

Case No. D2/23

Salaries tax – whether there was basis for re-opening the assessment of salaries tax – meaning of ‘error and omission’ – costs ordered for appeal without merit – sections 8(1)(a), 9(1), 9(1)(a), 11B, 11D, 11D(a), 51(5), 64, 64(1), 66, 68, 68(4), 68(9), 70A, 70A(1) of the Inland Revenue Ordinance (the ‘IRO’)

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.

Company A (‘the Company’) filed employer’s returns of remuneration and pensions of Mr B (‘the Appellant’), the Company’s director, for the years of assessment 2007/08 to 2011/12. The employer’s returns were signed by the Appellant in the capacity of the Company’s director.

The Assessor raised on the Appellant Salaries Tax Assessments for the years of assessment 2007/08 and 2009/10 to 2011/12 and the Revised Salaries Tax Assessment for the year of assessment 2008/09 (collectively ‘the Subject Assessments’). None of the Subject Assessments were objected to by the Appellant either by himself or his tax representative within 30 days from their respective dates of issuance.

By a letter dated 28 January 2013, the Company stated, among others, that it used to pay commission to the director at year end based on the annual performance. On 18 September 2013, the Appellant, through A Golden Champion CPA Limited (‘the Former Representative’), made an application to correct the Subject Assessments under section 70A of the IRO. The Assessor conducted a tax audit on the tax affairs of the Appellant. On 6 February 2015 and pending the outcome of the tax audit, she raised on the Appellant additional salaries tax assessment for the year of assessment 2008/09 (‘Additional Salaries Tax Assessment for 2008/09’). From the Company’s books and records, the Assessor ascertained a number of things, including an item described as ‘staff quarters’ of \$941,832.60 (‘the Sum’) in the Company’s entertainment and marketing expenses charged for the year ended 31 December 2008.

In response to the Assessor’s enquiries, the Company, either by itself or through the Former Representative, furnished further information. The Assessor was not satisfied that the tax charged on the Appellant under the Subject Assessments were excessive by reason of an error or omission, as prescribed by section 70A of the IRO. By a letter dated 27 June 2019, the Assessor refused the Appellant’s application for correction of the Subject Assessments.

The Appellant, through Asia Fortune Consultants Limited (‘the

Representative’), on 25 July 2019 objected to the Assessor’s refusal. The Assessor maintained the view that the Subject Assessments should not be revised pursuant to section 70A of the IRO. However, she was of the view that the Sum was a staff benefit provided by the Company and should be chargeable to Salaries Tax. She considered that the Additional Salaries Tax Assessment for the year of assessment 2008/09 should be revised.

The Appellant’s objections were considered by the Respondent. On 4 January 2022, the Acting Deputy Commissioner of Inland Revenue made determinations on the Appellant’s objections (‘the Determination’). The Appellant was not satisfied with the Determination. By his 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.

Having considered the background of the case and the grounds of appeal relied on by the Appellant, the Board felt that the issues for the Board to determine were: (a) whether the Subject Assessments became final and conclusive; (b) if so, whether they could be re-opened by virtue of section 70A of the IRO; and (c) whether the Additional Salaries Tax Assessment for 2008/09 was excessive.

Held:

1. The scope of section 70A is restricted and it has been intended to have a narrow coverage. The scope is restricted by the need for an error in a return or an accompanying statement (Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218; and Good Mark Industrial Ltd v Commissioner of Inland Revenue [2014] 2 HKLRD 981 followed).
2. A change of mind by a taxpayer in connection with how any part of the accounts should be made up could not be regarded as an error or omission in relation to the accounts previously submitted with the Inland Revenue Department. The trust on others who made an alleged erroneous return on behalf of the taxpayer was not an error within the meaning of Section 70A of the IRO (D142/01, IRBRD, vol. 17, 46; and D46/00, IRBRD, vol.15, 504 followed).
3. Sections 64, 70 and 70A belong to Part 11 of the IRO. It followed that if the Appellant objected to the Subject Assessments, he had to do so within 1 month (as stipulated by section 64) after the respective dates of the notices of the Subject Assessments. The Salary Tax Assessment for year 2011/12 was issued to the Appellant by the Respondent on 3 October 2012 while the Subject Assessments (other than the Salary Tax Assessment for year 2011/12) were issued earlier. The earliest response or objection to the Subject Assessments was made by the Appellant to the Respondent on 28 January 2013. Apparently, the objection was done after the time limited by section 64 of the IRO. The Appellant made no allegation that he was prevented from

giving notice of objection within the time limit because of his absence from Hong Kong, sickness or other reasonable cause. It followed that the Subject Assessments should become final and conclusive pursuant to section 70 of the IRO because the objection was lodged outside the 1-month period as stipulated by section 64 of the IRO.

4. To the Board, the facts of the current case demonstrated that both the Company and the Appellant purposely and intentionally had the employer and employee relationship for the relevant financial years for the purpose of obtaining tax benefit. The payments made by the Company to the Appellant in each of the relevant financial years were by way of salary or income instead of 'drawings' as alleged. The Appellant derived or obtained income or salary from the Company in the capacity of being its director.
5. The Board agreed that the alleged 'error', if any, was no more than a subsequent change of opinion. The change of opinion could not be regarded as an error within the meaning of section 70A (Extramoney Limited v Commissioner of Inland Revenue [1997] HKLRD 387; and D124/02, IRBRD, vol 18, 175 followed).
6. There was no specific ground on the Appellant's appeal against the Additional Salaries Tax Assessment stated in his Statement of Grounds of Appeal. For the purpose of discussion, the Board treated it that the Appellant relied on the general ground that the income referred to should be his drawings from the Company, to which the Board had already rejected. The Former Representative in response to the Respondent's enquiry did mention that the Sum was related to renovation and soft furnishing of the director's quarters, which was a staff benefit. Since it was the Appellant's stance that the Sum represented the staff benefit to the Appellant, the Sum, being a perquisite, should be included as part of the Appellant's income chargeable to Salaries Tax under section 9(1)(a) of the IRO.
7. The Appellant failed to discharge the burden of proof that (a) the Subject Assessments could be re-opened pursuant to section 70A of the IRO; and (b) the Subject Assessments and the Additional Salaries Tax Assessment were excessive. Given our finding, the Subject Assessments and Assessor's refusal to correct the Subject Assessments under section 70A of the IRO were confirmed. The Additional Salaries Tax Assessment as revised in Fact (15) of the Determination was hereby confirmed.
8. The Board took the view that there was no reasonable prospect of success in the appeal which should have been known to the Appellant. Pursuant to Section 68(9) of the IRO, the Board ordered the Taxpayer to pay as costs of the Board in the sum of \$10,000, which shall be added to the tax charged and recovered therewith.

