Case No. D3/15

Profits tax – appellant failing to furnish tax returns within time limit – appellant honestly but mistakenly relying on tax representative's advice that it was unnecessary to file tax returns unless having profit – whether an 'error' in the return within first limb of section 70A – whether 'arithmetical error or omission in calculation' within second limb of section 70A – when an assessment becoming final and conclusive – whether IRD acting in bad faith – whether assessment unreasonable – sections 5(1A), 14, 51, 59, 64, 68, 70 and 70A of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Lo Pui Yin (chairman), Chan Wan Po Paul and Leung Wai Keung Richard.

Date of hearing: 22 October 2014.
Date of decision: 4 May 2015.

The Appellant was a company incorporated in 2001, to which Mr B had been the sole director and shareholder in 2005. Since 2009, the IRD had been issuing profits tax returns of 2004/05 to 2010/11 to the Appellant, who failed to furnish the returns within time limit. In the absence of returns, the Assessor raised with the appellant estimated assessments. Later, the Appellant through Company C, its former tax representatives, submitted tax returns and declared adjusted loss. The Assessor refused to correct the assessments.

The Appellant objected, whose objection was rejected by the Commissioner and the Assessor's assessments were confirmed. The Appellant appealed to the Board.

At the hearing before the Board, the Appellant adduced no oral evidence. It relied on Mr B's witness statement, but provided no reason for Mr B's absence. The Appellant also submitted that: (a) the Appellant's honest and mistaken belief through Company C's advice that it only needed to submit tax return when there was a profit ('Honest Belief') was a mistake and an 'error' within the meaning of the first limb of section 70A; (b) the Commissioner failed to consider that section 70A did not mention a time when a tax return had to be submitted and it never mentioned that the return had to be submitted before the issuance of an assessment; (c) the assessments only became final and conclusive when the Commissioner so informed the Appellant by letter; (d) due to the Commissioner's omission of facts, there was an arithmetical omission in the calculation of the amount of the profits tax charged; (e) IRD had not acted in good faith in raising the assessments, which were unreasonable and ought to be annulled.

Held:

Mr B's witness statement

1. The Board attached no weight on Mr B's witness statement and was not prepared to accept assertions made by the Appellant on its behalf unless they were supported by undisputed documents. The Board rejected the Appellant's claim that it had not furnished profits tax returns within the stipulated time limit because of the Honest Belief. (D7/08, (2008-09) IRBRD, vol 23, 102, D35/10, (2010-11) IRBRD, vol 25, 698, D28/12, (2012-13) IRBRD, vol 27, 633 and D18/13, (2013-14) IRBRD, vol 28, 454 considered)

First limb of section 70A(1)

2. The Appellant had the burden to establish that the tax charged was excessive by reason of (a) an error or omission in any return submitted; and/or (b) any arithmetical error or omission in the calculation of net assessable value, assessable income or profits assessed or in the amount of tax charged.

3. Further, the Appellant also had to substantiate the claimed mistake with evidence 'in the strongest terms' or 'clear evidence that a mistake has been made'. The Appellant's evidence of Honest Belief came nowhere near the requirement, and failed to establish the existence of 'error'. (Extramoney Ltd v Commissioner of Inland Revenue [1997] 2 HKC 38 and D6/91, IRBRD, vol 5, 556 considered)

4. 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. (D5/71, IRBRD, vol 1, 30, D93/89, IRBRD, vol 6, 342, D40/91, IRBRD, vol 6, 159 and D49/95, IRBRD, vol 10, 326 considered)

5. Under the scheme of IRO, notices requiring furnishing of tax return might be given by an assessor. The notice stipulated a time within which tax return should be furnished. Where a person failed to furnish a return and the assessor was of the opinion that such person was chargeable with tax, the assessor was authorized to make an assessment by estimation. The assessments raised on the Appellant were indeed assessments of the amount of assessable profits of the Appellant.

6. An assessment became final and conclusive by operation of law, not by a decision or notification of a Commissioner. In the present case, no valid objection was received by the Commissioner within one month after the date of notice of each estimated assessments. Thus, each estimated assessment became final and conclusive. The same situation arose in respect of the assessments made by the Assessor. (Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166, Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (1983) 2 HKTC 17, D40/91, IRBRD, vol 6, 159, Extramoney Ltd v Commissioner of Inland Revenue [1997] 2 HKC 38 and D6/91, IRBRD, vol 5, 556 considered)

Second limb of section 70A(1)

7. 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. (D40/91, IRBRD, vol 6, 159 considered)

8. The 'information' that IRD was alleged to have omitted in calculation was not before the Assessor at the time of assessment, as the Appellant had not put it before the Assessor. Hence, it could not be the case that the Assessor had 'omitted' to consider the 'information' when it exercised the power to make assessments by estimation; the 'information' was not something that was 'left out' or 'excluded' when the relevant 'calculation' was made. Further, the Appellant's contention, if accepted, would allow taxpayers who chose not to file returns to circumvent sections 59(3), 64(1) and 70 by using section 70A to accuse an assessor of having omitted to consider matters when it was the taxpayer's duty to submit relevant information to IRD timeously, truthfully, and completely, but which was not done because of its own failure.

Bad faith & unreasonableness

9. The Assessor did not act in bad faith in making an estimated assessment. Where the Appellant complained 'unreasonableness' of the assessments in general sense (i.e. for being excessive and/or incorrect), the statutory avenue would have been by way of an objection and thereafter an appeal, which the appellant failed to do so within statutory period.

10. The power to correct assessments did not apply to estimated assessments against which no objection had been lodged. Otherwise, taxpayers who did not appeal against estimated assessments would be able to resurrect losses incurred many years back whereas those taxpayers who were merely misguided or negligent were inhibited by the time limit, and IRD was bound by the same time limit in making additional assessments. (Mok Tsze Fung v

Commissioner of Inland Revenue (1962) 1 HKTC 166, D66/87, IRBRD, vol 3, 86 considered)

Appeal dismissed.

Cases referred to:

Argosy Co Ltd (In Voluntary Liquidation) v CIR (Guyana) Privy Council [1971] 1 WLR 514
Corpora Enterprises Limited v Commissioner of Inland Revenue 2 HKTC 656
Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (1983) 2 HKTC 17
D40/91, IRBRD, vol 6, 159
D49/95, IRBRD, vol 10, 326
Extramoney Ltd v Commissioner of Inland Revenue [1997] 2 HKC 38
D6/91, IRBRD, vol 5, 556
D7/08, (2008-09) IRBRD, vol 23, 102
D35/10, (2010-11) IRBRD, vol 25, 698
D28/12, (2012-13) IRBRD, vol 27, 633
D18/13, (2013-14) IRBRD, vol 28, 454
D5/71, IRBRD, vol 1, 30
D93/89, IRBRD, vol 6, 342
Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166
D66/87, IRBRD, vol 3, 86

La Fontaine Chung, instructed by Yau & Leung CPA Limited, for the Appellant
Elizabeth Cheung, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Taxpayer, Company A, appeals against the Determination of the Deputy Commissioner of Inland Revenue dated 6 January 2014 rejecting the Taxpayer's objection against the refusal of the Revenue's Assessor to correct the Profits Tax Assessments for the years of assessment 2006/07 to 2010/11 and the Additional Profits Tax Assessments for the years of assessment 2006/07 to 2007/08, and confirming those assessments. The issues that the Deputy Commissioner determined were whether the profits tax charged for those years of assessment was excessive by reason of an error or omission in any returns or statement submitted in respect of those years, 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; and whether, for any of the reasons provided in section 70A of the Inland Revenue Ordinance (Chapter 112), this provision could be invoked to correct those assessments.

2. The Notice of Appeal lodged on behalf of the Taxpayer with the Office of the Clerk to the Board of Review seeks the following orders from this Board: (a) correction under section 70A of the Inland Revenue Ordinance of the Profits Tax Assessments for the years of assessment 2006/07 to 2010/11 and the Additional Profits Tax Assessments for the years of assessment 2006/07 to 2007/08; (b) annulment of those assessments; (c) corrections in terms of specified adjusted loss for each of the relevant years of assessment or such other amount as decided by this Board; and (d) remitter of the case to the Revenue with such opinion of this Board as may deem fit. The statement of the grounds of appeal accompanying the Notice of Appeal contends that the Deputy Commissioner of Inland Revenue misconstrued section 70A when he rejected the Taxpayer's objection and that the Taxpayer should be allowed to reopen those assessments under section 70A.

