Case No. D4/17

Profits tax – assessment made in absence of a return – Taxpayer referring the third party statements after the assessment – whether assessment excessive by reason of an omission in any return or statements submitted thereof – section 70A of the Inland Revenue Ordinance ('IRO')

Panel: Lo Pui Yin (chairman), Liu Kin Sing and Anson Wong SC.

Date of hearing: 23 October 2015.
Date of decision: 9 May 2017.

The Taxpayer did not file a return sent by the Revenue for the 2006/07 year of assessment. Hence, on 10 February 2010, the Revenue raised profits tax assessment with estimated assessable profits in the absence of a return, pursuant to section 59(3) of the IRO. The Taxpayer's request for extending the time to raise an objection against the assessment out of time was rejected by the Court of Appeal. Then, the Taxpayer sought to argue that, when the Revenue sent letter to Company C in December 2009, it claimed to have information concerning the payment of money to Company C. The money was treated as the Taxpayer's income in the profits tax assessment. The Taxpayer argued that this was an error under the first limb of section 70A(1), or in the alternative, an arithmetical error under the second limb of section 70A(1). The Revenue refused to correct the 2006/07 profits tax assessment. The Taxpayer then appealed against the Revenue's refusal.

At the hearing before the Board, the Taxpayer sought to argue that the Revenue omitted to take into consideration a letter from Company C's tax representative to the Revenue dated 9 March 2010, in which the tax representative stated that the documents concerning the income were seized by the Commercial Crime Bureau, and could not be submitted to the Revenue. Alternatively, the Taxpayer argued that the failure of the Revenue to consider the unavailable documents referred to by Company C's tax representatives constituted an omission under the second limb of section 70A(1) of the IRO. He did not call any witness at the hearing before the Board to give evidence.

Held:

1. The Taxpayer's argument in relation to the first limb of section 70A(1) of the IRO at the hearing was different from that contained in the Notice of Appeal. Pursuant to section 66(3) of the IRO, the Board shall only consider the ground put forward in the Notice of Appeal.

2. In absence of any evidence put before the Board, the Board would not accept any allegation made by the Taxpayer in letters to the Revenue as

evidence unless such allegation was supported by undisputed documents, or not disputed by the Revenue (Commissioner of Inland Revenue v Crown Brilliance Ltd HCIA 1/2015, 14 October 2015 at paragraphs 18-19; D6/91, IRBRD, vol 5, 556 at 558; D7/08, (2008-09) IRBRD, vol 23, 102 at paragraph 64; D35/10, (2010-11) IRBRD, vol 25, 698 at paragraph 12; D28/12, (2012-13) IRBRD, vol 27, 633 at paragraphs 16-17; D18/13, (2013-14) IRBRD, vol 28, 454 at paragraphs 47-50; D3/15, (2015-16) IRBRD, vol 30, 338 at paragraph 40 referred to). Thus, the Taxpayer failed to show that the Revenue knew as a fact that it was Company C, rather than the Taxpayer, which received the money which was considered as the Taxpayer's income in the profits tax assessment.

3. A taxpayer who wishes to invoke section 70A must first prove the correct amount of profits and the correct amount of tax in order to establish the tax charged was excessive (D25/06, (2006-07) IRBRD, vol 21, 496 at paragraphs 75-76 referred to). There must then be strong and clear evidence to show that the 'omission' to be in the 'statement' that was submitted and the 'omission' to be 'in respect of' the assessment that correction was sought (Extramoney Ltd v Commissioner of Inland Revenue [1997] HKLRD 387 at 395G; D6/91 at 560 referred to). It follows that the Taxpayer failed to satisfy the first limb of section 70A(1).

4. In any event, the letter by Company C's tax representative was only sent to the Revenue after the profits tax assessment was raised. As a matter of logic, 'statements' in relation to the first limb of section 70A(1) could not have been something written and received after the raising of an assessment.

5. Further, 'statement' in the first limb of section 70A(1) refers to statements submitted in respect of a return (B/R 5/71, IRBRD, vol 1, 30; D93/89, (1990) IRBRD, vol 6, 342; D137/02, (2003-04) IRBRD, vol 18, 239; D25/06 followed). The statement should be accompanying the return (Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218 at paragraph 126 considered).

6. The omission must have been contained in the return, and the statement in respect thereof. Such a restricted view is to balance between the promptness and finality of an assessment, and the avoidance of hardship and injustice (Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17; Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue at paragraphs 22-28 considered). Otherwise, an assessment can always be reopened based on any information or omission to transmit information or supply documents that bore a relation to the taxpayer, even if it was resulted from a deliberate and conscious decision of the taxpayer. This could not have been the objective of section 70A (Extramoney Ltd v Commissioner of Inland Revenue at 395-396 considered). Hence, the Taxpayer's argument on the

first limb of section 70A(1) failed.

7. Even if there may be a different meaning comparing the English and Chinese version of section 70A(1), the original English version as enacted should be relied on, and the authenticated Chinese text should not be given effect (Chan Fung Lan v Lai Wai Chuen [1997] 1 HKC 1 at 8H followed).

8. The Taxpayer also failed to prove the second limb of section 70A(1). Any error or omission can only relate to the calculation of the amount of the assessable profits assessed, or in the amount of the tax charged (Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166; Sun Yau Investment Co Ltd v Commissioner of Inland Revenue; D40/91, IRBRD, vol 6, 159 followed). Since the Taxpayer did not file any return before the profits tax assessment was raised, there could have been an error or omission in the calculation of the assessable profits. There was no complaint in respect of the subsequent calculation of the tax charged.

9. The Taxpayer's appeal was thoroughly unmeritorious. It was appropriate to impose costs on him pursuant to section 68(9) of the IRO.

Appeal dismissed and costs order in the amount of $5,000 imposed.

