Case No. BR 5/71

Board of Review:

Y. H. Chan, *Chairman*, K. Lo, J. H. W. Salmon & D. T. Nolan, *Members.*

15th November 1971.

Jurisdiction of Board—power to correct errors or omissions—Inland Revenue Ordinance, s. 70A.

The appellant had appealed to another Board against an estimated assessment for business profits raised in respect of a building development. That Board had, with certain adjustments, confirmed the estimated assessment. The taxpayer's agents subsequently asked for correction of the assessment as determined by the Board. The assessor declined to do so and the Commissioner upheld the assessor's refusal to correct the assessment and confirmed the same. The appellant then appealed to this Board against the Commissioner's determination. On appeal the Commissioner's representative submitted as a preliminary point that the appellant was, in effect, asking this Board to review the decision of the previous Board rather than to correct errors or omissions within the meaning of section 70A.

Decision: Appeal dismissed. The function of s. 70A(1) is to empower corrections to be made where excessive tax is charged by reason of an error or omission contained in any return or statement submitted by the taxpayer to the assessor.

Cases referred to:—

1. Mok Tsze Fung v. C.I.R., Hong Kong Tax Cases 166.

2. McLeish v. C.I.R., 38 T.C. 1.

Reasons:

At the outset of the hearing of this Appeal, a preliminary objection was taken on behalf of the Commissioner by Mr. Ladd, who contended that section 70A of the Inland Revenue Ordinance on which the taxpayer relies is inapplicable to this Appeal because the taxpayer is in effect seeking to get this Board to review the decision of a previous Board rather than to correct errors and omissions within the meaning of that section.

The assessment determined by the previous Board was for business profits tax in respect of the development of a property on Hong Kong Island. It was an estimated assessment raised under section 59(3) of the Ordinance. The taxpayer had filed a "nil" business profits tax return and declared thereon that he had not been carrying on any trade, profession or business. It is common ground that at all material times he was the Managing Director of E. Ltd. (hereinafter called "the Company") practically the whole of the capital of

which was owned by him. The objects of the Company included the purchase and sale of land and the development thereof.

The appeal to the previous Board was argued on two grounds. First it was contended that the taxpayer had not been carrying on any trade or business and that the business of developing the property aforesaid was in fact undertaken by the Company. Secondly it was argued that if the taxpayer was found to have been engaged in any such trade or business the assessment was erroneous because it was an estimate without supporting evidence and that it was grossly excessive.

At the hearing of the appeal the Board heard evidence adduced by the taxpayer and came to the conclusion that the taxpayer was trading in property and in consequence the first ground failed. As far as this part of the decision is concerned there is no room for section 70A to be invoked and if the previous Board were wrong, the proper remedy would be an appeal on law by way of a case stated.

As to the second ground of appeal to the previous Board, this was disposed of by them in the following terms : —

> "21. As to the second ground of appeal, viz. that the assessment was excessive, we find that the taxpayer had produced no overall evidence which we can accept to arrive at any computation.
>
> However, after repeated efforts by the Revenue's representative to arrange for a meeting with the taxpayer and his representative, one was eventually held on 20th May 1970. Based on information received by him at the meeting the Revenue's representative suggested for the Board's consideration a revised assessment for 1966/7 as follows :—

(1)	Sales …….		$1,674,000
Cost of Sale :			
(2)	Cost of land …….	$ 919,200	
(3)	Construction fee ……..	863,906	
(4)	Architect's fee …….	52,000	
(5)	Interior decoration etc. ……	120,000	
(6)	Commission on Mortgage ……...	40,000	
(7)	Insurance premium ……..	4,200	
(8)	Legal fee ……..	1,354	
(9)	Interest on Mortgage ……...	233,960	

(10)	Additional architect's fee ……	700	
(11)	Lift ……..	123,560	
(12)	Brick ……	60,000	
(13)	Water Pump …….	10,000	
(14)	Sinking Well ……...	50,000	
(15)	Scaffolding ……..	25,000	
(16)	Removal of debris ……...	10,000	
(17)	Add. Cost for excavation ……	50,000	
(18)		$2,563,880	
(19)	14/26 thereof ……..……		$1,380,551
			$ 293,449