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

Cases referred to:

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
D46/00, IRBRD, vol 15, 504
D142/01, IRBRD, vol 17, 46
D124/02, IRBRD, vol 18, 175

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. In the employer's returns of remuneration and pensions filed by Company A ('the Company'), in respect of Mr B ('the Appellant'), the Company's director, the following particulars were reported for the years of assessment 2007/08 to 2011/12:

<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>
Capacity in which employed	Director	Director	Director	Director	Director
Period of employment	1-4-2007 – 31-3-2008	1-4-2008 – 31-3-2009	1-4-2009 – 31-3-2010	1-4-2010 – 31-3-2011	1-4-2011 – 31-3-2012
Particulars of income –					
	\$	\$	\$	\$	\$
Salary / wages	580,000	600,000	1,200,000	1,200,000	1,200,000
Commission / Fees / Bonus	-	7,247,500	-	2,000,000	-
Total	<u>580,000</u>	<u>7,847,500</u>	<u>1,200,000</u>	<u>3,200,000</u>	<u>1,200,000</u>
Place of residence provided	Yes	Yes	No	No	No
Period	1-4-2007 – 31-3-2008	1-4-2008 – 15-12-2008			
Nature	Flat	Flat			
Rent paid by employer	\$237,750	\$199,750			

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The employer's returns were signed by the Appellant in the capacity of the Company's director.

2. In his Tax Return – Individuals for the years of assessment 2007/08 to 2011/12, the Appellant reported the same total income as that stated in paragraph 1 hereof having been derived from the Company.

3. The Assessor raised on the Appellant the following Salaries Tax Assessments for the years of assessment 2007/08 and 2009/10 to 2011/12 and the Revised Salaries Tax Assessment for the year of assessment 2008/09 (collectively 'the Subject Assessments'):

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
Date of issue	22-8-2008	26-2-2010	27-10-2010	11-8-2011	3-10-2012
	\$	\$	\$	\$	\$
Income	580,000	7,847,500	1,200,000	3,200,000	1,200,000
<u>Add</u> : Value of residence provided	<u>58,000</u>	<u>175,737</u>	<u>-</u>	<u>-</u>	<u>-</u>
	638,000	8,023,237	1,200,000	3,200,000	1,200,000
<u>Less</u> : Retirement scheme contributions	12,000	12,000	12,000	12,000	12,000
Other deductions	<u>80,000</u>	<u>1,337,355</u>	<u>180,000</u>	<u>257,355</u>	<u>457,218</u>
Net income	546,000	6,673,882	1,008,000	2,930,645	730,782
<u>Less</u> : Total allowances	<u>350,000</u>	<u>366,000</u>	<u>366,000</u>	<u>366,000</u>	<u>396,000</u>
Net Chargeable Income	<u>196,000</u>	<u>6,307,882</u>	<u>642,000</u>	<u>2,564,645</u>	<u>334,782</u>
Tax Payable (after tax reduction)	<u>5,705</u>	<u>993,082*</u>	<u>91,140</u>	<u>417,989</u>	<u>32,912</u>

*Standard rate on net income.

4. None of the Subject Assessments were objected to by the Appellant either by himself or his tax representative within 30 days from their respective dates of issuance.

5. By a letter dated 28 January 2013, the Company stated, among others, that 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 Company's profits would be insignificant. Personal tax rate was lower than that of profits tax by 1.5%. In the same letter, it requested the Respondent to make the tax assessment of the Company from YA 2007/08 to YA 2011/12 with its complete tax return and the overpaid tax be

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refunded and requested that the provisional tax for YA 2012/13 be held over¹.

6. On 18 September 2013, the Appellant, through A Golden Champion CPA Limited (formerly known as Louis Leung & Partners CPA Limited) ('the Former Representative'), made an application to correct the Subject Assessments under section 70A of the Inland Revenue Ordinance (Chapter 112), laws of Hong Kong ('IRO') claiming *inter alia* that:

- (a) Mr B was the sole director and operator of the Company. He was never employed by the Company and had no employment contract made.
- (b) He never received monthly salaries as a normal employee. He only drew profits from the Company when it had profits.
- (c) He reported the profits drawn as his own income based on the erroneous advice from his previous tax representative.
- (d) The Salaries Tax Returns for 2007/08 to 2011/12 were erroneous and the income reported did not represent real salary income of the Appellant.

7. The Assessor conducted a tax audit on the tax affairs of the Appellant. On 6 February 2015 and pending the outcome of the tax audit, she raised on the Appellant the following additional salaries tax assessment for the year of assessment 2008/09 ('Additional Salaries Tax Assessment for 2008/09'):

	\$
Additional Net Chargeable Income	<u>500,000</u>
Tax Payable thereon on standard rate	<u>75,000</u>

8. From the Company's books and records, the Assessor ascertained the following:

- (a) In its audited financial statements for the years ended 31 December 2007 to 2011, the Company disclosed that its profits before taxation were arrived at after charging the director's remuneration as follows:

<u>31-12-2007</u>	<u>31-12-2008</u>	<u>31-12-2009</u>	<u>31-12-2010</u>	<u>31-12-2011</u>
\$	\$	\$	\$	\$
<u>550,000</u>	<u>8,082,500*</u>	<u>1,050,500</u>	<u>3,200,000</u>	<u>1,200,000</u>

*Included housing allowance of \$235,000.

