INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D137/02

Salaries tax – whether the assessment based on the proposal submitted by the appellant excessive – meaning of the words 'return' and 'statement' in section 70A of the Inland Revenue Ordinance ('IRO') – whether a compromise necessarily excludes the operation of section 70A – frivolous and vexatious appeal – order to pay costs.

Panel: Kenneth Kwok Hing Wai SC (chairman), Horace Wong Ho Ming and David Yip Sai On.

Date of hearing: 27 February 2003.
Date of decision: 20 March 2003.

The appellant was the sole proprietor of a business. The appellant and his wife were also the shareholders and directors of a limited company. In early 1999, the assessors reviewed the tax affairs of the appellant, his wife and the limited company. The appellant's representatives filed a proposal to the Commissioner in settlement of the investigation. The Commissioner approved the said proposal and raised additional tax on the appellant. The appellant claimed that the assessments, which were based on a proposal submitted by the appellant's representatives, were excessive and the proposal was made under 'duress'.

Held:

1. The appellant sought to invoke section 70A. Unless the appellant could point to (a) an error or omission in any return; or (b) an error or omission in any statement submitted in respect thereof; or (c) 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, his appeal would be doomed to failure.

2. The Board sees no reason why a compromise necessarily excludes the operation of section 70A. Take a case where there is an arithmetical error or omission in the calculation of the amount of the assessable income or profits in a return. The arithmetical error or omission is then repeated in a compromise subsequently reached between a taxpayer and the Commissioner. Where the arithmetical error or omission results in an excessive tax charge, the requirements of section 70A appear to be satisfied and there is no good reason in law or in principle why the error should not be rectified under section 70A (D55/88, IRBRD, vol 4, 20 not followed).

3. The Board has considered sections 70A, 4, 15E, 20A, 22, 51, 51A, 51B, 52, 59, 63C, 63H, 63M, 64, 80, 82, 82A and schedule 10 and agrees that the word 'return' in section 70A means a return which a person is required to furnish to the Revenue under the IRO (BR5/71, IRBRD, vol 1, 30 followed).

4. The word 'statement' in section 70A is restricted to a statement submitted in respect of a return. Further, the Board agrees that the word 'statement' means a statement which a person is required to furnish to the Revenue under the IRO. Where the word 'statement' is intended to refer to a statement other than a statement which a person is required to furnish to the Revenue under the IRO, it is clear from the context.

5. The Board is not satisfied on the facts that there was any error or omission at all. The proposal is not a statement submitted in respect of any return and is not a statement which the appellant is required to submit under the IRO. It is not a 'statement' within the meaning of section 70A.

6. The Board dismisses the appellant's allegation of 'duress' as groundless and utterly irresponsible. The Board is of the opinion that the appeal is frivolous and vexatious and an abuse of the process. The appellant is ordered to pay $5,000 as costs of the Board.

Appeal dismissed and a cost of $5,000 charged.

Cases referred to:

D55/88, IRBRD, vol 4, 20
Ng Kuen Wai trading as Willie Textiles v Deloitte Touche Tohmatsu and CIR 5 HKTC 211
D49/92, IRBRD, vol 8, 1
Hartog v Colin & Shields (1939)
Sun Yau Investment Co Ltd v CIR 2 HKTC 17
Extramoney Limited v CIR 4 HKTC 394
D10/81, IRBRD, vol 1, 404
D2/82, IRBRD, vol 1, 410
D28/88, IRBRD, vol 3, 312
D30/89, IRBRD, vol 4, 346
D3/91, IRBRD, vol 5, 537
D93/89, IRBRD, vol 6, 342
D25/01, IRBRD, vol 16, 224
BR5/71, IRBRD, vol 1, 30

Tsui Siu Fong for the Commissioner of Inland Revenue.
Caesar Lee Chi Shing of M & C Consultants Limited for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 23 October 2002 whereby:

(a) assessor's notice of refusal dated 29 May 2002 was upheld and the salaries tax assessment for the year of assessment 1995/96 under charge number 9-4086604-96-9, dated 24 May 2000, showing assessable income of $5,195,000 with tax payable thereon of $779,250 was confirmed.

(b) assessor's notice of refusal dated 29 May 2002 was upheld and the additional salaries tax assessment for the year of assessment 1996/97 under charge number 9-2434663-97-8, dated 24 May 2000, showing additional assessable income of $10,000,000 with tax payable thereon of $1,537,125 was confirmed.