Less: Legal cost & Stamp Duties

(20)	14/15 × 10,000 …….	$ 9,333	
(21)	Insurance premium to December 1965 ……	650	
(22)	Brokerage on extension of Mortgage ……..	14,000	
(23)	Legal fee for above ……..	1,797	
(24)	Interest on loan to December 1965 …….	80,000	
(25)			$ 105,780
	Assessable profit ……		$ 187,669

22. We take the view that in making the above recommended revised assessment the Revenue's representative acted fairly and in the interest of justice, despite the somewhat unreasonable and querulous attitude adopted by the taxpayer's representative throughout . . .".

(The item numbers appearing in brackets have been inserted by us to facilitate further reference in our decision.)

The previous Board proceeded to deal with certain mosaic and other decorative work carried out at the premises and allowed a sum of $53,514 being 14/26th parts or shares of the total cost of such work which amounted in all to $99,384. The assessable profit was accordingly reduced by the Board from $187,669 to $134,155.

On the 9th July 1970, the taxpayer's agents asked for correction of the assessment as determined by the Board under section 70A of the Ordinance. The Assessor gave notice on the 20th July 1970 of his refusal to correct the assessment and in pursuance of section 64(2), the matter came up for consideration by the Commissioner who in his determination in writing dated 23rd February 1971 upheld the Assessor's refusal to correct the assessment as determined by the previous Board and confirmed the same. From this determination the taxpayer has appealed to the present Board.

According to the notice of appeal filed on the 22nd March 1971, the grounds of appeal may be summarized as follows : —

(1) The Board having found that the earlier financing of the development was probably obtained by drawing from the Company, the inference is irresistible that it is the Company and not the taxpayer which is liable to be taxed.

(2) If the above contention is not given effect to, the taxpayer will be made the foolish victim of his own rectitude.

(3) There is from the view of taxation and according to established cases no difference between the taxpayer and the Company.

(4) Letters produced to prove that interest was due by taxpayer to the Company have been wrongly rejected by the Commissioner.

The notice of appeal then sets out the following errors which the taxpayer asks this Board to correct : —

(A) As there were 24 flats only the sum of $120,000.00 for interior decoration (item (5)) should be restricted to 24 flats and not arbitrarily apportioned to 26 flats (item (19)).

(B) The same applies to the sum of $99,384.00 for the mosaic and decorative work.

(C) (i) Interest of $63,470.00 for the period from 1st January 1962 to the 5th November 1962 should be allowed as a debit to the taxpayer because it had not been debited to the Company. It is common ground that this matter was not before the previous Board.

(ii) $139,831.63 interest paid or credited to the Company from 31.3.1965 to 31.3.1969 should be allowed in view of the previous Board's finding that the financing was obtained by drawings from the Company.

(iii) Interest totalling $144,390.00 paid to the Hong Kong Industrial Commercial Bank Ltd. from December 1965 to 31st March 1970 should also be allowed.

(D) Interest on mortgage amounting to $233,966.00 (item (9)) should be treated as an expense in the same way as the interest of $80,000.00 (item (24)) and not as cost of construction.

(E) As the Board found the taxpayer had no capital, the whole of his floating capital requirement of $2,329,920.00 is an expense as is the interest of $233,960.00 mentioned above. The total of these two amounts is $2,563,880.00 (item (18)).

(F) Income from sales of $1,674,000.00 (item (1)) should be reduced by the above mentioned interest of $233,960.00 to $1,440,040.00.

(G) The notice of appeal indicates that the taxpayer also wishes to have corrected certain other errors and omissions particularised in his tax agents' letter to the Commissioner of the 31st July 1970 which is to the following effect :—

(i) The previous Board states at para. 8(*a*) of its decision in reference to the cost of foundation excavation work that such a claim should have been supported by some documentary evidence or at least the evidence of an expert. The Board over-looked the fact that the building contractor gave evidence and he was in fact an expert.