3. The parties to this Appeal have agreed to a Statement of Agreed Facts, which comes from the facts upon which the Deputy Commissioner arrived at his Determination. This Board finds the facts in the Statement of Agreed Facts, which are set out in the next section below, as facts.

4. The Taxpayer, represented by Yau & Leung CPA Limited, the present tax representative of the Taxpayer, initially filed and served the witness statement of Mr B. At the hearing of the appeal before this Board, Ms Chung of counsel (who was instructed by the Taxpayer's present tax representative to conduct the appeal) informed this Board that Mr B would not be giving oral evidence. Ms Chung then tendered before this Board the original signed witness statement of Mr B.

5. The Revenue, represented by Ms Cheung of counsel instructed by the Department of Justice, did not call any witness to give oral evidence.

The Agreed Facts

6. (a) The Taxpayer was incorporated as a private company in Hong Kong in October 2001. Its first set of accounts was closed on 31 March 2003.

(b) Mr B has been the sole director and shareholder of the Taxpayer since 2 September 2005.

(c) The principal activities of the Taxpayer as described in reports of its director(s) were 'retailing of cosmetic products and property investment holding' for the year ended 31 March 2005 and 'investment in investment properties' for the years ended 31 March 2006 to 2011.

7. The Revenue issued Profits Tax Returns for the years of assessment of 2004/05 to 2010/11 to the Taxpayer for completion and submission within stipulated time limit as follows:

Year of Assessment	Date of Issue	Time Limit Stated in Return	Extended Due Date under Block Extension Scheme
2004/05	28-10-2009	Within 1 month	Not applicable
2005/06	28-10-2009	Within 1 month	Not applicable
2006/07	03-04-2007	Within 1 month	15-11-2007
2007/08	01-04-2008	Within 1 month	15-11-2008
2008/09	01-04-2008	Within 1 month	16-11-2009
2009/10	01-04-2009	Within 1 month	15-11-2010
2010/11	01-04-2011	Within 1 month	15-11-2011

8. The Taxpayer failed to furnish the above returns within the time limit allowed. On divers dates, the Assessor of the Revenue raised on the Taxpayer the following estimated assessments for the years of assessment 2004/05 to 2010/11 under section 59(3) of the Inland Revenue Ordinance in the absence of returns:

(a) Profits Tax Assessment 2004/05 dated 26 May 2010

	$
Assessable Profits	7,000,000
Less: Loss set-off	6,637,209
Net Assessable Profits	362,791
Tax payable thereon	63,488

(b) Profits Tax Assessments 2005/06 to 2010/11

Year of Assessment	Date of Assessment	Assessable Profits	Tax Payable thereon
		$	$
2005/06	23-06-2010	50,000	8,750
2006/07	23-06-2010	50,000	8,750
2007/08	23-06-2010	2,500,000	412,500
2008/09	23-07-2010	50,000	8,250
2009/10	20-12-2010	500,000	82,500
2010/11	23-12-2011	4,000,000	600,000

(c) Additional Profits Tax Assessments 2004/05 to 2007/08

Year of Assessment	Date of Additional Assessment	Additional Assessable Profits	Additional Tax Payable thereon
		$	$
2004/05	08-08-2011	1,500,000	262,500
2005/06	11-11-2011	1,000,000	175,000
	23-12-2011	8,950,000	1,566,250
2006/07	11-11-2011	1,000,000	175,000

2007/08	23-12-2011	5,500,000	962,500

9. (a) On 16 April 2012, Mr B approved and authorized the issue of the Taxpayer's financial statements for the years ended 31 March 2006 to 2011.

(b) On 20 April 2012, the Taxpayer, through its former tax representatives, Company C ('the Former Representatives'), submitted Profits Tax Returns for the years of assessment 2005/06 to 2010/11 together with its audited financial statements and tax computations for the respective years ended 31 March 2006 to 2011. In the returns, the Taxpayer declared the following Adjusted Loss:

Year of Assessment	Adjusted Loss
	$
2005/06	1,020,468
2006/07	963,216
2007/08	271,116
2008/09	609,624
2009/10	148,633
2010/11	911,787

10. The Taxpayer appointed Yau & Leung CPA Limited ('the Representative') as its new tax representative in August 2012.

11. (a) By seven letters dated 26 September 2012, the Representative, on behalf of the Taxpayer, objected to the estimated assessments for the years of assessment 2004/05 to 2010/11 set out in paragraph 8 above claiming that they were incorrect.

(b) In relation to the objection against the assessments for the year of assessment 2004/05, the Taxpayer furnished its audited financial statements for the year ended 31 March 2005 approved by Mr B on 18 October 2005 together with tax computation for the year of assessment 2004/05 showing Adjusted Loss of $1,768,698.

(c) In explanation of the late lodgment of objection, the Representative asserted in the seven letters that the Taxpayer was advised by the Former Representatives that it had suffered tax losses. Management of the Taxpayer mistakenly but honestly believed that the Taxpayer needed only to submit a tax return with its audited financial statements when there was a profit. The management was awakened from that wrong belief when tax was collected from its property transaction in early 2012, and they immediately rectified and arranged tax returns to be submitted.

12. The Assessor of the Revenue did not accept the Representative's letter in paragraph 11 above as valid notices of objection under section 64 of the Inland Revenue Ordinance because they were not received within one month after the date of the relevant notices of assessment. Having considered the Representative's assertions in the letters, the Assessor was not satisfied that the Taxpayer had been prevented from lodging objection in time owing to absence from Hong Kong, sickness or other reasonable cause. By letter dated 9 October 2012, the Assessor informed the Taxpayer that the assessments for the years of assessment 2004/05 to 2010/11 in question must be regarded as final and conclusive in terms of section 70 of the Ordinance.

13. By a letter dated 13 November 2012, the Representative, on behalf of the Taxpayer, lodged an application under section 70A of the Inland Revenue Ordinance to correct the estimated assessments for the years of assessment 2006/07 to 2010/11 set out in paragraph 8 above ('the Subject Assessments'). The Representative claimed that the Taxpayer suffered adjusted losses for the said years and the tax charged under the Subject Assessments was incorrect and excessive.

14. The Assessor of the Revenue was not satisfied that the tax charged on the Taxpayer for the years of assessment 2006/07 to 2010/11 were excessive by reason of errors or omissions as prescribed by section 70A of the Inland Revenue Ordinance. By a notice dated 21 November 2012, the Assessor notified the Taxpayer of her refusal to correct the Subject Assessments.

15. The Representative, on behalf of the Taxpayer, objected to the Assessor's refusal to correct the Subject Assessments. The Representative elaborated the errors and omissions found in the Taxpayer's case as follows:

> Arithmetical error or omission in the calculation of the amount of assessable profits and the amount of tax charged
>
> (a) It was an omission of facts not to calculate the correct amount of assessable profits and amount of tax that should be charged on the Taxpayer for the years of assessment 2006/07 to 2010/11 upon receiving the Taxpayer's corresponding Profits Tax Returns together with their relevant audited financial statements and tax computations.
>
> (b) In Argosy Co Ltd (In Voluntary Liquidation) v CIR (Guyana) Privy Council [1971] 1 WLR 514, it was held that the right of the commissioner to make an estimated assessment of the taxpayer company in the absence of a return never arose because on the facts of the case he could have formed no reasonable opinion that the taxpayer company was liable to income tax. The appeal was allowed and the assessment was annulled.

(c) With reference to the Argosy case, the assessor was allowed under section 60 of the Inland Revenue Ordinance to assess on a person according to his judgment but that must be reasonable.

(d) The Revenue issued 12 sets of estimated assessments to the Taxpayer charging tax in the total amount of about $5 million for the year of assessment 2004/05 to 2010/11. The estimated assessments were plainly without basis and not reasonable and should be annulled.

(e) The Revenue had not acted in good faith in raising estimated assessments on the Taxpayer for the years of assessment 2004/05 to 2010/11. The omission of facts mentioned above was an error or omission made by the Revenue coming within section 70A of the Ordinance. However, according to the time limit set out in that section the Taxpayer could only object to the assessments for the years of assessment 2006/07 to 2010/11.

Error or omission in the Profits Tax Returns submitted

(f) It was a mistake of the Taxpayer to rely on the advice of the Former Representatives that it only needed to submit tax return with its audited financial statements when there was profit, which resulted in the late submission of the Profits Tax Returns for the years of assessment 2006/07 to 2010/11. There were errors in the returns.