(c) assessor's notice of refusal dated 29 May 2002 was upheld and the additional salaries tax assessment for the year of assessment 1997/98 under charge number 9-3819647-98-1, dated 24 May 2000, showing additional assessable income of $11,000,000 with tax payable thereon of $1,519,492 (after taking into effect of the Tax Exemption (1997 Tax Year) Order) was confirmed.

The admitted facts

2. The following facts in the 'Facts upon which the determination was arrived at' in the determination were admitted by the Appellant and we find them as facts.

3. The Appellant had objected to the assessor's notice of refusal to correct the salaries tax assessment for the year of assessment 1995/96 and additional salaries tax assessments for the years of assessment 1996/97 and 1997/98 raised on him. The Appellant claimed that the assessments, which were based on a proposal submitted by the Appellant's representatives, were excessive.

4. During the period from 1 November 1981 to 30 June 1995, the Appellant was the sole proprietor of a business ('the Sole Proprietorship business'). The Appellant declared in his tax returns that the Sole Proprietorship business was a manufacturer and seller of lamps.

5. At all relevant times, the Appellant and his wife were the shareholders and directors of a limited company ('the Limited Company'). The reports of the auditors, Accountants' Firm 1, in respect of the Limited Company's financial statements for the years ended 31 December 1992 to 1997 contain the following comments:

(a) Years ended 31 December 1992 and 1993

'Owing to the nature of the company's records we have been unable to satisfy ourselves that proper cut-off procedures were applied to enable the ascertaining of the correct amounts of debtors and creditors in relation to sales and purchases as at balance sheet date.

Because of the significance of the matters referred to in the preceding paragraph, we are not in a position to, and do not, express an opinion on the balance sheet.'

(b) Years ended 31 December 1994, 1995 and 1996

'In respect alone of the limitation on our work relating to stock and work in progress:

- We have not obtained all the information and explanations that we considered necessary for the purpose of our audit; and

- we were unable to determine whether proper books of account had been kept.'

(c) Year ended 31 December 1997

'Because of an attempt to change from a manual system of accounting to a computerised system a breakdown occurred as a result of which opening balances were not brought forward and many transactions were not properly accounted for ...

We report that

- we have not obtained all the information and explanations that we considered necessary for the purposes of our audit; and

- we were unable to determine whether proper books of account had been kept.'

6. On divers dates, the Appellant furnished his tax returns for the years of assessment 1995/96 to 1997/98. The Appellant declared in the returns that the following amount of salaries were earned from the Limited Company:

Year of assessment	**Date of the return**	**Amount of salaries**
		$
1995/96	1-7-1996	195,000
1996/97	20-5-1997	325,000
1997/98	28-5-1998	325,000

The Appellant also declared in the returns that he was provided with quarters by the Limited Company.

7. On divers dates, the assessor, pursuant to the Appellant's returns, raised on him the following salaries tax assessments for the years of assessment 1996/97 and 1997/98:

	1996/97	**1997/98**
	$	$
Salaries	325,000	325,000
Add: Rental value	32,500	32,500
Assessable income	357,500	357,500
Less: Married person's allowance	180,000	200,000
Child allowance	24,500	27,000
Dependent parent and additional dependent parent allowance	31,500	-
Net chargeable income	121,500	130,500
Tax payable thereon	16,500	15,300*

* To give effect to the Tax Exemption (1997 Tax Year) Order, the tax was subsequently revised to $13,770.

The Appellant did not object against the above assessments which had become final and conclusive in terms of section 70 of the IRO.

8. (a) In early 1999, the assessors reviewed the tax affairs of the Appellant, his wife and the Limited Company. On 18 March 1999, the Appellant and his wife, accompanied by Ms A of Accountants' Firm 1, attended an interview with the assessors. The assessor explained to the Appellant, among other things that if a taxpayer, without reasonable excuse, filed an incorrect return, he would be subject to penal actions under the IRO which might include prosecution or imposition of penalty by way of additional tax. The penal actions would be

considered by the Commissioner personally. If additional tax was imposed, the maximum amount could be treble the amount of the tax undercharged. The Commissioner would consider a taxpayer's degree of co-operation, the gravity of the case and the amount of commercial restitution before he decided the amount of the additional tax to be imposed.

(b) During the interview, the Appellant informed the assessors, among other things, that the Limited Company was carrying on a business of trading crystal lamps and that in 1988, through a processing agreement, the production line was moved to a place outside Hong Kong and that the Limited Company's Hong Kong office was responsible for the purchase of the raw materials.