(ii) The previous Board states at paragraph 8(*b*) of its decision that according to a statement made by the taxpayer dated the 16th January 1970 the whole construction work by the building contractors was about $1,222,400.00. At paragraph 21 of their decision the previous Board placed the construction fee at $863,906.00 (item (3)).

(This Board finds it difficult to appreciate the nature of the error or omission complained of here, but as far as we can understand, the objection appears to be directed against the inconsistency of the previous Board in its findings relating to the cost of construction.)

(iii) The previous Board raises the construction cost by $99,384.00 but fails to make a corresponding increase in Architect's fees. Such fees should be calculated at 6% on $1,592,680.00 as contended for by the taxpayer and not on $863,906.00 as found by the previous Board.

(iv) Out of a bundle of 16 cheques produced at the hearing of the previous appeal, 14 were made payable to the Company. It is contended that this is one reason why the Company and not the taxpayer is liable for tax on the business carried on by it.

(v) The cost of the 14 flats sold was allowed at $102,433.00 each. This ignores the interest of $309,615.00 and accounting conventions.

(vi) More weight should have been given to the taxpayer's evidence. It is wrong not to take into account his evidence regarding the capital at the outset of his undertaking.

(vii) Written evidence from the Banks concerning the subject of interest has not been mentioned.

(viii) The previous Board is in error in not heeding the fact that the taxpayer fell victim to serious rises in the cost of labour and material when his building plans were disrupted.

(ix) It is stated by the previous Board that in the brochure printed for the sale of flats all the flats were offered for sale whereas in fact only 24 flats were offered for sale. Despite this fact, 26 flats are mentioned in the computation reproduced above.

(x) The taxpayer is incorrectly stated to have had a history of property transactions.

(xi) Certain remarks directed against the tax agents of the taxpayer are unjustifiably unkind and unfair.

(xii) Despite the fact that 43 standard volumes of tax cases were on Counsel's table at the previous hearing, not one was referred to in rebuttal of the taxpayer's claim.

(xiii) Since the taxpayer started with little or nothing and drew what he needed from the Company, the Assessor had no grounds for disallowing interest and incidental expenses paid to a bank and interest paid to the Company of $37,633.00.

(xiv) In the light of the previous Board's decision, $139,786.53 interest disallowed to the Company should have been allowed to the taxpayer. In addition, the taxpayer claims a sum of $60,375.00 for interest paid for the period 1/1/62-30/9/62 under 2 mortgages. (It appears from para. 1(8) of the Commissioner's written determination herein that the sum of $60,375.00 represents interest payable under two mortgages given by

the taxpayer to the bank to secure banking facilities for the Company. This sum is given as $63,470.00 in Ground (C) above and was not claimed before the previous Board).

(xv) The assessed profit of $134,155 should have been made against the Company which had a business registration certificate whereas the taxpayer did not, and the whole of the liability for tax should be transferred to the Company in respect of the Year of Assessment 1966/67.

(H) The taxpayer also relies on a letter written by his tax-agents to the Assessor dated the 21st October 1970 in which the taxpayer makes the following contentions :—

(i) The taxpayer did not carry on the business of developing the property in question. The Company which was formed for the purpose of land development should have been assessed instead of the taxpayer.

(ii) The previous Board found that the Company financed the development and acted as selling agent, but, this notwithstanding, the Assessor wrongly refused to make any allowance to the Company for any interest on money lent and commission for acting as selling agent, or to bring into charge in its accounts any part of the profits of the development scheme.

(iii) The taxpayer on the other hand, had no capital, no business registration, no books, no accounts, and had filed a business tax return with a declaration of "No Business".

It appears to us that the grounds of appeal could have been very much more shortly and succinctly stated. Instead, we have been presented with a long rambling notice of appeal marked by its lack of clarity. It is unnecessarily verbose and involved and one finds in it considerable repetition and overlapping. Nevertheless, in our summary of the grounds relied on by the taxpayer, we have tried not to omit anything material put forward by him although in so doing we have had to abridge, simplify and para-phrase the same at various points so as to make the grounds more easily comprehensible.