(g) Profits tax should only be charged on a person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong. There were errors of law in the Subject Assessments in respect of the Profits Tax Returns for the years of assessment 2006/07 to 2010/11. As errors of law were capable of being corrected under section 70A of the Ordinance, the Subject Assessments should be corrected by taking into account the adjusted loss as stated in the returns.

(h) Section 70A of the Ordinance did not mention the time when a tax return had to be submitted in which error or omission was found. It had never mentioned that the return had to be submitted before the issuance of an assessment. As such, whenever there were errors or omission found in the return, the taxpayer should be allowed to reopen the assessment.

The Deputy Commissioner's Decision

16. The Deputy Commissioner rejected the Taxpayer's objection and decided to uphold the Assessor's refusal to correct the Subject Assessments and to confirm the Subject Assessments.

17. The Deputy Commissioner, in his determination dated 6 January 2014, considered that the Assessor of the Revenue raised on the Taxpayer estimated assessments for the years of assessment 2004/05 to 2010/11 under section 59(3) of the Inland Revenue Ordinance in the absence of returns. No valid objection against these assessments was lodged by the Taxpayer within the terms of section 64(1) of the Ordinance. By virtue of section 70 of the Ordinance, these assessments, and the amount of profits assessed, shall be final and conclusive for all purposes of the Ordinance, subject only to the provisions of section 70A of the Ordinance.

18. The Deputy Commissioner disagreed with the Taxpayer's claim that there were errors or omission falling within the two limbs of section 70A of the Inland Revenue Ordinance with the result that the Subject Assessments should be corrected. In particular, the Deputy Commissioner considered the Taxpayer's claim that it had mistakenly relied on the Former Representative's advice, resulting in the late submission of the returns, was not substantiated by evidence. The Deputy Commissioner also considered that even if there was such a mistake, it could not amount to an error or omission in the return submitted.

19. Also, the Deputy Commissioner considered that since the Taxpayer had not submitted valid returns for the years of assessment 2006/07 to 2010/11 when the Subject Assessments had become final for the purposes of section 70 of the Inland Revenue Ordinance, it could not be said that the tax charged was excessive by reason of an error or omission in any return submitted.

20. Further, the Deputy Commissioner considered that the Assessor of the Revenue did not commit any error or omission of an arithmetical nature simply because her assessment did not coincide with a figure she would have reached had the Taxpayer's returns been available to her. She estimated the profits of the Taxpayer in the Subject Assessments in round sums; these bare estimates could not of themselves involve any calculation.

21. The Deputy Commissioner reached the conclusion that section 70A of the Inland Revenue Ordinance could not be invoked to correct the Subject Assessments in the Taxpayer's case, having considered the facts of the case and several authorities, including Corpora Enterprises Limited v Commissioner of Inland Revenue 2 HKTC 656; Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (1983) 2 HKTC 17; D40/91, IRBRD, vol 6, 159; and D49/95, IRBRD, vol 10, 326. In this connection, the Deputy Commissioner was not satisfied that the Profits Tax charged for the years of assessment 2006/07 to 2010/11 was excessive by reason of an error or omission in any returns or statement submitted in respect thereof, or by reason of any arithmetic error or omission in the calculation of the amount of the assessable profits assessed or in the amount of the tax charged.

22. The Deputy Commissioner responded to the Taxpayer's claim that the estimated assessments made by the Assessor of the Revenue were unreasonable and should be annulled. The Deputy Commissioner noted that the Taxpayer failed to lodge a valid

objection to the assessments within the prescribed time limit in accordance with section 64 of the Inland Revenue Ordinance and they then became final and conclusive in terms of section 70 of the Ordinance. Referring to Mantell J's discussion on a similar submission in Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above), the Deputy Commissioner made the point that section 70A of the Ordinance could not be used to extend the time limited by section 64 for the Taxpayer to dispute the assessments which had become final and conclusive.

The Witness Statement of Mr B

23. This Board was provided at the hearing by Ms Chung, counsel for the Taxpayer, the original signed witness statement of Mr B dated 25 September 2014. Apart from signing after the date of the witness statement, Mr B also signed against a statement of the same date that he believed the facts stated in the witness statement were true.

24. Mr B stated at the beginning of his witness statement that he was the sole director of the Taxpayer and had been authorized by the Taxpayer to make the witness statement in support of the Taxpayer's appeal before this Board. He also stated that all the facts and matters in the witness statement were within his personal knowledge and were true unless otherwise indicated. For the matters that were not within his personal knowledge, he obtained the information from documents in connection with the appeal and believed them to be true.

25. Mr B's witness statement can be summarized as follows:

(a) The Taxpayer appointed the Former Representatives for handling tax matters for the years of assessment 2004/2005 to 2010/2011.

(b) Mr B was informed by the Former Representatives that the Taxpayer had suffered tax loss as well as accounting loss for the years of assessment 2004/05 to 2010/11. The Former Representatives advised and Mr B believed that the Taxpayer only needed to submit a tax return with its audited financial statements where there were profits.

(c) Between May 2010 and December 2010, the Revenue issued estimated assessments of Profits Tax for the years of assessment of 2004/05 to 2009/10. Between March 2011 and December 2011, the Revenue issued additional assessments of Profits Tax for the years of assessment of 2004/05 to 2009/10 and estimated assessment of Profits Tax for the year of assessment 2010/11.

(d) 'Since then, [the Taxpayer] was awakened that [the belief that the Taxpayer only needed to submit a tax return with its audited financial statements where there were profits] was a mistake.' Mr B 'immediately' instructed the Former Representatives to inform the

Revenue that the Taxpayer had suffered tax loss and accounting loss for the years of assessment 2004/05 to 2010/11, 'but was advised that I had to wait until the tax returns together with the audited financial statements for the respective years of assessment 2004/2005 to 2010/2011 were submitted to the [Revenue]'.

(e) Mr B expressed disappointment of the Revenue issuing the 12 sets of estimated assessments of Profits Tax and the additional assessments of Profits Tax, charging a total of about $5 million in Profits Tax, and suggested that this was not in good faith.

(f) Mr B approved on 16 April 2012 for and on behalf of the Taxpayer the audited financial statements for the years ended 31 March 2006 to 2011 respectively. The Former Representatives filed on 20 April 2012 the tax returns, the audited financial statements for the years ended 2006 to 2011 together with the Profits Tax computation of the Taxpayer for the years of assessment 2005/06 to 2010/11 with the Revenue.

(g) The Taxpayer appointed the Representative to be its new tax representative in place of the Former Representatives for handling tax matters in August 2012. The Representative sent on 26 September 2012 seven letters on behalf of the Taxpayer to make 'late objection of the estimated assessment and additional assessment of profits tax for the years of assessment 2004/2005 to 2010/2011 based on the ground of the Taxpayer's mistaken [belief that the Taxpayer only needed to submit a tax return with its audited financial statements where there were profits]'. The Revenue replied on 9 October 2012 that assessments for the years of assessment 2004/05 to 2010/11 was regarded as final and conclusive in terms of section 70 of the Inland Revenue Ordinance.

(h) Mr B was advised by the Representative that the estimated and/or additional assessments of Profits Tax for the years of assessment 2004/05 to 2010/11 were incorrect and excessive based on error and/or omission; and that due to the time limit set out in section 70A of the Inland Revenue Ordinance, the Taxpayer could only object to the assessments for the years of assessment 2006/07 to 2010/11.

(i) The Representative acting on behalf of the Taxpayer lodged an application to the Revenue on 13 November 2012 under section 70A of the Ordinance to correct the assessments for the years of assessment 2006/07 to 2010/11 based on the adjusted losses suffered by the Taxpayer for those years of assessment and the Profits Tax charged thereon was incorrect and excessive. The Assessor of the Revenue replied on 21 November 2012 of her refusal to correct the assessments.

(j) The Representative acting on behalf of the Taxpayer lodged on 10 December 2012 the Taxpayer's objection of the Revenue's refusal to correct the Profits Tax Assessment for the years of assessment 2006/07 to 2010/11 under section 70A of the Ordinance. The Revenue determined on 6 January 2014 against the Taxpayer's objection.