(c) The assessor informed the Appellant that she was of the view that the reported profits of the Limited Company were incorrect because the auditors could not confirm, for the years of assessment 1992/93 to 1997/98, whether proper books of accounts had been kept. Ms A said that she could prepare an assets betterment statement ('ABS') to quantify the understatement of the Appellant.

9. By letter dated 22 March 1999, the Appellant appointed Accountants' Firm 2 as his tax representatives for the years of assessment 1992/93 to 1997/98.

10. (a) On 14 September 1999, the Appellant and his wife, accompanied by Mr B and a Miss C of Accountants' Firm 2, attended a meeting with the assessors. During the meeting, Mr B explained that during the years under review, most of the profits of the Appellant's businesses were derived from outside Hong Kong. The Appellant remitted his profits back to Hong Kong to invest in properties and fixed deposits. The assessor explained that for those taxpayers who entered into processing agreement with an entity outside Hong Kong, the Revenue would consider their offshore claim if they had kept complete business records. However as the Limited Company did not retain the relevant records, the offshore claim could not be accepted.

(b) Having discussed with Mr B, the Appellant submitted the following proposal ('the 1999 Proposal') in settlement of the investigation:

(i) Revised profits tax assessment to be issued in name of the Sole Proprietorship business

	Revised assessable profits	**Profits already assessed**	**Revised additional assessable profits**
	$	$	$
1992/93	2,653,198	153,198	2,500,000

(ii) Salaries tax assessments to be issued in name of the Appellant

	Assessable income	**Income already reported**	**Additional assessable income**
	$	$	$
1993/94	2,643,000	143,000	2,500,000
1994/95	3,165,000	165,000	3,000,000
1995/96	7,195,000	195,000	7,000,000
1996/97	13,357,500	357,500	13,000,000
1997/98	14,357,500	357,500	14,000,000
	40,718,000	1,218,000	39,500,000

Mr B also signed as a witness in the 1999 Proposal. The assessors advised the Appellant that the 1999 Proposal would be submitted to their seniors for consideration.

11. By an authorisation letter dated 17 September 1999, the Appellant appointed Accountants' Firm 3 as his authorised tax representative replacing Accountants' Firm 2 to handle the investigation.

12. By letter dated 20 September 1999, Accountants' Firm 3 informed the assessor that the Appellant requested for a longer period of time to re-examine the 1999 Proposal before making final decision. Accountants' Firm 3 also informed that they would review the Appellant's tax position.

13. On 27 September 1999, Miss D, a senior tax manager of Accountants' Firm 3, informed the officers of the Revenue that the Appellant considered that the profits of the Limited Company were derived from outside Hong Kong. As such, the Appellant considered that only 50% of the profits should be assessable to Hong Kong tax. The assessor explained to Miss D that apportionment of income could not be considered because:

(a) The Appellant's assets which were located outside Hong Kong were not taken into account in the ABS.

(b) The Limited Company did not maintain sufficient business records. Further, some of the accounting records provided to the Revenue did not tally with the financial statements of the Limited Company.

Miss D stated that according to the mode of operation of the Limited Company, only 50% of its profits should be considered as derived from Hong Kong and assessable to tax. The assessor

advised Miss D that in the absence of supporting records, the offshore claim could not be entertained.

14. On 15 March 2000, Miss D informed the assessors that she had visited the Limited Company's factory outside Hong Kong in September 1999 and discovered that the factory merely kept records of bank transaction movements which were insufficient to provide the details of sales amount and subcontractor charges incurred. Under such circumstances, Miss D agreed to use ABS method to quantify the Appellant's understatement. During the interview, Miss D requested to exclude various sums of totalling about $10,800,000.