It should be pointed out that an Appeal against an Assessor's refusal to correct an assessment is governed by the same rules as those regulating other appeals and under section 66(3), an appellant may not at the hearing of his appeal rely on grounds other than those contained is his statement of grounds of appeal filed in accordance with section 66(2) save with the consent of this Board. No such consent has been applied for and we must, therefore, confine ourselves to the grounds summarized above.

In our opinion, the Revenue is entitled to succeed in its preliminary objection. We think Mr. Ladd is right in his submission that the function of section 70A(1) is not to authorise the Assessor to review the decision of a Board but to enable him, and, on appeal, this Board to correct an excessive charge to tax caused by an error or omission contained in any return or statement submitted to the Assessor by the taxpayer.

To begin with, a few words on our system of taxation and appeal may not be out of place. As we see it, assessments depend primarily on disclosure by taxpayers. They are prepared initially at least, from returns, statements, and other documents furnished or submitted by the taxpayer. These are augmented whenever necessary by information obtained by inquiries or examination. Any person aggrieved by an assessment may by notice in writing to the Commissioner object to such assessment. From the determination of the Commissioner an appeal lies to the Board of Review.

The Board is a fact finding body and has power to hear witnesses and to accept or reject any evidence which may be adduced. Section 69(1) expressly provides that its *decision* shall be final provided that a dissatisfied taxpayer may require the Board to state a case on a question of law for the opinion of the Supreme Court. Under section 70, an *assessment* which has been determined on appeal shall be final and conclusive as regards the amount of income or profits assessed, but section 70A goes on to provide that notwithstanding the provisions of section 70 such *assessment* may be corrected in cases of certain errors or omissions.

Section 70A refers to two types of errors and omissions. It reads as follows :—

> "70A(1) Notwithstanding the provisions of section 70, if, upon application made within six years after the end of a year of assessment or within six 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 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 completed 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.
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> (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".

It seems explicit from sections 70 and 70A that although there may have been errors or omissions in an assessment, once it has been determined by a Board of Review it becomes absolutely final and conclusive unless it is proved to be excessive by reason of :—

(i) an error or omission in any return or statement submitted in respect thereof, or

(ii) any arithmetical error or omission in the calculation of the amount of the assessable income or profits assessed or in the amount of tax charged.

It is significant that the subject matter declared to be final in section 69(1) is the Board's *decision* while that in section 70 is the *assessment* as determined by the Board. Section 70A enables an assessment to be corrected but nowhere does it say that a decision of the Board can be reviewed. The word "decision" has a wider scope than the word "assessment" and invariably it contains findings of fact and sometimes of law. In our view, these findings clearly must remain final, subject only to any appeal on a point of law. What may be reviewed is the assessment but not the Board's findings. This construction necessarily restricts the scope of what can be corrected and in our opinion that is exactly what the legislature deliberately sets out to do, that is to say, to limit the power to correct assessments where errors or omissions are found in the returns or statements submitted or in the mechanical process of calculating the profits or tax. These are errors or omissions which can be readily corrected without calling for a review of the findings of the Board.

Coming to the history of the present case, the proceedings commenced with a "nil" return submitted by the taxpayer, as a result of which the Revenue was compelled to raise an estimated assessment. The taxpayer appealed, and as to what happened at the hearing of the appeal, it seems to us material to revert at this point to the excerpts from the decision of the previous Board quoted in paragraph 5 where comment was made on the absence of any evidence which could be accepted to arrive at any computation. Other references were made in the decision to the lack of documentary and expert evidence which was obviously necessary. Finally the previous Board had this to say in paragraph 14 of its decision : —

> "Since accounts have not been produced, we cannot accept the taxpayer's statement that no commissions were paid. We find it incomprehensible that a mature and experienced man of business, embarking on a project involving the expenditure of over $1 million, did not keep some accounts or record of expenditure on it.".