(k) Mr B expressed his disappointment that the Revenue 'had failed to consider the error and/or omission in the calculation of the amount of assessable profits and the amount of tax that should be charged on the [Taxpayer] as opposed to the estimated and/or additional assessment of profits tax for the years of assessment 2006/2007 to 2010/2011. Therefore the profits tax charged on the [Taxpayer] thereon was incorrect and excessive'.

The Submissions of the Parties

26. Ms Chung for the Taxpayer submitted that the issues of the Taxpayer's appeal were as follows:

(a) Whether section 70A of the Inland Revenue Ordinance could be invoked.

(b) Whether there were error(s) or omission(s) in the Subject Assessments that could be corrected under section 70A. In this connection, two sub-issues arose: (i) Whether there were error(s) or omission(s) in the Profits Tax returns that the Taxpayer submitted, falling within the first limb of section 70A; and (ii) Whether there was an arithmetical error or omission in the calculation of the amount of assessable profits and the chargeable tax on the Taxpayer, falling within the second limb of section 70A.

(c) If either (i) or (ii) in issue (b) was established, then whether the Taxpayer was aggrieved by excessive and incorrect tax charged thereon in the Subject Assessments by reason of the error(s) or omission(s) within the meaning of section 70A.

27. In relation to issue (a), Ms Chung submitted that:

(a) The Revenue erred in relying on Corpora Enterprises Limited v Commissioner of Inland Revenue (above); Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above); D40/91 (above); and D49/95 (above) to claim that section 70A of the Inland Revenue Ordinance could not be invoked in the Taxpayer's case. In those four cases, the taxpayer failed to submit the tax returns within the time limit and made

the objection without filing the tax returns beforehand. So at the time of the objection, there was nothing for the Revenue to consider.

(b) The Taxpayer's case was different. Although the Taxpayer failed to submit tax returns within the time limit, that was because the Taxpayer's management was under the mistaken belief due to the advice of the Former Representatives that it needed to submit a tax return with the audited accounts when there was a profit. Ms Chung referred to the audited accounts prepared for the year of 2004/05, which stated a loss. Ms Chung continued to say that that was why the Former Representatives informed the Taxpayer since there was a loss and no profit, there was no need to submit the audited financial statement as well as the tax return. On the other hand, Ms Chung accepted that as a matter of law, the Taxpayer should submit the audited accounts with tax return even if it suffered a loss in a year of assessment.

(c) Once the Taxpayer became aware of the estimated assessments issued by the Revenue, it instructed accountants to prepare the financial statements and tax returns for submission to the Revenue. The submission of the tax returns was made on 20 April 2012. After the submission was made, the Taxpayer made the late objection on 26 September 2012. Thus the objection was made after all the tax returns were submitted to the Revenue. It was on 9 October 2012 that the Revenue informed the Taxpayer by letter that the assessments in question, including the Subject Assessments, must be regarded as final and conclusive in terms of section 70 of the Inland Revenue Ordinance. Ms Chung hence submitted that in the circumstances, the Subject Assessments must be final and conclusive with effect from 9 October 2012 and that the Profits Tax returns of the Taxpayer were submitted to the Revenue before the Subject Assessments had become final and conclusive. The Revenue could have calculated the amount of assessable profits and profits tax chargeable, if any, for the Subject Assessments based on the Profits Tax returns and the audited financial statements of the Taxpayer submitted on 20 April 2012 when objection was made on 26 September 2012. These facts distinguished the Taxpayer's appeal from the four cases relied on by the Revenue.

(d) Ms Chung was asked by Mr Leung, Member of this Board, to note that on 9 October 2012, the Revenue did not make new assessments. Rather, assessments were made earlier. Ms Chung replied that her submission was that after the late objection was made by the Taxpayer, the Revenue did consider the situation under section 64 of the Inland Revenue Ordinance as to whether there was reasonable cause for extension of time and it was until 9 October 2012 that the Taxpayer was informed of the assessments becoming final and conclusive. Before the assessments

became final and conclusive, the Revenue had to calculate assessable profits and Profits Tax charged, if any, on the Subject Assessments based on what they had at hand at the time.

(e) Ms Chung was also asked by the Chairman of this Board to clarify her submission. Ms Chung replied that her submission was that the Revenue must at least look at the information before it and see whether any adjustments in the figures of the assessments had to be made before they became final and conclusive.

(f) Ms Chung continued to submit that having made the objection, the Taxpayer tried the route of correction and that the Taxpayer had complied with the relevant time limit for seeking correction under section 70A.

28. In relation to issue (b), Ms Chung began with submissions on the second limb of section 70A of the Inland Revenue Ordinance:

(a) The Revenue erred in interpreting the word 'omission' in the second limb of section 70A. This word ordinarily means someone or something that has been left out or excluded.

(b) In the Taxpayer's case, there was omission of facts by the Revenue in the calculation of the correct amount of assessable profits and the amount of tax chargeable for the Subject Assessments. The omission involved leaving out or excluding the following available information before the Revenue: *Firstly*, the Taxpayer made the honestly believed mistake of relying on the Former Representatives' advice that no tax return and audited accounts were required to be submitted if there was an accounting loss and a tax loss. Ms Chung referred to the approval by Mr B of the 2004/05 audited accounts on 18 October 2005 showing a loss for the year and an accumulated loss as well in order to show that the honest belief was substantiated. *Secondly*, the Taxpayer had suffered adjusted loss for the Subject Assessments but the Revenue had left that out. *Thirdly*, the Taxpayer made the objection having prepared the financial statements, tax returns and tax computations for the Subject Assessments and submitted them to the Revenue; and *Fourthly*, the Taxpayer had made its best efforts in preparing the financial statements and tax returns and in submitting them after it came to know of the mistake.

(c) As to the claimed omission of the honest and mistaken belief, Ms Chung was questioned by this Board as to whether the Revenue rather did consider the honest and mistaken belief as the submitted reason of the Taxpayer and decided not to accept it as a reason for extension of time.

Ms Chung replied that there was no evidence to show that the Revenue had considered this submitted reason. No reason was given for the rejection. Her submission was that the Revenue failed to consider this submitted reason.

(d) As to the meaning of 'omission' in the context of the second limb, Ms Chung was questioned by this Board, particularly whether the word 'arithmetical' had any effect on the meaning of 'omission'. Ms Chung replied that it was because of the omission of fact that there was arithmetical omission in the calculation of the Profits Tax or loss charged on the Taxpayer for the Subject Assessments.

(e) Ms Chung added that there was evidence to show that the Revenue had not acted in good faith or even with bad motive in raising the estimated and additional assessments for Profits Tax for the Subject Assessments. Ms Chung referred to the raising of the estimated assessments and the additional assessments within a short period of time of one and a half year between May 2010 and December 2011 in the light of the loss of the Taxpayer of $6.6 million odd carried forward for the year of assessment 2004/05. Ms Chung cited the case of Argosy Co Ltd (In Voluntary Liquidation) v CIR (Guyana) (above) to make the point that the estimated and additional assessments of the Assessor of the Revenue must be reasonable and honestly made. Therefore, Ms Chung submitted that the evidence showed that the Subject Assessments were without basis and unreasonable and should be annulled.

(f) Ms Chung was asked by this Board as to the evidence explaining why it took about two years to prepare all the audited accounts and tax returns when the first estimated assessment came in May 2010. Ms Chung was reminded that on each of the estimated assessments, there was the statement that if the Taxpayer wished to object to the estimated assessment, it must refer to its rights stated on the estimated assessment and the objection must be accompanied by a completed tax return. Ms Chung replied that that was the reason for the Taxpayer becoming 'awakened' and then starting to prepare the audited accounts and tax returns and once the Taxpayer and the Former Representatives had prepared all the documentation, they were submitted altogether in one go in April 2012. Later, Ms Chung clarified that her instructions were that the Taxpayer was 'awakened' towards the end of receiving those estimated assessments and not at the earlier time. As to the reason for not making an objection when the Taxpayer submitted the audited accounts and tax returns, Ms Chung referred to the change of tax representative and the absence of advice from the Former Representatives to file an objection at that time. It was only until the

change of the tax representatives that the Taxpayer was advised properly.

(g) Ms Chung was also asked by this Board as to how the submission that the Subject Assessments were unreasonable could be entertained under section 70A. Ms Chung replied that how the Assessor of the Revenue raised the estimated and additional assessments was totally unfair to the Taxpayer and this Board should be informed of this.