¹ (Note) Due to the Company failed to file tax returns for financial years 2007/08 to 2011/12 and the Assessor was of the opinion that the Company was chargeable with tax, the Assessor issued estimated assessments pursuant to section 59(3) of the Inland Revenue Ordinance to the Company.

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- (b) In the audited financial statements, the Company disclosed the following amounts due to/from director as at 31 December 2007 to 2011:

<u>As at</u>	<u>31-12-2007</u>	<u>31-12-2008</u>	<u>31-12-2009</u>	<u>31-12-2010</u>	<u>31-12-2011</u>
	\$	\$	\$	\$	\$
Amount due (to)/ from director	<u>(48,100)</u>	<u>355,666</u>	<u>125,409</u>	<u>172,380</u>	<u>(1,477,728)</u>

- (c) In the directors' reports, the directors did not recommend any payment of dividends for the years ended 31 December 2007 to 2011.
- (d) The breakdown of the Appellant's income reported in the employer's returns referred to in paragraph 1 hereof:

<u>Month</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
April	40,000	50,000	100,000	100,000	100,000
May	40,000	50,000	100,000	100,000	100,000
June	50,000	50,000	100,000	100,000	100,000
July	50,000	50,000	100,000	100,000	100,000
August	50,000	50,000	100,000	100,000	100,000
September	50,000	50,000	100,000	100,000	100,000
October	50,000	50,000	100,000	100,000	100,000
November	50,000	50,000	100,000	100,000	100,000
December	50,000	7,297,500	100,000	2,100,000	100,000
January	50,000	50,000	100,000	100,000	100,000
February	50,000	50,000	100,000	100,000	100,000
March	<u>50,000</u>	<u>50,000</u>	<u>100,000</u>	<u>100,000</u>	<u>100,000</u>
	<u>580,000</u>	<u>7,847,500</u>	<u>1,200,000</u>	<u>3,200,000</u>	<u>1,200,000</u>

- (e) The Company contributed \$1,000 per month to a Mandatory Provident Fund ('MPF') Scheme in respect of the Appellant during the years of assessment 2007/08 to 2011/12.
- (f) The Company's entertainment and marketing expenses charged for the year ended 31 December 2008 included an item described as 'staff quarters' of \$941,832.60 ('the Sum') which represented the expenses incurred for the acquisition of the Property and its decoration expenses. Details of the Sum are set out in Appendix A of the determination referred to in paragraph 13 hereof.

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- (g) In the Company's trial balance for the year ended 31 December 2011, a sum of \$1,120,000 was charged as salaries with the corresponding credit entry made to the ledger account of 'Amount due to director'.

9. In response to the Assessor's enquiries, the Company, either by itself or through the Former Representative, provided the following information:

- (h) There was no computation basis for the Appellant's salary. The Appellant would transfer to his personal account the fund needed to meet his family's cash flow. At the year end, he would make a rough assessment and adjusted the total salary accordingly.
- (i) The Sum was related to renovation and soft furnishing of the director's quarters, which is a staff benefit.

10. The Assessor was not satisfied that the tax charged on the Appellant under the Subject Assessments were excessive by reason of an error or omission, as prescribed by section 70A of the IRO. By a letter dated 27 June 2019, the Assessor refused the Appellant's application for correction of the Subject Assessments.

11. The Appellant, through Asia Fortune Consultants Limited ('the Representative'), on 25 July 2019 objected to the Assessor's refusal under paragraph 10 hereof above claiming that the tax charged was excessive, and that:

- (a) He was advised by the Immigration Department that he should pay some tax in order to renew his visa to stay in Hong Kong.
- (b) He was a foreigner with little Hong Kong tax knowledge. He relied on the previous tax representative and reported the money he drew as salaries, which was in fact an appropriation of the Company's profits.
- (c) He drew cash from the Company's bank account, and the withdrawals were often used to pay various expenses incurred by the Company.
- (d) The reported income of Mr B differed from the amount of cash he actually received as shown below. The reported income were thus fictitious figures, and should not be taxed.

Year ended	<u>31 December</u>		Year ended	<u>31 March</u>	
	Actual cash received	Director's remuneration, per paragraph 8(a) hereof		Actual cash received	Director's remuneration per paragraph 1 hereof
	\$	\$		\$	\$
2007	380,240	550,000	2008	535,240	580,000
2008	8,037,065	8,082,500	2009	7,753,065	7,847,500
2009	1,041,357	1,050,500	2010	1,025,357	1,200,000
2010	3,536,178	3,200,000	2011	3,386,178	3,200,000
2011	80,000	1,200,000	2012	230,000	1,200,000

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- (e) The Appellant could not distinguish between remuneration and withdrawal of profits. His behaviour was something incorrectly done through ignorance or inadvertence, a mistake.
- (f) According to MPF rules, a director was regarded as an employee of the Company. The Applicant had to make mandatory contributions, which was not relevant to whether he received remuneration from the Company or not.

12. The Assessor maintained the view that the Subject Assessments should not be revised pursuant to section 70A of the IRO. However, she is of the view that the Sum was a staff benefit provided by the Company and should be chargeable to Salaries Tax. She now considers that the Additional Salaries Tax Assessment for the year of assessment 2008/09 should be revised as follows:

	\$
Additional Net Chargeable Income –	
The Sum (referred to in paragraph 8(f) hereof)	<u>941,832</u>
Tax Payable thereon on standard rate	<u>141,275</u>

13. 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) The Assessor's refusal to correct the Salaries Tax Assessment for the year of assessment 2007/08 under section 70A of the IRO, dated 27 June 2019, is upheld and the Salaries Tax Assessment for the year of assessment 2007/08 under Charge Number X-XXXXXXX-XX-X, dated 22 August 2008, showing Net Chargeable Income of \$196,000 with Tax Payable thereon of \$5,705 is confirmed.
- (b) The Assessor's refusal to correct the Revised Salaries Tax Assessment for the year of assessment 2008/09 under section 70A of the IRO, dated 27 June 2019, is upheld and the Revised Salaries Tax Assessment for the year of assessment 2008/09 under Charge Number X-XXXXXXX-XX-X, dated 26 February 2010, showing Net Chargeable Income of \$6,307,882 with Tax Payable thereon of \$993,082 is confirmed.
- (c) Additional Salaries Tax Assessment for the year of assessment 2008/09 under Charge Number X-XXXXXXX-XX-X, dated 6 February 2015, showing Additional Net Chargeable Income of \$500,000 with Tax Payable thereon of \$75,000 is increased to Additional Net Chargeable Income of \$941,832 with Tax Payable thereon of \$141,275.