Little wonder, therefore, that no return or statement was submitted by the taxpayer to the Assessor apart from a "nil" return under section 51 of the Ordinance. The taxpayer's agent did not dispute this. In fact he admitted that the only statement submitted was the one quoted in paragraph 5 hereof; to quote his own words : ". . . the Board's statement which it alone submitted (we submitted no such statement) caused the errors; and section 70A must be invoked".

According to Mr. Ladd, the errors and omissions referred to in the first part of section 70A(1) are limited to those contained in a return or statement submitted under section 51(1).

That section provides that an assessor may by notice in writing require any person to furnish any "return" containing such particulars and in such form as may be prescribed. The word "statement" does not appear but is used in many other sections of the Ordinance as is also the word "return". As far as we can see, every time these two words are used in the Ordinance, the context indicates very clearly that they refer to returns and statement submitted by a taxpayer or by some private individual expressly required to furnish the same. We have in mind the following provisions.

Under section 52(2) an Assessor may call for a "return" from any person who is an employer. In cases where he does not accept a "return" or a "return" has not been furnished, an assessor may make an estimated assessment (see section 59(2) and 59(3) respectively).

Under section 22(2) the precedent partner of a partnership carrying on any trade, profession or business is required to make and deliver a "statement" of the profits or losses of such trade, profession or business.

Section 23(2) refers to the duty of a life insurance company to "submit" *inter alia*, an abstract "statement" or other documents to the Commissioner.

Section 80(2)(*a*) makes it an offence for :—

(*a*) the making of an incorrect "return" by any person by omitting or understating anything of which he is required to make a "return"; or

(*b*) making an incorrect "statement" in connection with a claim for any deduction or allowance.

Then under section 82, any person who :—

(*a*) omits from a "return" any sum which should be included, or

(*b*) makes any false "statement" or entry in any "return", or

(*c*) makes any false "statement" in connection with a claim for any deduction or allowance, or

(*d*) signs any "statement" or "return" furnished without reasonable grounds for believing the same to be true,

shall be guilty of a misdemeanour.

Apart from the above the Ordinance also enacts that nobody appointed under or employed in carrying out the provisions of the Ordinance shall be required to produce or communicate to any Court, *inter alia*, any "return" coming under his notice (sec. 4(3)) but the Commissioner or any officer authorised by him may communicate to certain

Government officers any matter including, *inter alia,* a copy of any "return . . ." submitted to him (section 4(4)).

There is no doubt in our mind that in all these provisions, the words "return" and "statement" refer to any return or statement submitted by a taxpayer or private individual required to furnish the same and that they cannot possibly mean any return or statement submitted by an assessor to a Board of Review. It follows, therefore, that errors and omissions of the first type which can be rectified under section 70A, must be confined to errors or omissions contained in any return or statement submitted by a taxpayer to an assessor. No other returns or statements could have been contemplated by the legislature. In our view, the taxpayer in this case cannot rely on any errors or omissions contained in the revised assessment quoted in paragraph 5 hereof because it is not a return or statement within the meaning of section 70A and for that reason we hold that we have no jurisdiction to correct the errors or omissions allegedly made by the previous Board.

We think we should also say a few words about the computation described above as a "revised assessment". It must be borne in mind that the appeal to the previous Board concerned from beginning to end an estimated assessment made under section 59(3). It is true that mid-way through the hearing of the previous appeal the Revenue's representative suggested for the Board's consideration a computation showing how the assessable profits might be calculated. It does not alter the fact, however, that the assessment of the assessor was an estimated assessment and remained so after it was reduced by the previous Board. The importance of this lies in the fact that in making an estimated assessment, an assessor is not required to justify his assessment with precise figures.