15. On 28 March 2000, Accountants' Firm 3 submitted, on behalf of the Appellant, the following proposal ('the 2000 Proposal') in settlement of the investigation:

(a) Understatement of profits by the Sole Proprietorship business

	Assessable profits	**Income already assessed**	**Additional assessable profits**
	$	$	$
1992/93	1,153,198	153,198	1,000,000

(b) Understatement of income by the Appellant

	Assessable income	**Income already assessed**	**Additional assessable income**
	$	$	$
1993/94	1,143,000	143,000	1,000,000
1994/95	2,165,000	165,000	2,000,000
1995/96	5,195,000	195,000	5,000,000
1996/97	10,357,500	357,500	10,000,000
1997/98	11,357,500	357,500	11,000,000
	30,218,000	1,218,000	29,000,000

16. The 2000 Proposal was approved by the Commissioner of Inland Revenue. Accordingly, on 24 May 2000, the assessor raised the following profits tax assessment on the Sole Proprietorship business and salaries tax assessments on the Appellant:

(a) The Sole Proprietorship business

	Revised assessable profits per paragraph 15(a)
	$
1992/93	1,153,198

(b) The Appellant

(i)	Year of assessment 1993/94	$
	Revised assessable income per paragraph 15(b)	1,143,000
	Tax payable thereon	171,450

(ii)	Year of assessment 1994/95	$
	Additional assessable income per paragraph 15(b)	2,000,000
	Tax payable thereon	324,730

(iii)	Year of assessment 1995/96	$
	Assessable income per paragraph 15(b)	5,195,000
	Tax payable thereon	779,250

(iv) Years of assessment 1996/97 and 1997/98

	1996/97	**1997/98**
	$	$
Additional assessable income per paragraph 15(b)	10,000,000	11,000,000
Tax payable thereon	1,537,125	1,519,492*

* The tax payable was reduced pursuant to the Tax Exemption (1997 Tax Year) Order.

17. Neither the Appellant nor Accountants' Firm 3 have objected to the assessments set out at paragraph 16(b)(iii) and (iv) within the statutory one month period as stipulated by section 64 of the IRO. The assessments have become final and conclusive in terms of section 70 of the IRO.

18. The Commissioner was of the opinion that the Appellant had, without reasonable excuse, made incorrect tax returns by understating the chargeable profit of the Sole Proprietorship business for the year of assessment 1992/93 to the extent of $1,000,000 and the Appellant's chargeable income for the years of assessment 1993/94 to 1997/98 to the extent of $29,000,000. By notices dated 7 July 2000, the Commissioner notified the Appellant of her intention to assess on him additional tax under section 82A of the IRO. The Appellant was invited to make representations to the Commissioner with regard to the proposed assessment of additional tax.

19. In response to the notices at paragraph 18, Accountants' Firm 3, on behalf of the Appellant, put forward their representations on 4 August 2000 in the following terms:

(a) '**Our client's allegation**

The discrepancy for the years concerned totaling HK$30,000,000 was arrived at using the asset betterment approach. As previously explained, [the Appellant] has been doing business mainly [outside Hong Kong] since 1993. He reiterated that his assets, as reflected in the Asset Betterment Statement, are in fact financed by profits derived from his businesses [outside Hong Kong] and not Hong Kong. Our client regrets that he has not maintained proper current accounts to record the amount of inward remittances from [outside Hong Kong] nor kept sufficient documents to evidence the application of these funds. As a layman in taxation and accounting, he wrongly believed that these transactions merely represent internal fund transfers between his own businesses and never realized the importance of keeping detail records.'

(b) ' Our client apologizes for the incorrect reporting of the Returns and the failure in keeping sufficient accounting records. He stresses that the error was not deliberately made to conceal the profits of [the Sole Proprietorship business] and [the Limited Company]. Rather, it was an inadvertent error due to the incompetence of the accountant and their lack of accounting knowledge.'

(c) '**Conclusion**

Our client has been most cooperative with your Department and prompt in furnishing information. He appointed [Accountants' Firm 2] to act as his tax representative to rectify his tax position as soon as he received your Department's enquiry in March 1999. Within just six months' time, in September 1999, our client came to a preliminary agreement with your Department for the conclusion of this case.'

(d) ' Our client does not understand accounting and taxation and had to rely on the advice given by his former tax representative. He suffered from substantial stress and pressure as a result of this investigation, and, thus, even though he was of the opinion that the proposal agreed in September 1999 was highly excessive, he, after consultation with his former tax representative, accepted it in order to expedite the settlement of this case.'

(e) ' It was only after serious reconsideration, second thought, and a strong feeling of injustice, that [the Appellant] decided to appoint our firm to perform another detail review of the case. Upon the examination of additional information supplied by him, including the incomplete accounting records of [the offshore business], we finally reached a compromised agreement with your Department to reduce the discrepancy down to the current level.'