29. Ms Chung also submitted on the first limb of section 70A of the Inland Revenue Ordinance:

(a) By reference to Extramoney Ltd v Commissioner of Inland Revenue [1997] 2 HKC 38, which concerned the meaning of 'error' for the purpose of section 70A, Ms Chung submitted that the Taxpayer's honest and mistaken belief that it only needed to submit a tax return with its audited accounts when there was a profit was a mistake and an error within the meaning of the first limb of section 70A.

(b) Upon questioning by Mr Leung, Member of this Board, Ms Chung accepted that there was no evidence before this Board that there was mistaken advice from any accounting firm saying that there was no need to prepare audited accounts on an annual basis. Rather, the Taxpayer's case was that it prepared all the audited financial statements in one go after being 'awakened' by the estimated assessments towards the end.

(c) In this connection, the Chairman of this Board referred Ms Chung to the documents provided by the Revenue concerning action taken to recover tax from the Taxpayer, which suggested that summonses were first issued in September 2010 in the magistrates' court and tax claims thereafter in the District Court. A Master of the District Court made a notice to show cause in respect of a charging order on 11 October 2011 against several properties in which the Taxpayer had a beneficial interest. Solicitors acting on behalf of the Taxpayer then wrote to the Department of Justice in December 2011.

(d) Ms Chung responded that the sole director of the Taxpayer became aware of the assessments upon receipt of a letter dated 1 June 2011 sent to his address. Letters before that were sent to the address of the Former Representatives but the Former Representatives was not informing the Taxpayer during that time. This Board pointed out to Ms Chung that there was nothing in Mr B's witness statement on this matter. Ms Cheung for the Revenue also pointed out that the Revenue did send letters to the Taxpayer's registered office address and there was no evidence that the Taxpayer did not receive those letters. Ms Chung

replied that the registered office address in District D was the address of the Former Representatives.

(e) Mr Leung, Member of this Board, also pointed to the first summons provided by the Revenue which suggested that the Taxpayer was fined $5,000 upon pleading guilty to the offence of failing to furnish a return before the expiry of the prescribed time period without a reasonable excuse in January 2011. Ms Chung replied that the Taxpayer should have known about the summons and should have become 'awakened' towards the end of 2010 to early 2011.

(f) Ms Chung continued to submit that an error of law was equally an error capable to be corrected under section 70A, relying on Inland Revenue Board of Review Decision D6/91, IRBRD, vol 5, 556. In the present case, Ms Chung submitted that the late submission of the Profits Tax returns due to the Taxpayer's mistake that there was no need to submit tax return if there was no profit was an error of law. She referred to section 14 of the Inland Revenue Ordinance and made the point that there was only one true and correct interpretation of that provision on the charging of Profits Tax.

30. Lastly, Ms Chung submitted that if it could be shown that Profits Tax was overcharged on the Taxpayer in the Subject Assessments by reason of the error and omission falling within either the first limb or the second limb of section 70A of the Inland Revenue Ordinance, then the Taxpayer was aggrieved by the excessive and incorrect assessments of the Subject Assessments.

31. Ms Cheung for the Revenue relied on her written submission of 16 pages prepared before the hearing of this Appeal. She also underlined the following points in her oral submissions:

(a) Where no return has been submitted at the time of the estimated assessments, the first limb of section 70A of the Inland Revenue Ordinance cannot be invoked. This is because there has been no error or omission in any return or statement filed as there was no such return made.

(b) Further, and in any event, where the Assessor has estimated in the absence of return, there can be no arithmetical error or omission.

(c) Section 64(1) of the Inland Revenue Ordinance provides that a taxpayer has one month to lodge an objection to an assessment. Upon expiry of the one month period, by virtue of the operation of section 64(1) and section 70, the assessment becomes final and conclusive. The assessments of Profits Tax in the present appeal did not become final and

conclusive only by the letter of the Revenue in October 2012. When the late objection was lodged with the Revenue on behalf of the Taxpayer, the Revenue considered the reasons put forward and was not satisfied that these were valid reasons for the objection having been lodged late and therefore declined to admit it as a valid objection. For the purposes of the Inland Revenue Ordinance, where there is no valid objection made, the relevant assessment is final and conclusive binding on both the Taxpayer and the Revenue. It was not a matter of discretion on the part of the Revenue. If there was any grievance on the part of the Taxpayer in the Revenue refusing to entertain the late objection, the proper avenue of redress was to apply for judicial review.

(d) The Taxpayer chose not to call its witness without any explanation. In the circumstances, no weight should be given to the narrative of the witness statement as well as to the submissions of fact made by Ms Chung for the Taxpayer. In particular, the asserted facts about the alleged mistaken belief, the alleged 'awakening' and the best endeavours to prepare accounts as soon as possible should not be given any weight. In the absence of cross-examination, it was difficult to see the allegation of an honest belief based on the alleged wrong advice of the Former Representatives.

(e) Even if the so-called honest belief mistakenly held were substantiated, it would not have assisted the Taxpayer whether under the first limb or the second limb of section 70A.

(f) By reference to a sequence of events, Ms Cheung referred to a number of documents. The first document was said to be a sample letter issued by the Revenue to taxpayers that are corporations. The letter states: 'It is the practice of the Department not to call for the annual submission of Profits Tax returns by corporations in instances where … trade or business carried on does not give rise to assessable profits (before the set-off of any losses brought forward). Assessable profits are profits chargeable to tax calculated in accordance with the provisions of the Inland Revenue Ordinance. … However, it is IMPORTANT that your company should note … (ii) this letter does not exempt your company from the requirement to lodge a Profits Tax return which may be issued to your company from time to time. Thus, if your company receives a return in future your company must comply with its requirement failing which legal or other action may be instituted against your company; … (v) this exemption does not absolve your company from complying with any obligation imposed on your company by the Companies Ordinance or other statutory requirement to prepare audited accounts annually. Therefore, you should NOT wait for the issue of a Profits Tax return to prepare annual audited accounts in future'.

(g) The second document referred to was a letter of the Revenue to the Taxpayer dated 29 November 2007 offering to compound the Taxpayer for failing to file the tax return for the year of assessment of 2006/07 by the due date upon meeting three conditions. This letter was sent by the Revenue to the registered office address of the Taxpayer in District D. The acceptance slip was signed and returned to the Revenue on 11 March 2008; it was apparently signed by Mr B, Director. As the letter stated that failing to file tax return by the due date is an offence and that in the absence of a reasonable excuse, the taxpayer may be prosecuted for this offence, this, according to Ms Cheung, was a reminder to the Taxpayer that it had to return completed tax returns which were sent from the Revenue from time to time. The signing back of the acceptance slip would be the Taxpayer's acknowledgement that it was an offence not to file tax returns and the consequences of committing that offence. Ms Cheung considered that as a matter of contemporaneous records, there was some serious doubt as to whether the Taxpayer really did harbour the belief that there was never a need if it was making losses to file returns to the Revenue.

(h) Ms Cheung refuted the Taxpayer's claim that the Assessor of the Revenue acted in bad faith or with bad motive by raising the estimated and additional assessments in a quick succession. Rather, in the same time period, the Revenue had also been sending Profits Tax returns, reminding the Taxpayer of its failure to furnish returns, demanding outstanding payments of tax and taking legal action to recover tax.

(i) The sequence of events showed that firstly the Taxpayer had been expressly reminded time and again by the Revenue of its obligation to file tax returns notwithstanding that the Revenue had no obligation to so remind the Taxpayer. Secondly, the Taxpayer was in continuing default of payment of taxes and failed to furnish tax returns notwithstanding being asked to do so. This would cast doubt on the genuineness of the Taxpayer's case of the honest and mistaken belief and its 'awakening' to the mistake.

32. In reply, Ms Chung for the Taxpayer underlined that there was no evidence that the sample letter Ms Cheung for the Revenue referred to had been sent to the Taxpayer. Ms Chung also stated that it was correct to say that the tax returns were sent to the registered office of the Taxpayer which was also the address of the Former Representatives and that the Former Representatives kept them until the accounts had been prepared and submitted them in April 2012.

33. Ms Chung further submitted that section 64 of the Inland Revenue Ordinance does not mention when an assessment would become final and conclusive; this was still not

clear when one read section 64 with sections 67 to 70. The assessments should, where an objection was lodged, become final and conclusive after the Revenue had considered the objection. Thus it was until the Taxpayer had been informed of the result of the consideration that the assessment became final and conclusive.