In **Mok Tsze Fung v. C.I.R.**[1] Mr. Justice Mills-Owens, after pointing out that an assessor may estimate under section 59 and section 60 when faced with circumstances giving rise to doubt whether the taxpayer has made full disclosure, proceeds to say at p. 183 : —

> "I might add that certain passages in the case stated might be taken to indicate that the assessor is put strictly to proof of his assessment on the hearing before the Commissioner. As I have indicated I would not take this to be so. It might well be impossible for the assessor to prove facts justifying his assessment in the precise amount thereof, or indeed, in any amount. The law allows him to 'estimate' or, as the case may be, to assess 'according to his judgement' and if he was required to prove his assessment strictly, his powers would, for practical purposes, be nullified. He is in the words of Vaisey J. quoted above, not required to prove the exact quantity or quality of the profits or other income not disclosed by the taxpayer.".

What the Revenue's representative did at the hearing of the appeal to the previous Board was that he made a concession to revise his estimate by taking into consideration certain information received by him at a meeting which took place during the hearing between him on the one hand and the taxpayer and his representative on the other. The

[1] Hong Kong Tax Cases 166.

Revenue's representative did so because, in the words of the previous Board, the taxpayer had produced no evidence which could be accepted to arrive at any computation. This means that any computation prepared by the assessor must of necessity be an estimate only. In this respect the situation may be likened to that in **McLeish v. C.I.R.**[2], cited by Mr. Ladd.

That case concerns the claim of a company director to the deduction of various expenses incurred by him for three companies. He was provided by one of the companies with a motor car, the running costs and maintenance of which were paid by the company. It was also the director's custom to attend agricultural shows and to travel to various places and to entertain at his house and elsewhere the directors and customers of the 3 companies. Two of the companies paid him the expenses which he had incurred for these purposes by lump sum allowances or by reimbursements of expenses according to detailed returns submitted by him. Before the General Commissioners, the taxpayer produced an abstract statement of the reimbursements so paid and claimed that they as well as the lump sum allowances were deductible expenses necessarily incurred by him. The Revenue submitted that the director had produced no evidence to support his claim that the whole of the sums paid had been necessarily expended in the performance of the duties of his office but, as a concession, made an estimated apportionment of the expenses which they were prepared to allow which apportionment the General Commissioners accepted. On appeal, Lord Clyde deals with the point at issue in the following terms at p. 8 of the report :—

> "The Commissioners have expressly found that the evidence submitted on behalf of the Appellant was insufficient to justify his claiming as a deduction from the assessments under appeal the whole sums paid to him in respect of expenses. For they held that the evidence on behalf of the Appellant as to the quality of the expenses incurred by him was inconclusive. In other words, he has not discharged the onus which rests upon him. On a strict view this might have entitled the General Commissioners to leave the assessments standing, but in the course of the hearing, Her Majesty's Inspector of taxes, recognising no doubt that part at least of the reimbursements could qualify as a deduction, indicated that they might allow certain deductions from assessments, and the Commissioners, while regarding the Inspector's apportionment as generous, gave effect in their determination to the modifications of the sums mentioned in the assessments which he had tentatively put forward. The first ground put to us is whether on the facts and the evidence herein-before stated, the Commissioners were not entitled to do so. The onus was on the Appellant to establish his right to any part of the deductions which he claimed. He failed to discharge that onus by the evidence which he led, and it seems to me that the General Commissioners, if they considered that none the less some part of these expenses (which had not been quantified in the evidence) should not be included could deal with the matter in the way in which they did and could accept the only estimate of a reasonable apportionment of those sums which was before them. The view appears to me to be reinforced by the fact that they considered that the apportionment inclined to the generous side in the Appellant's favour. The issue is a pure question of fact and is peculiarly a matter for them. I see no ground upon which we could interfere with it in the circumstances . . . The failure to obtain any express findings as to the deductibility of any particular item of expenses was not the fault of the Crown nor of the General Commissioners

[2] 38 T.C. 1.

> but was attributable to the insufficiency of the Appellant's own evidence in crystalising this point.".