- (d) The Assessor's refusal to correct the Salaries Tax Assessment for the year of assessment 2009/10 under section 70A of the IRO, dated 27 June 2019, is upheld and the Salaries Tax Assessment for the year of assessment 2009/10 under Charge Number X-XXXXXXX-XX-X, dated 27 October 2010, showing Net Chargeable Income of \$642,000 with Tax Payable thereon of \$91,140 is confirmed.
- (e) The Assessor's refusal to correct the Salaries Tax Assessment for the year of assessment 2010/11 under section 70A of the IRO, dated 27 June 2019, is upheld and the Salaries Tax Assessment for the year of assessment 2010/11 under Charge Number X-XXXXXXX-XX-X, dated 11 August 2011, showing Net Chargeable Income of \$2,564,645 with Tax Payable thereon of \$417,989 is confirmed.
- (f) The Assessor's refusal to correct the Salaries Tax Assessment for the year of assessment 2011/12 under section 70A of the IRO, dated 27 June 2019, is upheld and the Salaries Tax Assessment for the year of assessment 2011/12 under Refund Number X-XXXXXXX-XX-X, dated 3 October 2012, showing Net Chargeable Income of \$334,782 with Tax Payable thereon of \$32,912 is confirmed.

14. The Appellant was not satisfied with the Determination. By his 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

15. The Statement of Grounds of Appeal is consisted of 5 pages but major points can be summarized as follows: -

- (a) The Appellant is a Country C 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) He is the sole owner of the Company from which he derived all his income for the relevant years.
- (c) When he applied for resident visa from the Immigration Department, he was advised to pay some tax in Hong Kong in order to strengthen the chance of renewing the visa to stay in Hong Kong.
- (d) He drew cash from the Company's account to pay for Company's expenses as well as personal expenses as this was the normal pattern of working style in Country C.

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- (e) Whenever there were big surplus cash in the company's account, he transferred them into his own account thus the drawing for each year was substantial.
- (f) When he received the Salaries Tax returns, he sought advice from his tax representative and she advised that since salaries tax rate is lower than profits tax rate and personal income tax is more obvious evidence for visa purposes, it would be advantageous to report the profits under salaries tax and for simplicity, just to use the annual drawing as a basis to report as the salary income.
- (g) In his case, the money received by him represented drawings and not income thus it should not be subject to salaries tax. Alternatively, the cash received differed from the income reported thus there were errors in the Salaries Tax returns previously submitted.
- (h) The director has no service contract with the Company thus he has no legal rights for accrual of income for any year of assessment. Nor was there any formal basis for accrual.
- (i) The previous auditor and tax representative was ignorant, has erroneously advised the Company to put through the credit entry in the current account with director to raise the income to \$1,200,000. This was evidence of erroneous advice.
- (j) When he does not have a salaries tax status, any benefit in kind could not be chargeable to Salaries Tax.
- (k) He was advised by Mr Cheung of the Inland Revenue Department to make a claim of 70A in salaries tax as the facts and circumstances favored such application.
- (l) It has taken nearly six years for the officers to consider the application and he presumed that they must have 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 of Review.

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 all the matters stated in the 'Statement of Grounds of Appeal' carefully and thoroughly.

Issues

16. 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 Subject Assessments become final and conclusive;
- (b) if so, whether they can be re-opened by virtue of section 70A of the IRO; and
- (c) whether the Additional Salaries Tax Assessment for 2008/09 is excessive.

Undisputed Facts of the Case

17. The statements made in paragraph 1 to paragraph 14 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 Respondent or documents submitted by the Appellant or its tax representatives or from the documents in the bundles. The documents and correspondences were not objected to nor disputed by the Appellant.

18. The parties had not come to an agreement on the facts of the case prior to the hearing. In order to sort out the Appellant’s complaints on the Determination, the Board went through the Determination with the Appellant paragraph by paragraph with a view to narrowing down the disputed facts. At first, the Appellant indicated that he objected to paragraph 5 hereof and paragraph 8(d), paragraph 8(f) and paragraph 8(g) hereof. After hearing his reasons, the Board found that he just wished to give more information on the said paragraphs. As a matter of fact, he did not object thereto. As such, we find the statements set out in paragraph 1 to paragraph 14 hereof form part of the facts of the Appeal.

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

- (a) Company A is company incorporated in Hong Kong in 2003. Its principal activities included acting as a property agent and providing property consulting services. It had a business address in Hong Kong. The Company closed its accounts on 31 December annually.
- (b) At the relevant times, the Appellant was a director and shareholder of the Company.
- (c) The Appellant is a citizen of country C, His wife is Ms D.
- (d) Ms D had been the registered owner of a property located at Address E (‘the Property’) since XX August 2008 before its sale in 2018.