Cases referred to:

Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17
Extramoney Ltd v Commissioner of Inland Revenue [1997] HKLRD 387
B/R 5/71, IRBRD, vol 1, 30
D137/02, (2003-04) IRBRD, vol 18, 239
D25/06, (2006-07) IRBRD, vol 21, 496
D93/89, (1990) IRBRD, vol 6, 342
Good Mark Industrial Ltd v Commissioner of Inland Revenue [2015] 2 HKLRD 16
Commissioner of Inland Revenue v Crown Brilliance Ltd, HCIA 1/2015, 14 October 2015
D40/91, IRBRD, vol 6, 159
Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166
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
D3/15, (2015-16) IRBRD, vol 30, 338
Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218
Chan Fung Lan v Lai Wai Chuen [1997] 1 HKC 1

Ernest Ng instructed by Messrs Cheung & Liu, Solicitors, for the Appellant.
Mike Lui instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Taxpayer, Mr A, appeals against the Determination of the Deputy Commissioner of Inland Revenue dated 3 March 2014 rejecting the Taxpayer's objection against the refusal of the Assessor of the Inland Revenue Department ("Revenue") to correct the profits tax assessment for the year of assessment 2006/07, and confirming that assessment. The issues that the Deputy Commissioner determined were whether the profits tax charged for that year 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 that assessment.

2. The Notice of Appeal lodged on behalf of the Taxpayer with the Office of the Clerk to the Board of Review sought to adopt as the grounds of appeal the contents of the letter of Taxpayer's solicitors to the Commissioner of Inland Revenue dated 22 February 2013. The letter maintained that the Revenue 'must have been mistakenly or inadvertently in issuing the captioned tax assessments to [the Taxpayer] in his personal capacity by reason of "an error in any return or statement" under the first limb of section 70A of the Ordinance'; that 'as a corollary, it is obvious that your department has also made an "arithmetical error" in treating those 3 payments as [the Taxpayer's] chargeable income under the 2nd limb of Section 70A of the Ordinance'; that 'your department wrongly refusing [the Taxpayer's] section 70A application without pending the results of those proceedings'; and that the case of Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17 was 'entirely distinct and different from the present [on the facts] and thus it is not applicable in the circumstances of our case'.

3. The parties to this Appeal have agreed that the facts upon which the Deputy Commissioner arrived at his Determination are not in dispute, save and except that the Revenue indicates that the truth of the assertions made in the letters received by the Revenue is not admitted. This Board finds the facts stated in the Deputy Commissioner's Determination, which are set out below, as facts. These facts will be summarized in the next section.

4. The Taxpayer, represented by Mr Ng of counsel instructed by Messrs Cheung & Liu, Solicitors, did not call any witness to give oral evidence.

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

The Undisputed Facts

6. On 18 June 2009, the Revenue issued a 'Tax Return – Individuals' for the year of assessment 2006/07 to the Taxpayer for his completion. The Taxpayer failed to file the tax return within the stipulated time period.

7. On 10 February 2010, in the absence of a tax return and pursuant to section 59(3) of the Inland Revenue Ordinance, the Assessor of the Revenue raised the following Profits Tax Assessment on the Taxpayer:

Year of Assessment 2006/07	
	$
Estimated Assessable Profits	1,376,000,000
Tax Payable thereon (Tax rate at 16%)	220,160,000

8. The Taxpayer did not lodge an objection against the 2006/07 Profits Tax Assessment within the stipulated one-month period under section 64(1) of the Inland Revenue Ordinance. The assessment has become final and conclusive under section 70 of the Inland Revenue Ordinance.

9. (a) The Taxpayer's tax representative lodged on his behalf an objection to the 2006/07 Profits Tax Assessment by a letter dated 4 June 2010. The tax representative stated in the letter that there was reasonable cause for the Taxpayer to lodge the objection beyond the stipulated one-month period and requested the Revenue to extend the time to lodge an objection pursuant to section 64(1)(a) of the Inland Revenue Ordinance.

(b) The Revenue advised the Taxpayer's tax representative by a letter dated 22 June 2010 that the Taxpayer's request for an extension of time to lodge an objection against the 2006/07 Profits Tax Assessment was refused.

(c) The Taxpayer applied for judicial review of the Revenue's refusal to extend the time to lodge an objection against the 2006/07 Profits Tax Assessment. The Court of First Instance, in a judgment dated 1 June 2011, ordered that the Revenue's refusal in the letter dated 22 June 2010 to grant an extension of time to object be quashed. The Revenue appealed successfully to the Court of Appeal, which by a judgment dated 8 March 2012, allowed the appeal and dismissed the Taxpayer's application for judicial review. The Taxpayer applied unsuccessfully before the Court of Appeal for leave to appeal to the Court of Final Appeal. The Taxpayer's application to the Appeal

Committee of the Court of Final Appeal for leave to appeal was also unsuccessful.

10. (a) Messrs Cheung & Liu, Solicitors wrote in letters dated 16 November 2012 and 24 December 2012 on behalf of the Taxpayer to the Revenue that there was reasonable excuse for the Taxpayer to lodge a late objection against the 2006/07 Profits Tax Assessment and requested that an extension of time to object be granted.

(b) The Revenue replied by a letter dated 8 February 2013 to Messrs Cheung & Liu, Solicitors that the Taxpayer's request for an extension of time to object was refused.

11. Messrs Cheung & Liu, Solicitors, by a letter dated 26 November 2012 to the Revenue, lodged on behalf of the Taxpayer, an application to correct the 2006/07 Profits Tax Assessments under section 70A of the Inland Revenue Ordinance in the following terms:

(a) 'It was clearly stated in (the Inland Revenue Department's) letters to [Mr A], [Position B] of [Company C] and ([Company C]) dated 4th and 9th December 2009 that your department had information revealing that it was in fact ([Company C]) which had received payments totaled $2,064 million from [Company D] and [Company E]. Hence, it is self-evident that it is not (the Taxpayer) who had received such payments in his personal capacity. More importantly, it is indeed ([Company C]) which is the final recipient of the subject payments as it has never transferred any such payments to the (Taxpayer).'

(b) 'Accordingly, we are of the view that your department has therefore inadvertently or mistakenly made an error under the 1st limb of section 70A to issue the captioned tax assessments to (the Taxpayer) personally as he is a separate legal entity.'

(c) 'In the circumstances, therefore, since the captioned tax assessments should never have been issued to (the Taxpayer) in the first place, as a corollary, it is obvious that your department has also made an arithmetical error under the second limb of section 70A to impose the relevant tax of about HK$340 million upon him.'