34. This Board asked whether Ms Chung's submission meant that an assessment of tax could never become final and conclusive unless and until the taxpayer decided to lodge an objection and asked for an extension of time and the Revenue considered the objection and decided against granting extension of time, so that the assessment would become final and conclusion on the date when the taxpayer was informed of the rejection of the application for extension of time, which could be decades from the date of the assessment. This appeared to mean that there would never be finality in taxation matters and the finality would only come when the taxpayer decides to lodge an objection and the related application for extension of time was rejected by the Revenue. This Board also referred Ms Chung to the process of recovery of tax that is based upon an amount of tax payable, considered by the Revenue as final and conclusive for the purpose of the Inland Revenue Ordinance.

35. Ms Chung submitted that that was not the substance of her submission. Her submission was that section 64 of the Inland Revenue Ordinance does not state clear enough when the assessment would become final and conclusive. The date for the assessment becoming final and conclusive is a matter to consider in the circumstances of the specific case but this would not mean that if a late objection were taken after many years, the related assessment could not become final and conclusive after so many years of time. Where, as in the Taxpayer's case, after filing returns of Profits Tax, a late objection was made, the Revenue had to consider whether the late objection would be allowed before the assessments could become final and conclusive. If the late objection was allowed, then the assessments were not yet final and conclusive and could be corrected.

Discussion and Findings

36. Section 70A of the Inland Revenue Ordinance provides:

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

> *Provided that under this section no correction shall be made to any assessment in respect of an error or omission in any return or statement submitted in respect thereof as to the basis on which the liability to tax ought to have been computed where the return or statement was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return or statement was made.*
>
> *(2) Where an assessor refuses to correct an assessment in accordance with an application under this section he shall give notice thereof in writing to the person who made such application and such person shall thereupon have the same rights of objection and appeal under this Part as if such notice of refusal were a notice of assessment.'*

37. The Taxpayer appeals against the determination of the Deputy Commissioner rejecting the Taxpayer's objection to the refusal of the Assessor of the Revenue to correct the Subject Assessments pursuant to section 70A of the Inland Revenue Ordinance. The Taxpayer has exercised its rights of objection and appeal pursuant to section 70A(2) and its appeal is therefore an appeal under Part 11 of the Inland Revenue Ordinance to this Board.

38. Section 68 of the Inland Revenue Ordinance accordingly applies to the Taxpayer's appeal before this Board. Section 68(4) provides that the appellant shall have the onus of proof, which, in the context of an appeal in respect of a refusal to correct under section 70A, refers to the burden to establish that the tax charged for the relevant year of assessment is excessive by reason of one of the two reasons provided for in section 70A(1). These two reasons have been generally referred to respectively as the first limb (namely 'by reason of an error or omission in any return or statement submitted in respect thereof') and the second limb (namely 'by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value (within the meaning of section 5(1A)), assessable income or profits assessed or in the amount of the tax charged').

Finding of Facts

39. This Board has found as facts the facts in the Statement of Agreed Facts that are set out above.

40. The Taxpayer was advised by the Representative, a firm of accountants, and by Ms Chung of counsel. The Taxpayer decided to adduce no oral evidence to establish the factual assertions. The Taxpayer instead chose to rely on a signed witness statement of its sole director, Mr B, and provided no reason for Mr B's absence at the hearing of this appeal. Ms Chung rather submitted that this made no difference since the Taxpayer's evidence was entirely based on the correspondence and documents produced by the Taxpayer and the Revenue before this Board. As summarized above, the witness statement contains bare factual assertions in generalized terms. The Revenue had no opportunity to cross-examine Mr B to test the veracity of his assertions. Rather, in the course of Ms Chung's submission

for the Taxpayer, members of this Board had referred to several documents that appeared to challenge the veracity of some of Mr B's factual assertions, including when the Taxpayer was 'awakened' to the mistake in the belief it had held due to the advice of the Former Representatives. This Board therefore attaches no weight to the factual assertions in Mr B's witness statement. This Board also attaches no weight to the assertions made by Ms Chung in the course of her submissions since the assertions were plainly instructions Ms Chung received and could not be regarded as evidence. This Board further notes Ms Chung's acceptance in the course of her submissions that there was no evidence from any accounting firm of the giving of the alleged mistaken advice to the Taxpayer. Indeed the Taxpayer has exhibited before this Board only the covering letters of the Former Representatives sent on 20 April 2012 together with the return, audited accounts and Profits Tax computation of each of the years of assessment of 2005/06 to 2010/11. By not adducing any oral evidence from witness(es), the Taxpayer has produced no evidence before this Board in support of its appeal, other than those documents which have been produced and which are uncontroverted, and the facts that have been agreed between the parties (as set out above). Although this Board will not draw adverse inference against the Taxpayer from the absence of witnesses, the lack of oral testimony also means that this Board will not look beyond the undisputed facts. In particular, this Board is not prepared to accept assertions or allegations made by the Taxpayer or made on behalf of the Taxpayer in letters to the Revenue as evidence unless such assertions or allegations are supported by undisputed documents. See Case No D7/08, (2008-09) IRBRD, vol 23, 102, paragraph 64; Case No D35/10, (2010-11) IRBRD, vol 25, 698, paragraph 12; Case No D28/12, (2012-13) IRBRD, vol 27, 633, paragraphs 16-17; Case No D18/13, (2013-14) IRBRD, vol 28, 454, paragraphs 47-50.

41. This Board therefore rejects the Taxpayer's claim that it had not furnished the Profits Tax returns for the years of assessment of 2006/07 to 2010/11 within the stipulated time limit (see paragraph 7 above) because of its mistaken belief, alleged to be an honestly held one due to the advice from the Former Representatives, that it needed not to do so if there was no profit for the relevant year of assessment.

42. The Taxpayer has also submitted in this appeal that the circumstances of its case in respect of the Subject Assessments nonetheless satisfied either the first limb or the second limb of section 70A(1) of the Inland Revenue Ordinance, so that it has established that the tax charged for the relevant years of assessment is excessive and ought to have been corrected pursuant to section 70A(1). This Board now examines these submissions.

The First Limb of Section 70A(1)

43. In respect of the first limb of section 70A(1) of the Inland Revenue Ordinance, Ms Chung for the Taxpayer submitted that the Taxpayer's honest and mistaken belief that it only needed to submit a tax return with its audited accounts when there was a profit was a mistake and an 'error' within the meaning of the first limb of section 70A.

44. This Board rejects the submission of the Taxpayer based on the first limb of section 70A(1) of the Inland Revenue Ordinance. This Board has, for the reasons stated

above, rejected the Taxpayer's claim of not furnishing Profits Tax returns because of the claimed honest and mistaken belief. Moreover, Patrick Chan J (as he then was) indicated in Extramoney Ltd v Commissioner of Inland Revenue (above) at 49G-I that the taxpayer not only has the burden to show that the assessment was excessive by reason of an error or omission in the tax return or statement it submitted (since they were its documents) but also has to substantiate the claimed mistake with evidence 'in the strongest terms'. The Board of Review had also required in Case No D6/91 (above) that 'there is clear evidence that a mistake has been made'. It is plain that the Taxpayer's evidence of its claimed honest and mistaken belief came nowhere near the requirement of evidence 'in the strongest terms', or of 'clear evidence'. The Taxpayer therefore has failed to establish before this Board the existence of the 'error' it claimed to have for the purpose of establishing the first limb of section 70A(1).

45. Additionally, and in any event, this Board rejects the Taxpayer's submission on the ground that the Taxpayer's submission that its reason for not furnishing Profits Tax returns (ie the claimed honest and mistaken belief) could qualify as an 'error … in any return or statement submitted in respect thereof' under the first limb of section 70A(1) of the Inland Revenue Ordinance for showing that 'the tax charged for that year of assessment is excessive'. The Taxpayer's submission is misconceived since it focuses on the expression 'error' in section 70A(1) and solely on that expression without having any regard of the language, context and purpose of section 70A(1). Since the first limb of section 70A(1) is concerned with an 'error … in any return or statement submitted in respect thereof', an error on the part of the Taxpayer over its decision on whether or not it would file or submit a return cannot possibly be an error in that return and if no return were filed or submitted as a result of the decision, there would have been no return in which one could discern an error.