The testimony of Mr B

20. The Appellant testified before the Board under oath. He called no other witness at the hearing.

21. The following is the summary of the Appellant's testimony given at the hearing:

- (a) He confirmed paragraph 1 to paragraph 14 hereof save that he had given further comments on paragraph 5 and paragraph 8(d), (f) and (g) hereof.
- (b) Originally, he objected to the statement 'the Subject Assessments became final and conclusive in terms of section 70 of the IRO' in paragraph 4 hereof which is in paragraph 6 of the Determination. Given the fact that it is a matter for the Board to decide, it is fair that such statement should not become fact undisputed by the Appellant.
- (c) In respect paragraph 8(d) hereof, the Appellant said that he had no pay roll with the Company. He was asked by the assessor to give a breakdown. That explained why he made this one to the assessor. He stressed that there was no monthly payment to him. In respect of paragraph 8(f) hereof, he used the wrong trial balance, so the figures were not correct. In respect of 8(g) hereof, the Appellant said there was a discrepancy between the figures because there was an adjustment of \$1,120,000 as his drawing was only \$80,000. If we looked at paragraph 11(d) hereof (which is paragraph 14(d) of the Determination), we could find that the actual drawdown on that year was only \$80,000 but finally \$1.2 million had been charged. Actually, they were just numbers only. It did not like actual salary. So, they should not be considered as the salary.
- (d) The Appellant said for salary tax-wise, basically as the owner and director, he used to draw down the cash whenever he needed, also by cheque to his personal account to cover his family's living expenses.
- (e) Although he maintained the salaries tax, he was benefitted 1.5 percent tax rate difference. But the IRD could add back this one to the profits tax of the Company and they could open the cases for proper calculation of the profits tax and then also salaries tax. So, in respect of paragraph 8(g) hereof, they should not perceive the sum as the salaries.
- (f) The Appellant was referred to the notes of the Company's audited report for 2008 to 2011 by Ms Wong which stated that the audited financial statements had been prepared under the accrual basis of

accounting. He was asked to confirm whether the Company's income and expenses including director's remuneration were booked in the audited financial statements on accrual basis. The Appellant said the Company did not have double entry. He just used the bank statements and the single entry only. For him, he did not have any accrual basis. He agreed that the audited reports were wrong in this regard.

- (g) The Appellant further commented that he did not make any accrual because he did not understand the audited reports, their contents and details. He only prepared the bank statements, the list of transactions by the bank statements and then gave to the auditor. He only used 'cash basis'. The auditors prepared all these things. He only trusted his auditors. He could not say whether they were right or wrong. He simply signed the relevant pages of the audited reports. The auditors handled everything.
- (h) He admitted that it was his fault in signing the audited report which he did not quite understand their exact meanings.
- (i) When he was asked why he confirmed the audited reports were true and correct, the Appellant said he only looked at the balance sheet and then the income statement. He did not actually read other things in the reports. He only counted on his auditors.
- (j) He was under the impression that he could not challenge his own auditors in 2012 though he could distinguish the meaning of accrual and cash basis.
- (k) He confirmed that the contents of the audited reports were not correct as he did not check the figures at 2012. He only spent time to understand the reports after the IRD issued additional assessment to him.
- (l) The Appellant was referred to page 23 of R1 Bundle (the Company's audited reports for 2008/09) where it stated the salary of director being \$7,847,500.00. He confirmed that the report was correct when he signed the same in 2012. When he was asked whether the director's salary of \$7,847,500.00 was correct, he said the amount did not match with the ledger so it was wrong. That was his mistake to sign the report.
- (m) When the Appellant was asked what happened when he signed the audited report, he said it was really rush because the CPA told him that it was so. So at that time, he did not know the details or exact understanding of the salaries.

- (n) The Appellant said each year he only gave the bank statements and documents to his auditors. The auditors would group them together and calculated the director's salary. He also gave the employer tax return IR 56B to his auditor for her calculation. He thought it was salary but after discussion with his current tax representative Mr Leung, this should not be salary. It was some sort of drawings from the Company's account.
- (o) The Appellant said during a meeting with the IRD staff (together with Mr Leung), the officer in charge actually gave him the advice the estimated assessments for the profits tax could not be re-opened again for new assessment. He advised him to go for the salary tax and all salary tax could be added back to the profits tax. Based on his advice, he lodged the claims not only for the profits tax assessments, but also the salary tax assessments. He said according to the officer and Mr Leung, he should have a strong case because he made the tax returns and proper tax returns.
- (p) Upon clarification, the Appellant agreed that it was not a promise on the part of the officer but some sort of hint. In any event, he had lodged the objections and the appeals. He also agreed that the hint was the trigger point to lodge the salary tax objections and appeal.
- (q) The Appellant was asked if there were errors, had the Company corrected the errors once such was found. He replied that as the case was still going on, the Company had not made any rectification and he would do so after the case was fixed. He said without the confirmation of the IRD, he could not correct the errors.
- (r) The Appellant was asked if his tax representative asked for correction when he lodged the section 70A application, he said his tax representative did not.
- (s) The Appellant was referred to several letters sent to the IRD for holding over taxes, they referred to his salaries. He agreed that the Company intended to pay him salary for the relevant years. He did not get any advice from any tax adviser or CPA or professional. He confirmed that the contents of those letters were true and correct.

The Statutory Provisions relating to Salary Tax

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

Section 8(1)(a)

'Salaries tax shall ... be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from ... any office or employment of profit.'

Section 9(1)(a)

'Income from any office or employment includes any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others.'

Section 11B

'The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.'

Section 11D

'For the purpose of section 11B –

(a) income which has accrued to a person during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, ... an additional assessment shall be raised in respect of such income:

Provided that ... income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person;

(b) income accrues to a person when he becomes entitled to claim payment thereof ...'

Section 51(5)

'A return, statement, or form purporting to be furnished under this Ordinance by or on behalf of any person shall for all purposes be deemed to have been furnished by that person or by his authority, as the case may be, unless the contrary is proved, and any person signing any such return, statement, or form shall be deemed to be cognizant of all matters therein.'

Section 64(1)

'Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment; but no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the

Commissioner within 1 month after the date of the notice of assessment:

Provided that – (a) if the Commissioner is satisfied that owing to absence from Hong Kong, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving such notice within such period, the Commissioner shall extend the period as may be reasonable in the circumstances; ...'

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 ...'

23. The onus of proof in an appeal before the Board and the issue of costs are provided in section 68 of the IRO as follows:

(a) Burden of Proof

Section 68(4)

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

(b) Costs

Section 68(9)

'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.'