(d) 'For the reasons of the aforesaid, we believe that (the Taxpayer) has already clearly established to the satisfaction of the assessors that the captioned tax assessments are not only excessive but indeed should never have been imposed. Thus we urge your department to correct such assessments accordingly.'

12. The Assessor of the Revenue was not satisfied that the tax charged on the Taxpayer for the year of assessment 2006/07 was excessive by reason of errors or omissions as prescribed by section 70A of the Inland Revenue Ordinance. On 23 January 2013, the Assessor issued a notice of refusal to correct the 2006/07 Profits Tax Assessment.

13. By a letter dated 22 February 2013, Messrs Cheung & Liu, Solicitors, lodged on behalf of the Taxpayer an objection to the Assessor's refusal to correct the 2006/07 Profits Tax Assessments. The terms of the objection have been summarized above since the Taxpayer has adopted the terms of the objection as his grounds of appeal.

The Deputy Commissioner's Decision

14. The Deputy Commissioner rejected the Taxpayer's objection and decided to uphold the Assessor's refusal to correct the 2006/07 Profits Tax Assessment and to confirm the 2006/07 Profits Tax Assessment.

15. The Deputy Commissioner, in his determination dated 3 March 2014, considered that the Assessor of the Revenue, in accordance with section 59(3) of the Inland Revenue Ordinance, raised the 2006/07 Profits Tax Assessment with estimated assessable profits in the absence of a return. The 2006/07 Profits Tax Assessment, hence, was not made by reference to any return or statement submitted by the Taxpayer. The Deputy Commissioner considered, in the circumstances, that there was no case that the tax charged by the 2006/07 Profits Tax Assessment was excessive by reason of an error or omission in any return or statement submitted as provided under section 70A(1) of the Inland Revenue Ordinance. Reference was made to Case No B/R 5/71, IRBRD, vol 1, 30.

16. The Deputy Commissioner then referred to the case of Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above) and considered that this case clearly applied to the Taxpayer's case. The Deputy Commissioner did not agree that there was an arithmetical error or omission in the calculation of the amount of the assessable profits simply because the estimated assessable profits did not coincide with a figure which would have been reached had other information been available to the Assessor of the Revenue when the assessment was made. Also, since the amount of tax charged by the 2006/07 Profits Tax Assessment was arrived at by applying the appropriate tax rate to the estimated assessable profits, there was no arithmetical error or omission in the calculation in the amount of the tax charged.

The Submissions of the Parties

17. Mr Ng for the Taxpayer at first requested this Board to adjourn the appeal to enable his team of legal representatives to take instructions from the Taxpayer himself on certain matters raised in the skeleton submission of the Revenue. Upon this Board discussing with Mr Ng the issues for determination in this Appeal and Mr Lui for the Revenue clarifying the rationale for raising those matters in the skeleton submission, Mr Ng took instructions and informed this Board that he would not proceed with the request for adjournment.

18. Mr Ng stated in the Taxpayer's skeleton argument that the Taxpayer's submission in the Appeal was that the tax charged under the 2006/07 Profits Tax Assessment was excessive by reason of:

(a) An 'error or omission' under the first limb of section 70A of the Inland Revenue Ordinance; and

(b) An 'arithmetic error or omission' under the second limb of section 70A of the Inland Revenue Ordinance.

19. In relation to issue (a), Mr Ng submitted that:

(a) The Revenue erred in adopting an unduly narrow view of the word 'statement' in relation to the first limb of 'by reason of an error or omission in any return or statement submitted in respect thereof' in section 70A(1) of the Inland Revenue Ordinance. Contrary to what the Revenue had submitted, section 70A's first limb did not require an element of 'mistake'. The legislative history of section 70A was uncertain as to whether the legislature intended that the section required an element of 'mistake'.

(b) The Taxpayer considered that 'statement' in the first limb of section 70A(1) is something broader than a 'return' and relying on the wording of the legislation, includes a 'statement' submitted by a private individual (be he/she the Taxpayer or someone other than the Taxpayer) in respect of an assessment and where there is such a statement submitted, the Revenue would have to look into whether or not there has been an 'error or omission'.

(c) The Taxpayer contended that the Revenue had been informed by the tax representatives (Company F) of Company C by letters that certain documents required by the Revenue from Company C relating to particulars of the receipt of HK$2,064 million from Company D and Company E had been seized by Commercial Crime Bureau of the Hong Kong police force and could not be produced. The Taxpayer submitted that these letters were letters submitted to the Revenue and should have been considered by the Revenue as 'statements' within the meaning of the first limb of section 70A(1) but the Revenue had failed to recognize them as 'statements'.

(d) The Revenue erred in failing to find that there had been an 'omission' in such 'statements' in respect of the 2006/07 Profits Tax Assessment of the Taxpayer. The word 'omission', it is said, has not been definitively defined in section 70A(1). On the other hand, it is also said that 'inadvertence' or 'mistake' are not a necessary prerequisite element. And it is accepted that a deliberate act of not

complying or a deliberate act causing an omission would not come within 'omission' under section 70A(1). There were multiple 'omissions' since each time Company C's tax representative informed the Revenue that the documents the Revenue requested for could not be provided constituted an 'omission' not of a deliberate nature, adopting Patrick Chan J's approach in respect of 'error' under section 70A(1) in Extramoney Ltd v Commissioner of Inland Revenue [1997] HKLRD 387. These 'omissions' were in respect of the 2006/07 Profits Tax assessment since the letters requiring information from Company C were made in respect of the Taxpayer's business profits and Company C's tax representatives submitted letters in the same respect, notwithstanding that those letters did not say in respect of the assessment of the Taxpayer and in which year of assessment, since there is no requirement that there has to be an express reference in the statement to a particular assessment. Both the letters requiring information and the 2006/07 Profits Tax appeared to share the same file number. These 'omissions' should have been but were not rectified or dealt with by the Revenue. As a result, the 2006/07 Profits Tax Assessment was rectifiable.

20. In relation to issue (b), Mr Ng submitted that:

(a) If this Board rejects the Taxpayer's submission based on the first limb of section 70A(1) of the Inland Revenue Ordinance, the Taxpayer would rely on the second limb of section 70A(1).

