,169.88</u>	<u>14,155,170.33</u>

It is the Respondent's contention that so far, the Appellant did not explain why three different figures could have been stated as its turnover, if they were prepared by reference to the same sets of books and records. Besides, nothing there explained what and why audit adjustments had been made in arriving at the account balance.

72. We feel the Appellant did explain why it submitted 3 different sets of account to the IRD and why there were discrepancies amongst them, but whether the explanation is credible is a matter for the Board's consideration.

73. At the hearing, Mr A accepted that there were discrepancies between the allegation that the 'Operation' expenses referred to in the trial balance submitted in 2016 meant petty cash and the explanation that it was later adjusted to the director's current account in the trial balance submitted in 2022. He agreed that such statements were contradictory. However, he confirmed that the version of trial balance submitted in 2016 was not correct. It was his overall answers to the questions raised by the Respondent that any discrepancies in the entries of the account stemmed from the fact that the version of accounts submitted in 2016 was not correct. That explained why he needed to send another version after he found that the 1st version did not match with the audited report. After he submitted the version in 2021, he found that the item of 'revenue' was missing. Accordingly, it necessitated him to submit the 3rd version of accounts in 2022.

74. Mr A claimed that the last version was correct as he could match each item with the audited reports. Despite his explanation and claim, we are not certain that his claim that the version sent in 2022 was correct because apart from the mere claim, there were no other creditable evidence presented to justify his claim.

Sum A1 (HK\$1,000,000.00)

75. Sum A1 being HK\$1,000,000 was remitted to Mr A's bank account in Country D. Apart from the remittance record, there was no other record showing the purpose of the remittance. When he was cross-examined on this amount by Ms G, his answer was that he had provided explanations many times in his previous letter. He referred us to page 222 of R1 Bundle which was a letter from the Tax Representatives to the Respondent of 30 August 2018.

76. The explanation given was that the money was paid to 2 citizens of Country D who assisted the Appellant to conclude a big deal in property purchase in Hong Kong by one Country D company. As they resided in Country D and any remittance directly to them would create tax problem them, the Appellant remitted the amount to his Country D account and distributed cash to them directly in Country D. Setting aside whether such conduct might constitute an offence of 'aiding and abetting others to evade Country D tax', such explanation was far from satisfactory. The names of recipient were not provided. The property in question and the purchase price in question were not provided. The calculation of the remuneration was not provided. According to Mr A, there were no formal agreements written for this service because it was very sensitive and problematic if they were noticed by the Country D Government. Based on the answers, we did not know whether any services were actually provided to the Appellant and if so, whether they were paid for the production of the taxable income. Accordingly, we are not satisfied that Sum A1 is deductible under the IRO.

Sum A2 (HK\$60,742.30)

77. This was the adjustment made by the Former Representatives without the knowledge of the Appellant. Neither the Appellant provided nor we know the exact nature of the adjustment. Accordingly, we are not satisfied that it is deductible under the IRO.

78. They are items charged against the Company's turnover and expenses respectively while the corresponding credits were made to the current account with its director. We are not satisfied that documentary evidence had been adduced to show whether and what expenses were incurred and deductible under the provision of the IRO.

Sum B (Operation (ie Petty Cash), HK\$495,395.41) Sum C1 (credit card expenses, \$116,640.41) and Sum E (Costs by Auditors), \$157,237.00)

79. We agree with the Respondent that save the bank and credit card statements showing the withdrawals and the items charged, there were no other documents to show the extents of the expenses (relating to Sum B and Sum C1) which were allowable or prohibited from deduction under section 16(1) and 17(1) of the IRO.

80. We have earlier expressed our view that we are not satisfied that the financial statements provided by the Appellant and its treatment of petty cash (ie Sum B), staff quarters (ie Sum D) and costs by auditor (Sum E) recorded in its financial statements are unreliable. By reason of paragraphs 75 and 76, we are not certain that Sum B and Sum E are deductible.

81. By reason of the aforesaid, it is our conclusion that the Appellant failed to discharge the burden of prove that the revised Third Additional Profits Tax Assessment for the year of assessment 2008/09 was excessive.

Disposition

82. Accordingly, the appeal is dismissed and the Assessor's refusal to correct the Estimated Assessments under section 70A of the IRO is upheld and the Estimated Assessments are confirmed. The 2008/09 Additional Assessment as revised in Fact (17) of the Determination is hereby confirmed.

Costs

83. Under section 68(9) and Part 1 of Schedule 5 of the IRO, if the Appellant fails in its appeal, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount of HK\$25,000.

84. As discussed and analyzed in the above, the provisions of section 70 and section 70A of the IRO are simple and easy to understand. Further, the Appellant had all along been advised by professional tax advisers. The Appellant should have known that the Estimated Assessments became final and conclusive after it failed to lodge any objection within one month from their respective dates of issuance. The Appellant should know that there was no 'error' in the Estimated Assessments under section 70A of the IRO.

85. It is undesirable that the Appellant did not comply with the directions given by the Board as to conduct of the appeal. Regarding the items in the 2008/09 Additional Assessment it challenged as excessive, Mr A should have full knowledge of disputes as there were a lot of correspondence exchanged between the Appellant and the Respondent in this regard. He should prepare some sort of short explanation, table or chart with supporting documents to assist the Board to understand the Appellant's case. It is undesirable that the Board was referred to a number of accounting entries at the hearing.

86. Some of the submissions made by Mr A were bare or mere allegations without support of evidences.

87. The aggregate tax payable on the Estimated Assessments amounted to several million Hong Kong dollar. The tax benefit involved was therefore quite substantial. It follows that it is a great temptation for the Appellant to take this Appeal even though its case is weak. A lot of manpower and Board's time had been incurred to deal with this appeal which does not have reasonable prospect of success.

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88. In the circumstances, the Board feels it right to order and herein orders the Appellant to pay a sum of HK\$10,000 as costs of the Board which shall be added to the tax charged and recovered therewith pursuant to section 68(9) of the Ordinance.

89. Lastly, we wish to record herein our thanks to Ms Wong of the Respondent for her submissions, analysis of accounting records and kind assistance to the Board on this appeal.