At p. 9 of the report, Lord Russell says this :—

> "On a review of the above decision it seems reasonable and proper to accept journeys had to be undertaken by the Appellant in the course of his duties as a Director, but it does not follow that the full amount expended by him during his travels was necessarily expended in the performance of those duties. The onus lay on the Appellant to show how much was necessarily incurred in performing his duties. He failed to produce evidence establishing either that the whole expenses were so necessarily incurred, or even that precise sums in the total expenditure were so necessarily incurred for that purpose. In the result, it appears to me impossible to affirm that the decision of the General Commissioners, upholding the sums allowed as deductions—on the basis of a generous scaling down of the whole sums claimed—can reasonably be interfered with.".

We think the situation in **McLeish v. C.I.R.**[2] is not unlike that in our case. Throughout the previous Board's decision, one finds instance after instance where the Board comments scathingly on the lack or insufficiency of evidence to prove the cost of the building and thereby to discharge the onus placed on the taxpayer of proving that the assessor's estimated assessment was excessive. It was in these circumstances that certain concessions were made in the course of the hearing and a revised computation was suggested for the previous Board's consideration. We can see no reason why the revised computation should not be accepted by the previous Board although it was not meant to be a precise statement of account but merely an estimate to arrive at a figure which the previous Board found to be generous to the taxpayer in very much the same way as the General Commissioners did in **McLeish's** case[2]. It is significant that in the last mentioned case the Court held that it could not reasonably interfere with the estimate made by the Revenue.

We are not saying that an estimated assessment can never be re-opened under section 70A, because conceivably there may be cases where such an assessment can be proved to be excessive by reason of an error or omission in any return or statement submitted in respect of it, but the decision in **McLeish's** case[2] and the observations of Mr. Justice Mills-Owens is **Mok Tsze Fung v. C.I.R.**[1] on the impracticability of quantifying an estimated assessment in precise sums fortify our view that the suggested computation presented to the previous Board must be regarded as an estimate of the assessor similar to the suggested apportionment in **McLeish's** case[2] and not a return or statement submitted for the purpose of section 70A.

What then of the second type of errors or omissions which can be corrected by the assessor or, on appeal, by this Board? It is clear that they must be arithmetical errors or omissions in the calculation of the amount of the assessable income or profits assessed or in

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[1] Hong Kong Tax Cases 166.
[2] 38 T.C. 1.

the amount of the tax charged. Nowhere in the statement of the grounds of appeal or in the submissions of the taxpayer's agent has our attention been drawn to any error or omission of a strictly arithmetical nature. The gravamen of the appeal has been the previous Board's failure to take into consideration or give sufficient weight to certain facts or arguments and the unreasonableness and injustice of their decision. All these are either matters of law or of fact which this Board cannot go into for reasons we think we have sufficiently explained. The only complaints which at first sight may be said to be in some way connected with arithmetical calculation are Grounds, (A), (B), (C), and (G)(iii), but it will be found on closer examination that in reality they are not arithmetical errors or omissions at all, as we shall presently show.

Grounds (A) and (B) can be taken together. The complaint here is that whilst the previous Board has found that the cost of interior decorations of $120,000.00 (i.e. $5,000.00 per flat for 24 flats) would appear to be a reasonable allowance, they have apportioned this among 26 flats, thus reducing the proportionate cost of each flat to a smaller amount and thereby increasing the taxable profit. The same argument is advanced by the taxpayer in respect of the sum of $99,384.00 being the cost of certain mosaic and decorative work.

In our opinion, the matter of the interior decorations must be considered in its true perspective. To begin with, the previous Board was dealing with an estimated assessment when it said in its decision :—

> "The allowance of $120,000.00 for interior decoration was intended to cover electric wiring, gas piping, built-in wardrobes, etc. which items at $5,000.00 per flat for 24 flats would appear to be a reasonable allowance.".

The Board was not making a finding of fact that the work actually cost the precise sum of $5,000.00 per flat but was merely deciding that an estimate of $5,000.00 per flat would be a fair one. We do not think a decision on such a basis can be re-opened on the ground of arithmetical error or omission which one expects to be applicable only to matters that can be ascertained with arithmetical accuracy. What is more important, however, is that even assuming we are wrong and the previous Board did find that the work in question cost the exact sum of $120,000.00 for 24 flats, we have on record their further decision that the same should be spread over 26 units instead of 24 units. There could have been many reasons for their adopting such a course. If the point was not crystalised by sufficient cogent evidence at the hearing before the previous Board, the taxpayer had only himself to blame.