(b) The failure of the Revenue to consider the documents referred to as being not available in the letters of Company C's tax representative constituted an 'omission' under the second limb of section 70A(1), namely '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'.

21. Mr Lui for the Revenue relied on his written submission of 21 pages prepared before the hearing of this Appeal. Mr Lui made principally four points in the written submission: Firstly, the Taxpayer had not proved that the tax charged under the 2006/07 Profits Tax assessment was excessive by reason of the alleged error or omission, and the Taxpayer's case was plainly flawed since it ignored the requirement in section 70A(1) of the Inland Revenue Ordinance of proving excessiveness in the tax charged and a causal link between such excessiveness and the alleged error or omission. Secondly, no 'statement' contemplated under the first limb of section 70A(1) had ever been submitted and the Taxpayer was wrong to rely on the letters of the tax representative of Company C since those letters themselves were not required to be submitted under the Inland Revenue Ordinance (since what the Revenue requested Company C to submit were those other documents that the tax representative said in its letters as documents that could not be provided), they were not written 'in respect of' the 2006/07 Profits Tax assessment or any

specific assessment chargeable on any specific taxpayer, and they were only submissions requesting extension of time to comply with the Revenue's requests. Thirdly, the Taxpayer's contentions on 'omission' were not stated in the Notice of Appeal and should not be entertained, and, in any event, those contentions were absurd in that if those contentions were accepted, any taxpayer could reopen tax assessments under section 70A by not giving documents (or information) to the Revenue (or withholding the same from the Revenue) and that could not possibly be consistent with the legislative intent that section 70A should have a very limited scope. Reference was made to materials of the legislative history of the enactment and amendment of section 70A in the course of years. Fourthly, the Taxpayer's case on the second limb of section 70A was unarguable in the light of the case of Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above), since the second limb applies only if there is an arithmetical mistake in tax assessment and there was no arithmetical mistake in the 2006/07 Profits Tax Assessment of the Taxpayer.

22. Mr Lui also underlined the following points in his oral submissions:

(a) The judgment of Patrick Chan J in Extramoney Ltd v Commissioner of Inland Revenue (above) stated in essence that a deliberate choice of certain ways or alternative ways to present a tax assessment, or a tax computation for assessment could not be characterized as being mistaken. This applied to error in that case and it was submitted that it applied equally to omission.

(b) Previous decisions of the Board of Review, such as Case No B/R 5/71 (above), Case No D137/02, (2003-04) IRBRD, vol 18, 239 and Case No D25/06, (2006-07) IRBRD, vol 21, 496, made it clear that a 'statement' covered by section 70A of the Inland Revenue Ordinance should be a statement required to be submitted for tax purposes. Thus the only logical way of looking at the matter is to look at what the requests of the Revenue were and not to look at the asserted statements themselves. The requests of the Revenue were reviewed. It was submitted that those requests could not be said to have been made only in relation to the Taxpayer, though in the first two requests, a question was asked of Company C and one of its directors, Mr A, whether the $2 billion payments were related to the fung shui services provided by [the Taxpayer]. The other two requests were specific to the documents or matters requested, including a written consent from Company C to enable the Revenue to obtain copies of documents seized by the police force and a list of documents seized to enable the Revenue to make comparisons. It was also submitted that the requests of the Revenue did not ask Company C and its tax representative to write to the Revenue the letters that the Taxpayer now asked to be treated as 'statements' for the purpose of section 70A. Although those letters were written in response to the requests stating, among other things, that the documents requested had been seized by the police, they must be in

essence requests for extension of time, and like an asset betterment statement produced in the course of a tax audit (see Case No D93/89, (1990) IRBRD, vol 6, 342), they did not come within the meaning of a 'statement' under section 70A.

(c) A 'statement' contemplated in section 70A is one submitted in respect of the tax charged for that year of assessment. This is supported by the Court of Appeal's judgment in Good Mark Industrial Ltd v Commissioner of Inland Revenue [2015] 2 HKLRD 16, which underlined that the key point to 'in respect of' is the 'assessment'.

(d) A 'statement' submitted after the date of the assessment is completely irrelevant and cannot be a statement within the ambit of section 70A since logically, there cannot be an error leading to an excessive tax assessment by reason of something written after the assessment.

(e) The file number that was referred to by Mr Ng was the investigation file number. That was for investigation purposes and was never a unique reference to a particular assessment. The earlier 2005/06 Profits Tax Assessment also referred to the same file number. Therefore the file number was not conclusive as to whether there was any reference to a particular assessment.

(f) The investigation conducted by the Revenue was to ascertain the tax liabilities of various persons arising from what the Revenue knew at the time, namely the receipt of $2 billion by a particular company, a director of which was the Taxpayer's brother. Out of an investigation like this, more than one assessment could be issued and more than one assessment in respect of more than one person or entity could be issued.

(g) The Taxpayer's case had the fundamental problem of assuming erroneously that it had already been proved before this Board that the Taxpayer had never received the money. The Taxpayer relied only on assertions made in the letters of Company C's tax representative and their enclosures and those assertions were mere submissions or allegations of fact that the Revenue and this Board had no opportunity to verify. The Taxpayer had not produced any witness in this Appeal for cross-examination to verify the truthfulness of those assertions. Accordingly, the Taxpayer could not discharge his burden of proof. Reference was made to Commissioner of Inland Revenue v Crown Brilliance Ltd, HCIA 1/2015, 14 October 2015.

(h) Referring to Case No D40/91, IRBRD, vol 6, 159, it was submitted that an assessment based on an estimate by the assessor of the Revenue under section 59(3) in the context of there being no return involved no calculation in the estimation and therefore no arithmetic error or omission under the second limb of section 70A(1) could possibly arise in relation to the estimation. On the facts of this Appeal, without any return or any extraneous materials provided to the Revenue by the Taxpayer, there was no room whatsoever for the second limb to apply.