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

Legal Authorities submitted by the Respondent

24. 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) Extramoney Limited v CIR [1997] HKLRD 387;
- (b) Moulin Global Eyecare Trading Ltd v CIR (2014) 17 HKCFAR 218;
- (c) Good Mark Industrial Ltd v CIR [2014] 2 HKLRD 981.

Board Decisions

- (d) D46/00, IRBRD, vol.15, 504;
- (e) D142/01, IRBRD, vol. 17, 46;
- (f) D124/02, (2003-04) IRBRD, vol.18, 175;

The Respondent submitted no legal authorities.

The Applicable Legal Principles.

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

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

27. A change of mind by a taxpayer in connection with how any part of the accounts should be made up cannot be regarded as an error or omission in relation to the accounts previously submitted with the Inland Revenue Department. As per the Board's decision in D142/01 where it held:

'19. ... any "change of the mind of the Firm in connection with how any part of the accounts should be made up" cannot be regarded as an error or omission in relation to the accounts previously submitted by the Firm to the Revenue.'

'21. The Firm made a decision on the basis of the factual situation at the time. The fact that a different view is now taken on the basis

of hindsight does not mean that the original view was a 'mistake' or an 'error'.

The Board in D142/01 held that the Commissioner was correct in holding that there was no basis for re-opening the assessment under section 70A of the IRO and the appeal was dismissed.

28. The trust on others who made an alleged erroneous return on behalf of the taxpayer is not an error within the meaning of Section 70A of the IRO. In D46/00, the taxpayer submitted a profits tax return that showed a gain on disposal of property. The taxpayer was taxed based on this return. Later, the taxpayer alleged an error in offering the gain as a trading gain. The director contended that he did not review the accounts in detail but simply trust the previous accounting manager and signed the accounts. In dismissing the appeal, the Board found that³:

- (a) The accounts of the taxpayer have been properly prepared and the treatment of the gain on disposal of property as a trading gain was a deliberate act by the previous accounting manager, who prepared it and the first tax representative who audited it. They knew what they were doing.
- (b) Not understanding the tax implications of a certain manner of presentation of the accounts has no direct bearing on the error issue. The taxpayer made the section 70A application as an after thought in an attempt to avoid payment of the Profits Tax.

Submission of the Appellant and the Respondent

29. The Appellant filed a submission before the hearing for the Board's consideration. The submission was served with the A1 Bundle which contained the documents relied by the Appellant. In respect of the appeal relating to the Company against the estimated assessments for the financial years from 2007/08 to 2011/2012, the Appellant or the Company also filed 2 supplemental submissions.

30. The Respondent filed an Opening Submission and a Closing Submission with the Board for its consideration.

31. In deliberating its decision, the Board has amongst others duly and carefully considered all written submissions and the oral submission made by Mr B at the hearing, the Respondent's Opening and Closing Submission as well as the documents in the bundles for hearing.

Discussion and Analysis

Did the Subject Assessments become final and conclusive?

³ Paragraph 55 of the Decision.

32. In the course of giving evidence, the Appellant objected to the statement that ‘the Subject Assessments became final and conclusive in terms of section 70 of the IRO’⁴. It necessitates us to see if the Subject Assessments became final and conclusive under section 70 of the IRO.

33. 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.’

34. Section 64, section 70 and section 70A belong to Part 11 of the IRO (ie the same part). It follows that if the Appellant objected to the Subject Assessments, he had to do so within 1 month (as stipulated by section 64) after the respective dates of the notices of the Subject Assessments.

35. The Salary Tax Assessment for year 2011/12 was issued to the Appellant by the Respondent on 3 October 2012 while the Subject Assessments (other than the Salary Tax Assessment for year 2011/12) were issued earlier. The earliest response or objection to the Subject Assessments was made by the Appellant to the Respondent on 28 January 2013. Apparently, the objection was done after the time limited by section 64 of the IRO.

36. The Appellant made no allegation that he was prevented from giving notice of objection within the time limit because of his absence from Hong Kong, sickness or other reasonable cause. It follows that the Subject Assessments should become final and conclusive pursuant to section 70 of the IRO because the objection was lodged outside the 1-month period as stipulated by section 64 of the IRO.

What was the nature of the payment by the Company to the Appellant for the relevant financial years?

37. It is the Appellant’s contention (expressed through its Former Representative) that the Respondent should exercise the power under section 70A of the IRO to rectify the error and mistake and refund the tax paid *inter alia* on the following grounds: (a) the Appellant had no employment contract and is never employed by the Company; (b) the Appellant has never received monthly salary as a normal employee does. What he got was the drawing of profit from the Company at intervals when the Company generated such profits; (c) upon the erroneous advice by his previous tax representative, he reported these drawings as income in his Salaries Tax Return and taxed as such.

38. Whether there exists an employer and an employee relationship, it does not depend only on whether there has a written employment contract between the Appellant and

⁴ Paragraph 21(b) of this Decision.

the Company. Such relationship, if any, could be inferred from the conducts of the parties and background of the case.

39. The Appellant claimed that the income he reported as deriving from the Company was not his income, but appropriation of profits. However, the Appellant (being one of the directors of the Company) and the other director (being a corporate director) did not recommend and declare payment of dividends to the shareholders for the years ended 31 December 2007 to 2011.

40. The Appellant claimed that the cash received by him represented drawings from the Company, thus it should not be chargeable to Salaries Tax. Such claim, however, was not supported by the accounting records of the Company. In the Company's ledger, all the cash and cheques drawn by the Appellant between 2007 to 2014 were recorded as his salary.

41. In the letter sent by the Appellant (in the capacity of the managing director of the Company) to the Respondent of 28 January 2013, the Company admitted that

'the Company used to pay the commission to the director at the year-end based on the annual performance. The Company's profit used to be not significant while the salary tax was big when the performance is good. That is the only tax adjustment that he did it. Personal tax ratio is lower than that of profit tax by 1.5% point.'