Examining the facts more closely, we find that the property consist of 26 shares, one share each being allocated to 24 flats, an upper ground floor which serves as an esplanade, and a garage which was eventually sold as a godown. The taxpayer argues that the garage and the upper ground floor are unconnected with the flats so that it is a patent error to apportion to them any part of the cost of $120,000.00 and $99,384.00 for the interior decorations, mosaic work etc. carried out to the 24 flats,

There can be no gain-saying the fact that there are 26 units in the building even if two of them are a garage and an esplanade. These two units form as much an integral part of the building as the roof, halls, entrances, etc. Can it be suggested that to apportion the cost of these latter items to 26 units constitutes an arithmetical error?

Whether or not the previous Board is right in spreading the cost of the work in question over 26 instead of 24 units is, in our opinion, a matter of law or mixed law and fact. It is certainly not a matter of arithmetical error or omission. For these reasons, we hold that Grounds (A) and (B) cannot be relied on by the taxpayer.

As regards Ground (C), the suggestion is that a sum of $63,470.00 being interest for the period from the 1st January 1962 to the 5th November 1962 should have been allowed as a debit to the taxpayer. It may be argued that this represents an arithmetical omission because the matter was not before the previous Board. Mr. Ladd contends that this ground cannot be entertained and relies on the principles enunciated by the Court in **McLeish v. C.I.R.**[2] which lays down that if a taxpayer fails to lead sufficient evidence to support any claim to deduction or to crystalise such a claim, he cannot be heard to complain and the decision of the General Commissioners (or in Hong Kong the Board of Review) will not be interfered with. We agree with Mr. Ladd's submission. In our judgment, the omission to lead evidence on the claim of interest of $63,470.00 is an omission for which there is no remedy and is essentially different from an arithmetical omission in calculation. In an appropriate case, it may amount to an omission of the first type—that is, an omission contained in a return or statement submitted by a taxpayer—and therefore, capable of retification. But for the reasons we have stated above, the computation prepared by the assessor in this case is not such a return or statement. Ground (C), therefore, also cannot be entertained.

We come now to Ground (G)(iii). The taxpayer's argument here is that architect's fees should be calculated at 6% on $1,592,680.00 as contended for by the taxpayer and not on $863,906.00 as found by the previous Board. The previous Board's comment on this point appears in paragraph 8(*c*) of its decision which reads as follows :—

> "Documentary evidence was available to support the payment for lifts of $123,560.00 for legal expenses, insurance of the building, brokerage, commission for the mortgages, and loans from banks. But no receipt or other documentary evidence was produced to support a claim for $58,397.00 for architect's fees computed at 6% on $973,290.00 the tender price; this figure was contradicted by the taxpayer's evidence that he paid the architect 5% or 6% on about $1½ million and this merely for preparing the plans. The taxpayer stated that he received no advice from the architect who was alleged to have never supervised the construction work.".

In these circumstances, the previous Board eventually accepted a figure of $52,000.00 estimated by the assessor for architect's fees. The excerpts quoted above demonstrate very clearly that the previous Board regarded the evidence on architect's fees as being

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[2] 38 T.C. 1.

inconclusive and conflicting and consequently the matter became one eminently suitable for an estimated figure to be arrived at. Whether or not the estimate is reasonable is a matter which we cannot inquire into under section 70A. Certainly no arithmetical error or omission has been disclosed.

None of the other grounds can be remotely regarded as being related to any arithmetical error or omission. In consequence, we hold that even assuming that everything alleged in the statement of grounds of appeal is true, the appeal must fail *in limine* because it discloses no error or omission which this Board has jurisdiction to correct under section 70A.

The appeal is, therefore, dismissed.