20. Having considered the Appellant's representations, the Commissioner, on 15 September 2000, imposed the following additional tax under section 82A of the IRO on the Appellant:

	Additional tax
	$
1992/93	181,000
1993/94	168,000
1994/95	359,000
1995/96	810,000
1996/97	1,488,000
1997/98	1,379,000
	4,385,000

Neither the Appellant nor his representatives have appealed against the above additional tax assessments raised under section 82A of the IRO.

21. On 3 October 2001, the Appellant appointed M & C Consultants Limited as his tax representative.

22. By letter dated 28 March 2002, M & C Consultants Limited, on behalf of the Appellant, lodged objection against the assessments raised pursuant to the 2000 Proposal on the ground that the assessments did not reflect his profit derived from Hong Kong. In addition, M & C Consultants Limited applied under section 70A of the IRO to correct the assessments.

23. By letter dated 10 April 2002, the assessor informed the Appellant that she could not accept the letter at paragraph 22 above as a valid notice of objection under section 64 of the IRO because the letter was not received within one month after the date of issue of the assessments. The assessor [asserted] that section 70A did not apply because in D55/88, IRBRD, vol 4, 20, the Board of Review held that section 70A did not apply where the assessment was issued as a result of an agreement or compromise and the taxpayer subsequently changed his mind. The assessor [further asserted] that in Ng Kuen Wai trading as Willie Textiles v Deloitte Touche Tohmatsu and CIR 5 HKTC 211, the Court held that a taxpayer could not object to the assessable profit which was arrived at by way of an earlier agreement.

24. By letter dated 30 April 2002, M & C Consultants Limited commented that D55/88 was not applicable to the Appellant's circumstances and that they wished to pursue the claim under section 70A.

25. By notice dated 29 May 2002, the assessor rejected the application lodged under section 70A in respect of the assessments raised for the years of assessment 1992/93 to 1994/95

because the application was not lodged within the stipulated time frame. The assessor also refused to correct the salaries tax assessment for the year of assessment 1995/96 and additional salaries tax assessments for the years of assessment 1996/97 and 1997/98 under section 70A of the IRO.

26. By letter dated 11 June 2002, M & C Consultants Limited, on behalf of the Appellant, objected to the assessor's notice of refusal to correct the assessments for the years of assessment 1995/96 to 1997/98 on the following grounds:

(a) On 14 September 1999, the Appellant signed the 1999 Proposal with an agreed discrepancy of $42,000,000. After appointing Accountants' Firm 3, the agreed understatement was reduced to $31,000,000 (the correct amount should be $30,000,000 – see paragraph 15). This showed that the assessor realised the first basis of settlement was unfair and unreasonable because the Appellant carried out only a small business in Hong Kong. It also contradicted the argument that a taxpayer was bound to the settlement agreement and the terms thereof could not be interfered with.

(b) The 2000 Proposal was made by the Appellant under duress in order to avoid heavy penalty as the assessor had informed the Appellant that the Commissioner would levy heavy penalty if the Appellant spent time on finding information to prove his case that the discrepancy included offshore profit.

(c) The 1999 Proposal and the 2000 Proposal were based on one fundamental error made by the assessor that the Appellant had not maintained complete books and records. The assessor should not spend a lot of time in preparing the ABS rather than using a direct method in verifying the Appellant's returns.

(d) The Appellant's business setup in Hong Kong was very small when compared with his [offshore] setup outside Hong Kong. The assessor had completely ignored the Appellant's offshore operation and profit.

(e) The Appellant's assets [outside Hong Kong] had been fully disclosed to the assessor during the initial interview . Bank analysis indicated that he had not made any large remittance to overseas countries. Any assumption that he had large amount of investment outside Hong Kong was unsound.

The notice of appeal

27. The objection having failed, M & C Consultants Limited gave notice of appeal on behalf of the Appellant by letter dated 6 November 2002 lodging an 'objection' (*sic*) to the Respondent's:

> ' ... refusal to correct the following assessments under Section 70A for the years of assessment 1995/96 to 1997/98:
>
> | Year of assessment | Date of issue | Charge no. |
> |---|---|---|
> | 1995/96 | 24.5.2000 | 9-4086604-96-9 |
> | 1996/97 (Add'l) | 24.5.2000 | 9-2434663-97-8 |
> | 1997/98 (Add'l) | 24.5.2000 | 9-3819647-98-1 |
>
> Our client considers that the tax charged for the above-mentioned years of assessment is excessive due to the following reasons:
>
> 1. The assessor had made a fundamental error in interpreting our client's auditor report which induced our client to believe that he had not maintained complete books and records;
>
> 2. The assessor's mistake in interpreting the auditor report also resulted in an error in computing our client's correct assessable profits in Hong Kong as he failed to take into account our client's offshore profit generated from [outside Hong Kong].
>
> 3. The assessor had made a fundamental error in assessing our client's salaries income and induced him to accept these assessments.'