42. The Company's audited financial statements for the years of 2007 to 2011 showed that director's remunerations were charged to the Company in each financial year. In the employer's returns filed by the Company for each of the financial years ended 31 March 2008 to 2012, the Company reported that income had accrued to the Appellant in the capacity of a director. The said returns were prepared and signed by the Appellant in the capacity of the Company's director.

43. The Appellant also reported the same income in his personal tax return for the aforesaid years. Upon the enquiry by the assessor about the differences between the director's remunerations reported in the audited financial statements and the employer's returns filed for the Appellant, the Company said in its letter of 3 May 2016 that the difference was due to different cut-off dates and that there was no computation basis for the Appellant's salary. At the end of the fiscal year, he made the rough assessment and **adjusted the total salary** (emphasis added).

44. The Appellant contended that income should be calculated on actual cash received pursuant to section 11D of the IRO. Since the amount of money he drew from the Company differed from his reported income, he argued that there was an 'error' in his tax return filed. In this regard, we agree with Ms Wong's submission that the contention is misconceived. By virtue of the proviso to section 11D(a) of the IRO, any income credited and made available to the Appellant would be deemed to have been received by him and such income should form part of his income assessable to Salaries Tax.

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45. In her closing submission, Ms Wong pointed out the following evidence to the Board for its consideration: -

- (a) In the Applicant's application for holdover of provisional tax, the Appellant stated that **income of \$1,800,000** (emphasis added) had been received by him from April to November 2009 and the **estimated income** (emphasis added) to be received from December 2009 to March 2010 was \$500,000.
- (b) In his letter concerning the value of residence assessed to tax, the Appellant stated that **his total salary was \$600,000 and a special commission of \$7,247,500 was made to him on 31 December 2008**(emphasis added). These figures matched with the income reported in the employer's return and the tax return of Mr B for the year 2008/09.
- (c) In its letter of 16 November 2012 to the Respondent regarding tax payment, the Company stated that although it had a great result over years, **the profits had already been paid as the allowance on which personal income tax was paid accordingly** (emphasis added).
- (d) In its notice of objection, the Company, through the Former Representative, stated that the Appellant was its sole owner, and **he derived all his earning from the Company, which had been mostly transferred to his personal income account and reported and taxed as his income** (emphasis added).
- (e) In the remittance statements of MPF for its employees, the Company reported that Mr B had the relevant monthly income of \$100,000.
- (f) In the note of interview dated 8 March 2016, the Appellant said that his wife purchased a property in 2008 and the source of fund came from his salary derived from the Company.
- (g) In its letter requesting for re-assessment, the Company said (a) it used to pay commission to the director at the year-end based on its annual performance; (b) the Company's profit used to be not significant while the salary tax was big when the performance is good; and (c) that is the only tax adjustment that the Appellant did it; and (d) personal tax ratio is lower than that of profit tax by 1.5% point.
- (h) Had there been any shortfall (or excess) of the money paid, the Appellant might direct the Company to settle the differences by crediting or debiting (as the case may be) his current account with the Company. In fact, this is supported by the trial balance of the Company for the year ended 31 December 2011.

- (i) Upon enquiry, the Company did not deny that the Sum had been charged as the Company expenses for the year 2008. By the Former Representative's letter of 30 August 2018, it confirmed that the Sum was related to renovation and soft furnishing of the director's quarter. This was regarded as staff benefit to the staff (emphasis added) and was an allowable expense for tax purpose.

46. From the above, it is not difficult to see that for the financial years 2007/08 to 2011/12, the Appellant had an employer-employee relationship with the Company, of which he was the sole owner. Any benefit obtained by the Company would therefore go to the Appellant personally. By such relationship, he could appropriate the profits of the Company as his personal income so as to get the benefit of being taxed 1.5% point lower on the profits of the Company. Such arrangement had been confirmed by the Appellant's explanations in the correspondence to the Respondent in the course of investigation or objection, the Company's accounting treatments on payments to the Appellant, the Company's employer's return and the Appellant's employee salary returns.

47. To us, the above facts clearly demonstrate that both the Company and the Appellant purposely and intentionally had the employer and employee relationship for the relevant financial years for the purpose of obtaining tax benefit. They put their intention in action so as to achieve the purpose. They were conscious of what they did. They reported or attributed the profits of the Company as the Appellant's salary or income from the Company in the relevant financial statements and tax returns in order to achieve their purpose of lowering down the tax liability on the profits of the Company.

48. Now the Appellant argued that there was an error in the nature of payment to him by the Company in the relevant financial years. Had there been any error as alleged by the Appellant, we feel the Company should have taken steps to rectify the error by correcting its account entries in relation to such payment, its audited accounts of the relevant financial years, and/or the employer's return made by the Company to the Inland Revenue Department for the relevant financial year.

49. Although the Appellant explained that the Company would take steps to rectify after this appeal is settled, the explanation has no persuasive force. It was an after-thought explanation to justify that it has not taken any steps to rectify the alleged errors. The Company and/or the Appellant could not explain its non-action to rectify the alleged errors on its part. Quite on the opposite, the explanation offered reinforces the fact that there was no error in the nature of payment to the Appellant by the Company.

50. By reason of the aforesaid, we have no doubt that the payments made by the Company to the Appellant in each of the relevant financial years were by way of salary or income instead of 'drawings' as alleged. The Appellant derived or obtained income or salary from the Company in the capacity of being its director.

Was there an 'error' within the meaning of 70A of the IRO?

51. Given our findings stated in paragraphs 49 and 50 above, we do not feel that

there was any error or omission in the Salaries Tax Returns made by the Appellant to the Inland Revenue Department for the relevant financial years.

52. The Appellant said he was a foreigner and did not know about the local tax law. He counted on his tax adviser. His tax adviser advised since salaries tax rate is lower than profits tax rate and personal income tax is more obvious for visa purposes, it would be advantageous to report the profits under salaries tax and for simplicity, just to use the annual drawing as a basis to report as the salary income. The Representative alleged that the Appellant could not distinguish between remuneration and withdrawal of profits, and his behavior was something incorrectly done through ignorance or inadvertence, a mistake⁵.