(i) An assessor of the Revenue is not required to prove correctness of the estimate he made. While the Taxpayer can demonstrate in the context of an objection to the assessment under section 64 that the estimate was incorrect, after the assessment has become final pursuant to section 70, the mere fact of discovery of certain materials which would otherwise, had they been provided, show that a different figure would be arrived at, is not an error or omission or mistake for the purposes of the second limb of section 70A. Reference was made to Mok Tsze Fung v Commissioner of Inland Revenue (1962) 1 HKTC 166, which was followed in Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above).

23. In reply, Mr Ng for the Taxpayer focused on four points. Firstly, Mr Ng submitted that the Revenue had taken too narrow, artificial or arbitrary a view of an 'omission in a statement submitted in respect thereof' where Mr Lui appeared to submit on behalf of the Revenue that a letter submitted in response of a request for documents stating that one could provide the documents was a statement submitted 'in respect of' and that a letter submitted in response to a request for documents stating that one could not provide the documents was not a statement submitted 'in respect of'. The letters of the tax representative for Company C that Company C was unable to comply with the request constituted statements submitted in respect of the corresponding requests. Mr Ng also emphasized that the omission the Taxpayer contended was the failure to produce the requested documents at the end of the day, in relation to the receipt of the money for the year of assessment of 2006/07, which was before the assessment of that year of assessment. Mr Ng also noted that while the letters of the tax representative for Company C were sent to the Revenue after the assessment, the first request from the Revenue predated the assessment and there was still a causal link there.

24. Secondly, although the Revenue has clarified that the file number was an investigation number, Mr Ng maintained that an inference could be made that those statements were submitted 'in respect of'. The statute does not require that the letters to have express reference pointing to an assessment. Also the statute has no timing requirement; a requirement that the statement must be submitted before the assessment not only goes against the terms of the legislation but also goes against the intent of the legislature to allow for discovery of omissions. What is needed is to look at the facts to find whether or not the letters were submitted for a particular year of assessment and given that the Revenue had asked for the information specifically for a taxpayer, and for certain

information in relation to a year of assessment, that was sufficient for the purpose of the requirement of 'in respect of'.

25. Thirdly, in relation to Case No D93/89 (above), while the parties did not differ as to what 'in respect of' in section 70A means (i.e. in respect of an assessment), the Taxpayer disagreed with the Revenue's reliance of the holding that an asset betterment statement was not a 'return or statement' for the purposes of section 70A. That holding was not particular to 'return' or 'statement' and was inconsistent with Case No B/R 5/71 (above). In Case No D93/89 (above), the asset betterment statement was never required to be submitted, whereas in the Taxpayer's Appeal, one was concerned with a particular demand under section 51. Therefore, it was submitted that this Board should either hold that the holding in Case No D93/89 was erroneous or distinguish Case No D93/89 (above) on the facts.

26. Fourthly, in relation to Commissioner of Inland Revenue v Crown Brilliance Ltd (above), the Taxpayer relied on paragraph 19 of that judgment to the effect that 'contemporaneous documents submitted by the tax representative, at any rate those documents whose authenticity is not in dispute, may be considered by the board as admissible'. The authenticity of the correspondence between the tax representative of Company C and the Revenue had not been challenged. They are admissible as documentary evidence, subject to this Board's consideration as to the weight to be given to each of them.

Discussion and Findings

27. 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.'*

28. 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 2006/07 Profits Tax Assessment pursuant to section 70A of the Inland Revenue Ordinance. The Taxpayer has exercised his rights of objection and appeal pursuant to section 70A(2) and his appeal is therefore an appeal under Part 11 of the Inland Revenue Ordinance to this Board.

29. 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').

30. This Board has found as facts the facts that are set out in paragraphs 6 to 13 above. This Board is mindful of the Revenue's position of not admitting the truth of the assertions made in the correspondence between the tax representative of Company C and the Revenue that the Taxpayer relied on in his application for correction under section 70A of the Inland Revenue Ordinance made pursuant to the letter of his representative, Messrs Cheung & Liu, Solicitors, dated 26 November 2012.

31. This Board further notes that the Taxpayer, who has been advised by lawyers in the course of his application for correction under section 70A of the Inland Revenue Ordinance, his objection to the refusal to the application, and in this Appeal, called no oral evidence at the hearing of this Appeal. By not adducing any oral evidence from witness(es), the Taxpayer 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 on behalf of the Taxpayer in letters to the Revenue as evidence unless such assertions or allegations are either supported by undisputed documents or not disputed by the Revenue. See Commissioner of Inland Revenue v Crown Brilliance Ltd (above), paragraphs 18-19; Case No D6/91, IRBRD, vol 5, 556 at 558. See also 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; Case No D3/15, (2015-16) IRBRD, vol 30, 338, paragraph 40.

32. The Taxpayer's Notice of Appeal includes by adoption of the earlier objection a claim that the Taxpayer was unduly prejudiced by the Revenue in refusing to exercise its discretion to extend time for the purpose of the application under section 70A of the Inland Revenue Ordinance. Mr Ng has not maintained this claim in this Appeal.

33. In general terms, the Taxpayer's case in this Appeal is that there were matters in his case in respect of the 2006/07 Profits Tax Assessment that sufficiently satisfied either the first limb or the second limb of section 70A(1) of the Inland Revenue Ordinance, so that it has been 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)

34. In respect of the first limb of section 70A(1) of the Inland Revenue Ordinance, the first matter that this Board has to address concerns the Taxpayer's Notice of Appeal, which seeks to contend that the first limb was invoked because –

> 'your department must have been mistakenly or inadvertently in issuing the captioned tax assessments to [the Taxpayer] in his personal capacity by reason of "an error in any return or statement" under the first limb of section 70A of the Ordinance. In fact, it is difficult to understand your assertion that that it would not amount to any error even if it could be proved that the said payments were not personal income of our client'.
>
> It appears reasonably clear that the Notice of Appeal raises the ground of appeal that the first limb was invoked because there was an error in a return or statement in respect of the 2006/07 Profits Tax Assessment.

35. Mr Ng, as this Board finds in his written and oral submissions, has sought to argue on behalf of the Taxpayer in this Appeal that the Revenue should have invoked the first limb of section 70A(1) to correct the 2006/07 Profits Tax assessment by reason that there had been an 'omission' in 'statement(s)' in respect of the 2006/07 Profits Tax Assessment of the Taxpayer. Mr Lui for the Revenue indicated in his written submission that the Taxpayer's submissions based on 'omission' should not be entertained and maintained this contention in his oral submissions.