46. Ms Chung for the Taxpayer relied on the case of Extramoney Ltd v Commissioner of Inland Revenue (above) to support the Taxpayer's submission on the first limb of section 70A(1) of the Inland Revenue Ordinance. Ms Chung drew support from Patrick Chan J's adoption of the dictionary meaning of 'error' for the purpose of section 70A of 'something incorrectly done through ignorance or inadvertence; a mistake' (at 50F). However, this adopted meaning was applied in that judgment to this factual case: 'Where a taxpayer had deliberately and conscientiously made a decision to attribute a certain item, be it an item of profit or expenditure, in the tax return to be submitted to the assessor for assessment, if he subsequently changes his mind, that certainly cannot be an error within the meaning of s 70A of the Ordinance.' This illustrates the context of the first limb of section 70A: The error or omission has to be one that lies in the tax return submitted; it cannot be one in respect of whether the tax return should be submitted.

47. Ms Chung for the Taxpayer also relied on Case No D6/91 (above) to say that an error of law is equally capable of being corrected under section 70A of the Inland Revenue Ordinance and the Taxpayer's claimed mistake was an error of law embodied in the Profits Tax returns for the years of assessment 2006/07 to 2010/11 submitted to the Revenue. Ms Chung argued that the error of law was in respect of the correct interpretation of section 14 of the Inland Revenue Ordinance over the charge of Profits Tax. This Board

does not consider that an argument based on an error of law is available to the Taxpayer in the circumstances of its case where the tax charged for the relevant years of assessment had been assessed pursuant to section 59(3) of the Inland Revenue Ordinance in the absence of return. The essential prerequisite of the first limb of section 70A is that the error must be *in* the return.

48. Ms Cheung for the Revenue cited three authorities of the Board of Review that explain the said context of the first limb of section 70A of the Inland Revenue Ordinance:

(a) In Case No D5/71, IRBRD, vol 1, 30, the Board of Review held that the 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.

(b) In Case No D93/89, IRBRD, vol 6, 342, the Board of Review, having considered the earlier decision in Case No D5/71 (above) held that '[it] follows rather obviously that a return is something which the Taxpayer himself produces'.

(c) In Case No D40/91 (above), the Board of Review held that 'the first limb refers to assessments which are excessive by reason of an error or omission in any return, but, there being no such return that limb is inapplicable.'

(d) In Case No D49/95 (above), the Board of Review referred to Case No D40/91 (above) and noted that that decision was upheld by the High Court (per Mortimer J) in Inland Revenue Appeal No 6/1991. The Board of Review continued: 'As the Taxpayer had not submitted a valid profits tax return when the assessment had become final for the purposes of section 70, it cannot be said that there was "an error or omission in any return or statement submitted in respect thereof" in terms of section 70A'.

This Board respectfully follows these authorities.

49. Ms Chung for the Taxpayer has also contended that the Revenue had failed to consider that section 70A of the Inland Revenue Ordinance does not mention a time when a tax return had to be submitted in which an error or omission was found and the section had never mentioned that the return had to be submitted before the issuance of an assessment. Ms Cheung for the Revenue has sought to rebut this contention with the submission that the Inland Revenue Ordinance sets out the framework for returns to be filed within a stipulated time and that if a person has not furnished a return, then the Assessor of the Revenue is entitled, if he is of the opinion that such person is chargeable with tax, to estimate the sum in respect of which such person is chargeable to tax and make an assessment pursuant to section 59(3) of the Inland Revenue Ordinance. As the Taxpayer had not submitted a valid

return when the Subject Assessments became final and conclusive under section 70 of the Inland Revenue Ordinance, it could not be said that there was an error or omission in any return or submitted in respect thereof under the first limb of section 70A.

50. A short answer to Ms Chung's submission is that the submission had omitted to take account of the scheme of the Inland Revenue Ordinance in which section 70A operates. Notices requiring furnishing of a tax return may be given by an Assessor of the Revenue under section 51 of the Inland Revenue Ordinance. Each such notice stipulates a time within which to furnish the tax return. Section 59(1) of the Inland Revenue Ordinance requires an Assessor to assess every person who is in the opinion of the Assessor chargeable with tax as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1). But where a person has not furnished a return and the Assessor is of the opinion that such person is chargeable with tax, section 59(3) authorizes the Assessor to make an assessment by estimation. Such an assessment is nonetheless an assessment. Challenge to such an assessment has to be under Part 11 of the Inland Revenue Ordinance like any other assessment made by an Assessor and sections 64 (on objections), section 70 (on assessments to be final) and section 70A (on powers of assessors to correct errors) are all provisions under Part 11. The Subject Assessments raised on the Taxpayer were indeed assessments of the amount of assessable profits of the Taxpayer.

51. Further, it is convenient to deal with, in the course of resolving these rival submissions, the issue of how an assessment becomes final under section 70 of the Inland Revenue Ordinance, a matter that had generated some exchanges between this Board and the parties in the course of hearing this appeal.

52. Ms Chung for the Taxpayer submitted that the Subject Assessments only became final and conclusive when the Revenue informed the Taxpayer by letter on 9 October 2012 that the assessments in question, including the Subject Assessments, must be regarded as final and conclusive in terms of section 70 of the Inland Revenue Ordinance. Ms Cheung for the Revenue submitted that the Subject Assessments became final and conclusive by operation of sections 64(1) and 70 of the Inland Revenue Ordinance.

53. Section 64(1) is the provision governing the giving of notice of objection to an assessment, requiring that the notice to state precisely the grounds of objection to the assessment and that the notice must be received by the Revenue within one month after the date of the notice of assessment. This sub-section is subject to three provisos and two of them are material in the circumstances of the present appeal:

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

> *(b) where any assessment objected to has been made under section 59(3) in the absence of any return required under section 51, no notice of objection against such assessment shall be valid unless, in addition to such notice being valid in accordance with the foregoing provisions of this subsection, the return required as aforesaid has been made within the period provided by this subsection for objecting to the assessment or within such further period as the Commissioner may approve for the making of such return*'.

54. Section 70 provides materially that:

> ' *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 this Ordinance as regards the amount of such assessable income or profits or net assessable value:*
>
> *Provided that nothing in this Part shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year*.'

55. This Board accepts the Revenue's submission and rejects the Taxpayer's Submission regarding how an assessment becomes final and conclusive. This Board considers that an assessment becomes final and conclusive by operation of the law and that an assessment does not require a decision or a notification of the Revenue before it may become final and conclusive under section 70 of the Inland Revenue Ordinance. The language, context and purpose of section 70 all support this conclusion. Section 70, in its language, provides that '[where] no valid objection … has been lodged within the time limited by this Part [ie by section 64(1)] against an assessment as regards the amount of the assessable … profit … the assessment as made … shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable … profits' (emphasis supplied). This Board finds support in the following authorities, which discuss the context and purpose of section 70:

> (a) In Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166, Mills Owen J stated at 182 that: 'Section 70 provides for the ultimate finality of assessments, but the proviso thereto contemplates an additional assessment so long as it does not involve the re-opening of any matter determined on appeal for the same year. The Section thus contemplates an assessment which has crystallized as, for example, by lapse of time, and at the same time an additional assessment for the same period based upon new material.'

(b) In Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above), Mantell J underlined the object of the Inland Revenue Ordinance to be achieving finality within the timetable and procedures laid down. Before coming to this observation at the end of his judgment, the judge noted the common ground between the parties that section 70 would operate to make the assessment final and conclusive for all material purposes unless section 70A applied and he was then shown two documents which observed on or expressed the object of section 70. The first was the Report of the First Inland Revenue Ordinance Committee of 1954, where the committee observed that section 70 was 'so universal in its Prohibitions that even an obvious error cannot be adjusted after the statutory period for appeal has passed if the adjustment will reduce the income or profits assessed'. The second was the explanatory memorandum of the Inland Revenue (Amendment) Bill 1964, which stated, inter alia, that: 'It is essential, under any tax system, that finality as regards assessments be achieved. In Hong Kong, this is provided by section 70 of the Inland Revenue Ordinance, but to safeguard the position of taxpayers who for one reason or another disagree with their assessments, an assessment does not become final and conclusive under section 70, until the objections, if any, raised by the taxpayer have been disposed of on appeal in accordance with the successive rights of appeal granted to every taxpayer or agreement is reached between the taxpayer and the assessor, or, if no objection is raised, until the time limited for raising objections has expired.'

(c) In Case No D40/91 (above), the Board of Review held that since the notice of objection submitted in that case was invalid, the assessment of the relevant year of assessment became final and conclusive by virtue of the combined effect of sections 64(1) and 70, subject only to the invocation of section 70A. No point was taken by the tax representative in that case as to whether the assessor's letter to the taxpayer informing that the assessment 'must be regarded as final and conclusive in terms of section 70 of the Ordinance' constituted the act by which or marked the time at which the assessment became final and conclusive.