53. It would appear that the Appellant tried to use his ignorance, inadvertence or mistake as ‘error(s)’ to re-open the case under section 70A of the IRO. We do not agree that there was any ignorance, inadvertence or mistake. The Appellant conscientiously did what he has been advised by his tax representative to get the advantage of a lower tax rate by appropriating the profits of the Company as his income.

54. The Appellant said that he was advised to pay some tax in Hong Kong in order to strengthen the chance of renewing the visa to stay in Hong Kong when he applied for resident visa from the Immigration Department.

55. The facts that (a) he made use of the advice of paying some personal tax in order to strengthen his chance of obtaining resident visa; and (b) he did cause the payment of salary by the Company to him could reinforce the fact that the Appellant intended to treat and did treat the payment from the Company as income in order to strengthen the chance of renewing the visa to stay in Hong Kong.

56. We agree with Ms Wong’s submission that the alleged ‘error’, if any, was no more than a subsequent change of opinion. The change of opinion could not be regarded as an error within the meaning of section 70A following the decisions of *Extramoney* and *D142/01*.

Section 70A of the IRO, Can the Subject Assessment be re-opened thereunder?

57. A taxpayer who wishes to invoke section 70A of the IRO 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** (emphasis added).

⁵ Paragraph 11(e) of this Decision.

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

58. Since we have decided that there is no error or omission in his Salaries Tax Returns filed for the relevant financial years, the tax charged for those financial years could not be excessive by reason of error or omission in the relevant salaries tax returns filed by the Appellant.

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?

59. 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 returns filed by him for that year. It follows that we are not required to make the arithmetical calculation to see if there was any error or omission in this regard which caused excessiveness.

60. Since the Appellant made no complain in this regard, it is our conclusion that the Subject Assessments could not be re-opened under section 70A of the IRO which became final and conclusive under section 70 of the IRO.

Additional Salaries Tax Assessment for the year of assessment 2008/09 ('Additional Salaries Tax Assessment')

61. The Appellant appealed against the Additional Salaries Tax Assessment. However, there was no specific ground in this regard stated in his Statement of Grounds of Appeal. For the purpose of discussion, we treat it that the Appellant relied on the general ground that the income referred to should be his drawings from the Company, to which we have already rejected. The Former Representative in response to the Respondent's enquiry did mention that the Sum (being the amount of \$941,832.60) was related to renovation and soft furnishing of the director's quarters, which is a staff benefit.

62. It is a common ground and a fact⁶ found by the Board that the Company paid the Sum representing the decoration expenses and professional fee in respect of a property purchased in 2008 by the Appellant's wife. Details of the Sum is rendered below:

<u>Date</u>	<u>Description</u>	<u>Amount</u> \$	<u>Amount</u> \$
	<u>Company F</u>		
30-7-2008	Apportionment account	662.60	
	Professional charges	15,500.00	
	Disbursements	<u>429,630.00</u>	445,792.60
	<u>Company G</u>		

⁶ Paragraph 8(f) of this Decision.

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13-9-2008	Deposit paid on 6-9-2008	68,000.00	
28-11-2008	Second payment	66,710.00	
20-12-2008	Final payment	<u>14,800.00</u>	149,510.00
<u>Company H</u>			
1-9-2008	First payment	120,000.00	
13-11-2008	Second payment	205,000.00	
	Items bought	<u>21,530.00</u>	<u>346,530.00</u>
Total: (the Sum)			<u>941,832.60</u>

63. Section 9(1)(a) of the IRO provides *inter alia* 'income from any office or employment includes – (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, except '.

64. Since it is the Appellant's stance that the Sum represented the staff benefit to the Appellant, the Sum, being a perquisite, should be included as part of the Appellant's income chargeable to Salaries Tax under section 9(1)(a).

Disposition

65. By reason of the aforesaid, it is our conclusion that the Appellant failed to discharge the burden of proof that (a) the Subject Assessments could be re-opened pursuant to section 70A of the IRO; and (b) the Subject Assessments and the Additional Salaries Tax Assessment were excessive. Given our finding, the Subject Assessments and Assessor's refusal to correct the Subject Assessments under section 70A of the IRO are confirmed. The Additional Salaries Tax Assessment as revised in Fact (15) of the Determination is hereby confirmed.

Costs

66. 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.

67. 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 Subject 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 Subject Assessments under section 70A of the IRO given his treatments of the payments made by the Company to him as his income or salary for the relevant financial years.

68. Regarding the Additional Salaries Tax Assessment, there is no ground of appeal advanced. If there was one, it was no more than to confirm that the Sum was a staff benefit or perquisite. It contradicted his stance that he was not an employee of the Company

and all payments made to him were by way of ‘drawings’.

69. Some of the submissions made by Mr B were bare or mere allegations without support of evidences. The Appellant alleged that sometime in August 2013 he and his tax adviser had a meeting with Mr Cheung of the Inland Revenue Department. After going through the correspondence, Mr Cheung was quite sympathetic towards his situation and suggested that they should try to make a claim of 70A in salaries tax as the facts and circumstances favored such application. Apart from his mere allegation, there was no other evidence to support such claim. In normal case, if there was a meeting, there should be minutes of the meeting confirmed by the parties. In the absence of any minute to confirm such ‘suggestion’, we do not accept that there was such a suggestion made by Mr Cheung.

70. It does not matter whether there was such a suggestion or not as there was no binding effect on a suggestion even if there was one. In any event, the Appellant did initiate the objection and the appeal procedures as suggested by Mr Cheung if there was such a suggestion.

71. The aggregate tax payable on the Subject Assessments and the Additional Salaries Tax Assessment amounted to more than 1.5 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 his case is weak or unarguable. In our view, there is no reasonable prospect of success in the appeal which should have been known to the Appellant.

72. Substantial amount of public fund is incurred to deal with the appeal. We do not see why the public fund has to bear the costs of the Board in dealing with an unmeritorious appeal.

73. 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.

74. 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.