36. Section 66(3) of the Inland Revenue Ordinance provides:

> '*(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).*'

37. This Board is satisfied that the submissions Mr Ng made for the Taxpayer in his written and oral submissions in this Appeal present ground(s) of appeal seeking to invoke the first limb of section 70A(1) of the Inland Revenue Ordinance that are different and distinct from the rationale underlying the Taxpayer's application for correction of the 2006/07 Profits Tax Assessment (as it was stated in the letter of Messrs Cheung & Liu, Solicitors, dated 26 November 2012 and quoted in paragraph 11 above), and the reasoning presented in the ground of appeal in the Notice of Appeal that seeks to invoke the first limb of section 70A(1). Mr Ng had not sought the consent of this Board to rely on the ground(s) encapsulated in his submissions. This Board, pursuant to section 66(3) of the same Ordinance, declines to entertain the ground(s) presented in Mr Ng's submissions.

38. This Board now considers the ground of appeal contained in the Notice of Appeal relating to the first limb of section 70A(1) of the Inland Revenue Ordinance. This ground of appeal refers to a letter dated '9 February 2010' of the tax representative of Company C to the Revenue and contends that the Revenue should have been aware that it was Company C that was the recipient of three payments in the total amount of $2,064 million from Company D and Company E, so that the Revenue must have been mistaken or inadvertent in raising on 10 February 2010 the 2006/07 Profits Tax Assessment on the Taxpayer. Having reviewed the hearing bundle, this Board finds that the correct date of the tax representative of Company C to the Revenue in question is 9 March 2010, a date which was after the raising of the 2006/07 Profits Tax assessment on the Taxpayer on 10 February 2010. This Board agrees with Mr Lui's submission for the Revenue that, in relation to the first limb of section 70A(1) that there cannot logically be an error leading to an assessment said to be excessive by reason of something written and received after the raising of the assessment, so that a letter received after the date of the assessment is completely irrelevant and cannot possibly be a 'statement' within the first limb of section 70A(1). This Board understands that Mr Ng did not seriously question this proposition. This Board accordingly holds that the ground of appeal contained in the Notice of Appeal relating to the first limb of section 70A(1) must fail.

39. In case that this Board is wrong in its approach and decision under section 66(3) of the Inland Revenue Ordinance above, this Board now states its views on Mr Ng's submissions before this Board relying on 'omission' under the first limb of section 70A(1) of the same. Firstly, Mr Ng's submissions relying on 'omission' had not been altogether consistent in the course of this Appeal. At first, Mr Ng appeared to be contending that there were multiple 'omissions' on the part of the Revenue in the sense that each time Company C's tax representative informed the Revenue that the documents the Revenue requested for could not be provided there was constituted an "omission" not of a deliberate nature. At the end of the hearing before this Board, Mr Ng's contention became one which claimed that there was an 'omission' on the part of the Revenue over the failure or inability to produce the requested documents at the end of the day, in relation to the receipt of the money for the year of assessment of 2006/07, which was before the assessment of that year of assessment, and where the first request from the Revenue for documents in relation to the receipt of the money predated the assessment. This Board considers that Mr Ng was wise to have in effect abandoned the initial contention of multiple "omissions" since this contention is untenable in the face of the proposition that

there cannot logically be an omission leading to an assessment said to be excessive by reason of something written and received after the raising of the assessment.

40. Secondly, as this Board has noted earlier, Mr Ng's reliance on 'omission' in his submissions now raises a different and distinct case from that raised by his instructing solicitors in the Taxpayer's application for correction of the 2006/07 Profits Tax Assessment. In effect, this Board has been asked to consider a fresh application outside the time limit set by section 70A(1) of the Inland Revenue Ordinance. Had Mr Ng made an application for amendment of the grounds of appeal under section 66(3) to allow him to rely on his submissions on 'omission', this would have been one of the reasons to refuse such an application.

41. Thirdly, this Board would reject Mr Ng's submissions relying on 'omission' in a 'statement' submitted 'in respect of' on their merits. The reasons are as follows:

(a) (i) The Board of Review had stated in Case No D25/06 (above) that a taxpayer who wishes to invoke section 70A of the Inland Revenue Ordinance must satisfy the Revenue (and on appeal, the Board of Review) that the tax charged for the year of assessment in question is excessive and that the excessiveness is by reason of an error or omission in any return or statement submitted in respect thereof and that accordingly, to succeed, the taxpayer must first prove the correct amount of profits and the correct amount of tax in order to establish that the tax charged in the year of assessment in question is excessive (paragraphs 75, 76). Thus, assuming that excessiveness in the charge of tax is shown, the first limb of section 70A(1) of the Inland Revenue Ordinance requires the 'omission' to be in the 'statement' that was submitted and the 'omission' to be 'in respect of' the assessment that correction was sought in the application. Strong and clear evidence is required; see Extramoney Ltd v Commissioner of Inland Revenue (above) at 395G and Case No D6/91 (above) at 560.

(ii) Mr Ng claims the 'omission' to be the failure of Company C to produce the documents requested by the Revenue. Mr Ng also claims the relevant 'statement' to be the letters of the tax representative for Company C to the Revenue. This Board, on analysis, finds that Mr Ng's submissions have failed to establish the two requirements under the first limb of section 70A(1) mentioned in sub-paragraph (i) above.