The letter went on to allege that:

> ' The second proposal was made under duress in order to avoid heavy penalty as the officers informed our client that the Commissioner would levy heavy penalty if our client spent time on finding information to prove his case during the interview on 27.9.1999 (para. 7).'

The appeal hearing

28. At the hearing of the appeal, the Appellant was represented by Mr Lee Chi-shing, Caesar, certified public accountant, and the Respondent by Ms Tsui Siu-fong, senior assessor.

29. Mr Lee Chi-shing, Caesar, called the Appellant and a former employee to give oral evidence. No witness was called by Ms Tsui Siu-fong.

30. Mr Lee Chi-shing, Caesar, gave us a copy of the following authorities:

(a) Board of Review decision D49/92 (citation not given);

(b) Hartog v Colin & Shields (citation not given).

31. Ms Tsui Siu-fong submitted a bundle of the following authorities before the hearing:

(a) Sun Yau Investment Co Ltd v CIR 2 HKTC 17;

(b) Extramoney Limited v CIR 4 HKTC 394;

(c) Ng Kuen Wai trading as Willie Textiles v Deloitte Touche Tohmatsu and CIR 5 HKTC 211;

(d) Board of Review decision D10/81, IRBRD, vol 1, 404;

(e) Board of Review decision D2/82, IRBRD, vol 1, 410;

(f) Board of Review decision D28/88, IRBRD, vol 3, 312;

(g) Board of Review decision D55/88, IRBRD, vol 4, 20;

(h) Board of Review decision D30/89, IRBRD, vol 4, 346;

(i) Board of Review decision D3/91, IRBRD, vol 5, 537;

(j) Board of Review decision D93/89, IRBRD, vol 6, 342; and

(k) Board of Review decision D25/01, IRBRD, vol 16, 224.

32. At our request, Ms Tsui Siu-fong furnished us and Mr Lee Chi-shing, Caesar, with a copy of the following Board of Review decision:

(a) Board of Review decision BR5/71, IRBRD, vol 1, 30.

33. After Mr Lee Chi-shing, Caesar, had concluded his submission, we invited him to address us on costs. After his submission on costs, we told the parties that we were not calling on the Respondent and would give our decision in writing.

Our decision

'Error or omission' within meaning of section 70A

34. The Appellant sought to invoke section 70A. Unless the Appellant could point to:

(a) an error or omission in any **return**; or

(b) an error or omission in any **statement submitted in respect thereof**; or

(c) 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;

he would be wasting his own time and money. He was quite entitled to waste his own time and money. What we reprobate was wasting the time and resources of the Revenue by making a wholly unmeritorious objection and wasting the time and resources of the Revenue and the Board of Review by pursuing this appeal which was doomed to failure.

35. Section 70A provides that:

'(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.'

36. In our decision, it is plain and obvious from the wording of section 70A itself that 'errors or omissions' are confined to:

(a) an error or omission in any **return**; or

(b) an error or omission in any **statement submitted in respect thereof**; or

(c) 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.

D55/88

37. With respect, we are unable to agree with the reasoning in D55/88, a decision which the Revenue quoted in correspondence and appeared on the Revenue's list of authorities. The Board in D55/88 held at page 23 that:

> *'Section 70A of the Inland Revenue Ordinance can have no application in such circumstances. Where the parties have agreed to a compromise, the Board of Review has no jurisdiction to interfere with the terms thereof. A compromise reached between the Commissioner acting through his assessor as his agent and a taxpayer acting through a tax representative as his agent constitutes a legally binding and enforceable agreement between the two parties.*
>
> *There was no suggestion before us that the agreement had been reached either through fundamental error or misrepresentation. However, even if such claims were to be made, they cannot be made before a Board of Review but must made (sic) before a judge. We have no jurisdiction to hear contractual matters.'*

38. With respect, the proper approach is to construe section 70A, not to proclaim that section 70A does not apply to a compromise or to any agreement or any contractual matter.