(d) Patrick Chan J underlined at 49A-C of his judgment in Extramoney Ltd v Commissioner of Inland Revenue (above) that '[within] the comprehensive scheme provided by the Ordinance, there should be finality. Hence s 70.' And at 49E-G, the judge approved the Board of Review's decision in Case No D6/91 (above) stating that: 'Clearly there must be finality in taxation matters. That is the clear intention of s 70.'

56. In the Taxpayer's case, the Assessor of the Revenue made estimated assessments pursuant to section 59(3) of the Inland Revenue Ordinance on the dates stated in paragraph 8 above where for the relevant year of assessment, the Taxpayer had not

furnished a return by the stipulated date in respect of the return issued. The first of the dates, stated in paragraph 8 above, was 23 June 2010. No valid objection was received by the Revenue within one month after the date of notice of each of the estimated assessments, the time period provided for in section 64(1) of the Inland Revenue Ordinance. Thus, pursuant to section 70 of the Inland Revenue Ordinance, each and every one of the estimated assessments became final and conclusive for all purposes of the Ordinance as regards the amount of the assessable profits. The same situation arose in respect of the additional assessments made by the Assessor of the Revenue in 2011 on the dates stated in paragraph 8 above. Tax recovery action commenced in September 2010 of the tax charged based on the assessable profits under the relevant estimated assessments made and becoming final and conclusive for all purposes under the Ordinance as no valid objection had been lodged within the time limited under section 64(1) against those assessments.

The Second Limb of Section 70A(1)

57. In respect of the second limb of section 70A(1) of the Inland Revenue Ordinance, Ms Chung for the Taxpayer submitted that due to omission on the part of the Revenue of four facts, there was an arithmetical omission in the calculation of the amount of the Profits Tax charged. The four facts were: (1) The Taxpayer made the honestly believed mistake of relying on the Former Representatives' advice that no tax return and audited accounts were required to be submitted if there was an accounting loss and a tax loss; (2) The Taxpayer had suffered adjusted loss for the Subject Assessments but the Revenue had left that out; (3) The Taxpayer made the objection having prepared the financial statements, tax returns and tax computations for the Subject Assessments and submitted them to the Revenue; and (4) The Taxpayer had made its best efforts in preparing the financial statements and tax returns and submitting them after it came to know of the mistake. Thus there was an omission of facts by the Revenue in calculating the correct amount of assessable profits and the amount of tax charged on the Taxpayer for the Subject Assessments which could and should be corrected under the second limb.

58. This Board accepts Ms Cheung's reply for the Revenue that where the assessment in question was based on estimation on the part of the Assessor of the Revenue, it was a bare figure and could not involve a calculation with the result that there could not be an error within the meaning of the second limb of section 70A(1) of the Inland Revenue Ordinance, which is in the terms of 'by reason of any arithmetical error or omission *in the calculation of* the amount of the … assessable … profits assessed or in the amount of the tax charged' (emphasis supplied). The authority Ms Cheung cited, namely Case No D40/91 (above), clearly supports this reply. The Subject Assessments were in bare figures following estimation of the amount of the assessable profits and of the amount of the tax chargeable on the Taxpayer by the Assessor. Hence no calculation was involved and the second limb could not be invoked.

59. In so far as the Taxpayer contends that since the Revenue had subsequently been provided with the Taxpayer's financial statements, tax returns and tax computations after it had made its best efforts in preparing them, the Revenue had omitted them in the

calculation of the correct amount of assessable profits and the amount of tax charged on the Taxpayer, this contention is in the opinion of this Board without any merit. This Board explains this consideration in the following paragraphs.

60. The Taxpayer's arguments along this line of contention appear to depend on its claim that the Subject Assessments only became final and conclusive after its late objection, lodged following submission of the financial statements, tax returns and tax computations, had been rejected due to the Revenue refusing to grant an extension of time. The Taxpayer argued that since the correct information had been made available to the Revenue during the 'late objection period before the assessments become final and conclusive', the Revenue, in omitting such information in its calculation of the amount of the assessable profits or the amount of the tax charged on the Taxpayer, had caused the arithmetical omission complained of under the second limb of section 70A(1) of the Inland Revenue Ordinance.

61. This Board has earlier in this Decision considered how the Subject Assessments were raised by the Assessor of the Revenue and held that the Assessor was entitled to raise the Subject Assessments on the Taxpayer pursuant to section 59(3) of the Inland Revenue Ordinance. This Board has also held earlier in this Decision that in relation to the Subject Assessments, they became final and conclusive by the operation of sections 64(3) and 70 of the Inland Revenue Ordinance and did not only become final and conclusive upon the Revenue informing the Taxpayer by letter dated 9 October 2012, that the assessments for the years of assessment 2004/05 to 2010/11 in question must be regarded as final and conclusive in terms of section 70 of the Ordinance. As the premises underlying the Taxpayer's contention are not substantiated, the contention itself shall fall thereby.

62. This Board also accepts the submission made on behalf of the Revenue that the 'information' that the Revenue is alleged to have omitted in its calculation was not before the Assessor of the Revenue at the time of the making of the Subject Assessments because the Taxpayer had not put it before the Assessor, for example, by filing a tax return within the stipulated time limit. Therefore, when the Assessor exercised the power under section 59(3) of the Inland Revenue Ordinance to make assessments by estimation, it could not be the case that the Assessor had 'omitted' to consider the 'information'; it was not something that was 'left out' or 'excluded' when the relevant 'calculation' (bearing in mind that the Revenue's primary argument (which this Board accepts) was that there was no calculation involved in making an estimated assessment) was made to make the relevant assessments.

63. This Board adds that in so far as the Taxpayer relies on the fact that it had made the honestly believed mistake of relying on the Former Representatives' advice that no tax return and audited accounts were required to be submitted if there was an accounting loss and a tax loss, this Board has earlier in this Decision rejected this factual claim.

64. This Board further considers that there is force in the Revenue's comment that the Taxpayer's contention here, 'if accepted, would be to allow [taxpayers] that choose not to file returns to then be able to circumvent the provisions of sections 59(3), 64(1) and 70 of

the Ordinance by using section 70A to accuse an Assessor of having omitted to consider matters when it is the duty of the [taxpayer] to submit all relevant information to the IRD timeously, truthfully, and completely, but which was not done … because of its own failure'. This Board's queries of Ms Chung's submissions in paragraph 32 to 35 above also reflect similar concerns.

Other Submissions

65. Lastly, this Board notes that the Taxpayer has made submissions that the Revenue had not acted in good faith in raising the estimated and/or additional assessments for Profits Tax and that the Subject Assessments were unreasonable and ought to be annulled. This Board considers that in the context of the Taxpayer's appeal in respect of the refusal of the Assessor of the Revenue refusing to correct the Subject Assessments pursuant to section 70A, these submissions cannot be put forward as possible grounds of appeal. As this Board has earlier indicated in this Decision, the Taxpayer's burden in this appeal is to establish that the tax charged for the relevant year of assessment is excessive by reason of one of the two limbs provided for in section 70A(1). Also, this Board accepts the Revenue's submission, based on Mok Tsze Fung v Commissioner of Inland Revenue (above) that in making an estimated assessment under section 59(3) of the Inland Revenue Ordinance according to his or her judgment, the Assessor of the Revenue does not for that reason act in bad faith. Further, in so far as the Taxpayer complains of the 'unreasonableness' of the Subject Assessments in the general sense that they were excessive and/or incorrect, the statutory avenue would have been by way of an objection and thereafter an appeal, which the Taxpayer had not done so within the statutory time period and only did so by the time it was far too late. As the Revenue has correctly indicated, by reference to Case No D66/87, IRBRD, vol 3, 86, the power to correct assessments under section 70A does not apply to estimated assessments against which no objection has been lodged. Otherwise, taxpayers who did not appeal against estimated assessments in accordance with the statutory scheme would be able to resurrect losses incurred many years back whereas those taxpayers who were merely misguided or negligent are inhibited by the 6 year time limit of section 70A and the Revenue is bound by the same time limit in section 60(1) in making additional assessments.

Conclusion

66. The Taxpayer's appeal is dismissed. This Board confirms the Subject Assessments.