(iii) The Revenue's request was for the purpose of obtaining full information regarding the $2,064 million payments received from Company D and Company E and that request sought

primarily information under five questions, including the question of whether the $2,064 million payments were related to the fung shui services provided by the Taxpayer (and if so, further details of the services and the basis of determining each payment). However, the letters of the tax representative for Company C did not begin to respond substantively to the Revenue's request for information; they either sought extension of time or indicated that a response would only be provided when documents were released and made available to Company C. None of the letters of the tax representative for Company C included any information confirming or refuting the suggestion that the $2,064 million payments Company C received from Company D and Company E were related to the fung shui services provided by the Taxpayer. Particularly, in the first letter of Company C's tax representative, there was enclosed a letter of instruction of Company C to its tax representative and it merely stated materially these:

'We would advise that the Commercial Crime Bureau of Hong Kong ("CCB") has conducted an investigation on [the Taxpayer] (including [Company C]) as the recipient of the above payments. The CCB on various dates conducted searches on [Company C] pursuant to search warrants issued by the Magistrates Court and seized various documents and records of [Company C]. We have appointed lawyers to deal with the investigation and to protect our rights. We have been advised by the lawyers that in view of the on-going of the investigation by the CCB and the ensuing legal proceedings, you should inform the IRD on our behalves to seek further extension of time to reply to the Letters until the investigation and the related legal proceedings, if any, are completed.'

This statement did not state any position on the part of Company C or the Taxpayer in relation to the $2,064 million payments Company C received from Company D and Company E. Hence Mr Ng cannot on the evidence before this Board establish for the Taxpayer the claim that the Revenue would have known from the letters of the tax representative for Company C that the payments were or were not related to the Taxpayer and his provision of services.

(iv) Several consequences flow from the Taxpayer not establishing the claim that the Revenue would have known from the letters of the tax representative for Company C that the payments were or were not related to the Taxpayer and his provision of services. The first is that the Taxpayer cannot establish excessiveness in the Profits Tax charged for the year of

assessment of 2006/07. The second is that the Taxpayer cannot establish, as Mr Ng has attempted to claim on his behalf, that there was an 'omission' in the terms of Mr Ng's ultimate submission of non-production of the documents requested prior to the raising of the 2006/07 Profits Tax Assessment, assuming that the letters of the tax representative of Company C did qualify as 'statement' for the purpose of the first limb of section 70A. The third is that the Taxpayer cannot establish that the claimed 'statement' was submitted 'in respect of' the assessment that led to the charging of the Profits Tax for that year of assessment.

(b) The Hong Kong courts and the Board of Review have examined the legislative history of section 70A and compared it with similar provisions in English tax legislation:

(i) In Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218, CFA, both Tang PJ and Lord Walker NPJ had examined section 70A in Hong Kong's scheme of revenue legislation. Tang PJ's examination and discussion of section 70A in paragraphs 22 to 28 highlighted the object of the section and the purpose of its enactment, and considered the policy consideration of balancing between promptness and finality on the one hand, and avoiding hardship and injustice, on the other hand. Regarding the latter topic, Tang PJ observed in paragraph 28 that: 'The requirement for a genuine error may contribute to finality. … the clear object of s.70A, indeed the object of the Inland Revenue Ordinance, namely, that a taxpayer should pay what is properly chargeable and no more. No doubt payment should be prompt but any genuine mistake could be sorted out within a generous time limit.' Lord Walker NPJ's examination and discussion of section 70A in paragraphs 56 to 60 and 119 to 128 was more elaborate and included a study of Hong Kong and English authorities including Extramoney Ltd v Commissioner of Inland Revenue (above). For the purpose of this Appeal, Lord Walker NPJ's statement in paragraph 126 is instructive: '[Section 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' (italics inserted). And this was followed by Lord Walker NPJ's observations in paragraphs 127 to 128 that a proposed substitution of an entirely new return and set of statements would not be correction of one specific error

(such as excluding a bad debt, or a duplicated credit of a single receipt) and ought to be viewed as an impermissible rewriting of everything, and that a deliberate lie cannot be an error for the purpose of the section.

(ii) In Good Mark Industrial Ltd v Commissioner of Inland Revenue (above), the Court of Appeal underlined that the application to correct under section 70A is to correct an assessment specified and restricted by the notice of assessment.

(iii) In Case No D25/06 (above), the Board of Review followed Case No D137/02 (above) and adopted the construction that 'statement' for the purpose of the first limb of section 70A refers to 'statement submitted in respect of a tax return' related to the claimed excessiveness in the tax charged for the year of assessment in question. In Case No D137/02 (above), the Board of Review read Case No B/R 5/71 (above) to be stating the correct approach and proceeded to hold that the word 'statement' in section 70A is restricted to a statement submitted in respect of a return and further that the word 'statement' means a statement which a person is required to furnish to the Revenue under the Inland Revenue Ordinance.

(iv) In Case No D93/89 (above), the Board of Review, having referred to Case No B/R 5/71 (above) and sections 51(1) and (5) of the Inland Revenue Ordinance, concluded that 'statement' under the first limb of section 70A must be a statement submitted in respect of a return, 'since grammatically the "in respect thereof" in section 70A must mean in respect of a return'.

(v) In Extramoney Ltd v Commissioner of Inland Revenue (above), Patrick Chan J (as Chan NPJ then was) considered at 395-396 that 'error or omission' for the purpose of the first limb of section 70A does not include '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' and then concluded for the purpose of the inland revenue appeal before him that a deliberate and conscious decision on the part of the taxpayer to attribute a certain item in the tax return to be submitted to the Assessor of the Revenue for assessment cannot be an 'error' within the meaning of the first limb of section 70A if the taxpayer subsequently changes his mind on that matter.

(vi) 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. Section 70 would operate to make the assessment final and conclusive for all material purposes unless section 70A applied. To the judge, section 70A 'covers the case where there has been a miscasting by the Assessor of the Revenue on the materials available to him. The Assessor is not in error, let alone, arithmetical error, simply because his assessment does not coincide with a figure he would have reached had other information been available to him.' The judge also agreed with the words of Mills Owen J in Mok Tsze Fung v Commissioner of Inland Revenue (above) that: 'It might well be impossible for the assessor to prove facts justifying his assessment in the precise amount thereof, or, indeed, in any particular amount. The law allows him to "estimate", or, as the case may be, to assess "according to his judgment", and if he were to be required to prove his assessment strictly his powers would, for practical purposes, be nullified.'

(c) In the light of the above authorities:

(i) This Board rejects the Taxpayer's contention that the letters of the tax representative of Company C were 'statements' for the purpose of the first limb of section 70A. This Board follows the continuous line of decisions of the Board of Review in Case No D25/06 (above), Case No D137/02 (above) and Case No D93/89 (above), which all held that the word 'statement' in the first limb of section 70A(1) is restricted to a statement submitted in respect of a return. This Board notes that Mr Lui for the Revenue has taken a more cautious approach in relation to the above authorities by reason of his concern over the Chinese text of section 70A(1). This Board appreciates Mr Lui's careful concern but considers that the continuous line of decisions of the Board of Review referred to above were correct in construing section 70A(1) in the language expressed, and that this construction is well supported in the materials of enactment history that the Board of Review had read. In so far as there is an apparent discrepancy between the English text and the Chinese text of section 70A(1), as the enactment history has borne out, section 70A(1) was enacted in the original English version well before the efforts to produce an authenticated Chinese text of Hong Kong's legislation began. Accordingly, this Board respectfully follows the approach of Peter Cheung J (as Cheung JA then was) in Chan Fung Lan v Lai Wai Chuen [1997] 1 HKC 1 at 8H to

rely on the original legislation, as this Board has come to the view that the authenticated Chinese text of section 70A(1) contains an inaccuracy that this Board should not give effect to. In the Taxpayer's case in this Appeal, as there was no return submitted by the Taxpayer in the year of assessment of 2006/07, there were no 'statements' submitted by the Taxpayer or anyone else on his behalf in respect of the return for that year.

(ii) This Board also rejects the Taxpayer's contention on the meaning of 'omission' for the purpose of the first limb of section 70A(1). This Board accepts the submission of the Revenue that the legislature intended the ambit of operation of section 70A to be a limited one, as this submission is well supported by the enactment history of section 70A throughout the years, as well as the policy considerations highlighted in Lord Walker NPJ's judgment in Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (above) (with which Tang PJ agreed). This Board considers that 'omission' for the purpose of first limb of section 70A(1) could not have as broad or loose a meaning that the Taxpayer has submitted. Mr Ng for the Taxpayer had not satisfactorily answered and resolved the doubt raised by Mr Anson Wong SC, Member of this Board, in the course of the hearing, which was that the Taxpayer's contention, if accepted, would make section 70, which stipulates how an assessment becomes final and conclusive, rather meaningless since any taxpayer would, according to the proposition in the submission, have been able to reopen an assessment deemed final and conclusive by operation of section 70, through relying on what transpired in an inquiry the Revenue made with a third party, be it the provision of certain information or omission to transmit information or supply documents, that bore a relation with the Taxpayer, without the need to show that there has been a mistake of any sort involved. This Board additionally considers that since the first limb of section 70A(1) is concerned with an 'omission … *in* any return or statement submitted in respect thereof', letters informing the Revenue that information and documents the Revenue had requested for the purpose of an inquiry regarding certain payments received by a third party cannot possibly be regarded as containing an 'omission' therein, particularly where the 'omission' is said to be non-production of the documents the Revenue had requested. The letters responded to the request and stated in its terms the position taken by Company C. Nothing was omitted therein.

(d) Last but not least, the Taxpayer's submissions in this Appeal have plainly ignored the context of his case being one where the Assessor of the Revenue had raised an assessment in the absence of a return. As the Taxpayer had not submitted a valid return when the 2006/07 Profits Tax Assessment became final and conclusive under section 70 by operation of the law (as to which this Board refers to the analysis in Case No D3/15 (above) at paras 49 to 55 of sections 51, 59(1), 59(3), 64(1) and 70 of the Inland Revenue Ordinance), it could not be said that there was an error or omission in any return or statement submitted in respect thereof under the first limb of section 70A(1).

42. For the reasons adumbrated above, this Board rejects the Taxpayer's case relying on the first limb of section 70A(1) of the Inland Revenue Ordinance.

The Second Limb of Section 70A(1)

43. In respect of the second limb of section 70A(1) of the Inland Revenue Ordinance, Mr Ng for the Taxpayer submitted that the failure of the Revenue to consider the documents referred to as being not available in the letters of Company C's tax representative constituted an 'omission' under the second limb of section 70A(1).

44. This Board has no hesitation in rejecting the Taxpayer's purported reliance of the second limb of section 70A(1) of the Inland Revenue Ordinance. This Board agrees with Mr Lui for the Revenue that where the assessment in question was based on estimation on the part of the Assessor of the Revenue, the estimation itself could not involve a calculation with the result that there could not be an error or omission 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 cases of Mok Tsze Fung v Commissioner of Inland Revenue (above), Sun Yau Investment Co Ltd v Commissioner of Inland Revenue (above) and Case No D40/91 (above) clearly support this submission. The 2006/07 Profits Tax Assessment was raised following estimation of the amount of the assessable profits by the Assessor, as he was empowered to do under section 59(3) where the Taxpayer had not furnished a return and the Assessor was of the opinion that he was chargeable with tax. No calculation was involved in respect of the amount of the assessable profits. Whatever document(s) that the Assessor is said to have omitted were not before him at the time of the raising of the 2006/07 Profits Tax Assessment in exercise of the power under section 59(3) of the Inland Revenue Ordinance to make that assessment by estimation. It could not be said in the Taxpayer's case that there was something that was 'left out' or 'excluded' when the relevant 'calculation' was made to make the relevant assessment. There was no complaint in respect of the subsequent calculation of the tax charged. Accordingly, the second limb could not be invoked.

Conclusions

45. The Taxpayer has failed to prove that the tax charged under the 2006/07 Profits Tax Assessment was excessive by reason of one of the two limbs under section 70A(1) of the Inland Revenue Ordinance. The Taxpayer's appeal is dismissed. This Board confirms the 2006/07 Profits Tax assessment raised by the Revenue on the Taxpayer.

46. This Board considers that in spite of the skill with which Mr Ng had argued this Appeal, the grounds he had sought to advance were, on analysis, thoroughly unmeritorious. This Board therefore exercises its power under section 68(9) of the Inland Revenue Ordinance to order the Taxpayer to pay the sum of $5,000 as costs of the Board of Review, such sum to be added to the tax charged and recovered therewith.

47. Lastly, this Board thanks counsel from both sides of this Appeal for their assistance and expresses regret for the delay in the preparation of this Decision.