39. To start with, we see no reason why a compromise necessarily excludes the operation of section 70A. Take a case where there is an arithmetical error or omission in the calculation of the amount of the assessable income or profits in a return. The arithmetical error or omission is then repeated in a compromise subsequently reached between a taxpayer and the Commissioner. Where the arithmetical error or omission results in an excessive tax charge, the requirements of section 70A appear to be satisfied and there is no good reason in law or in principle why the error should not be rectified under section 70A.

40. Further, if D55/88 went so far as deciding that agreement precluded rectification under section 70A, this might rob the section of effect in cases where it was intended to have effect. In the majority of cases, the Revenue accepts the return and proceeds under section 59(2)(c). In a sense, there is agreement between the taxpayer and the Revenue. This is precisely the sort of cases where section 70A is intended to have effect – if it should subsequently transpire that there is an

error or omission in a return or statement in respect thereof or an arithmetical error or omission in the calculation.

BR5/71

41. This is the decision which we requested Ms Tsui Siu-fong to supply us and the Appellant with a copy.

42. The Board there considered sections 70A, 51(1), 52(2), 22(2), 23(2), 80(2)(a), 82, 4(3), and 4(4) and concluded at page 41 that:

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

43. With respect, we consider the approach and reasoning correct and convincing.

44. We have considered sections 70A, 4, 15E, 20A, 22, 51, 51A, 51B, 52, 59, 63C, 63H, 63M, 64, 80, 82, 82A and schedule 10 and agree that the word 'return' in section 70A means a return which a person is required to furnish to the Revenue under the IRO.

45. The word 'statement' in section 70A is restricted to a statement submitted in respect of a return. Further, we agree that the word 'statement' means a statement which a person is required to furnish to the Revenue under the IRO. The word 'statement' appears in sections 70A, 2, 22, 51, 51A, 51B, 51C, 64, 66, 67, 77, 80, 82, 82A, 82B. Where the word 'statement' is intended to refer to a statement other than a statement which a person is required to furnish to the Revenue under the IRO, it is clear from the context, for example:

(a) section 2 – 'statutory statement of the names of the partners';

(b) section 51B – 'satisfies a magistrate, by statement made on oath';

(c) section 51C – 'bank statements';

(d) section 64 – 'a statement of the facts upon which the determination was arrived at';

(e) section 66 – 'the statement of facts and a statement of the grounds of appeal'; and

(f) section 77 – 'satisfies a District Judge, by statement made on oath'.

No arguable error or omission within section 70A

46. Mr Lee Chi-shing, Caesar, made no attempt, whether in his grounds of appeal, or in the course of his oral or written submissions, to point to:

(a) an error or omission in any **return**; or

(b) an error or omission in any **statement submitted in respect thereof**; or

(c) 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.

47. When asked, Mr Lee Chi-shing, Caesar, said that there was no error or omission in any return and conceded that there was no arithmetical error or omission.

48. Mr Lee Chi-shing, Caesar, then changed his mind and said that the errors in the returns lay in not breaking down offshore and onshore profits. Under section 68(4), the onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant. Neither the Appellant nor the Respondent has produced any of the returns furnished by the Limited Company. There is no evidence of the contents of the returns furnished by the Limited Company and Mr Lee Chi-shing, Caesar, simply did not have any factual basis for alleging any error or omission in any of those returns. In any event, it cannot be said that any alleged excessiveness in the tax charged was in any way 'by reason of' the error or omission in not stating the amount of alleged offshore profits.

49. Mr Lee Chi-shing, Caesar, then shifted his grounds again and said that the errors lay in the Appellant's declaration of his salaries in the Appellant's returns (see paragraph 6 above). In our decision, this was clearly an after thought on the part of Mr Lee Chi-shing, Caesar. Neither the objection nor this appeal was concerned with the salaries earned from the Limited Company and reported by the Appellant in his returns. The reported salaries were assessed under the **original** salaries tax assessments for the years of assessment 1996/97 and 1997/98 (see paragraph 7 above) and the Appellant had made no attempt to reopen these **original** salaries tax assessments. What

the Appellant sought to reopen in this appeal are the original salaries tax assessment for the year of assessment 1995/96, and the **additional** salaries tax assessments for the years of assessment 1996/97 and 1997/98 (see paragraph 27 above).

50. The 2000 Proposal is not a statement submitted in respect of any return and is not a statement which the Appellant is required to submit under the IRO. It is not a 'statement' within the meaning of section 70A.

51. For the reasons given above, the appeal is bound to fail and does fail.

No error or omission

52. In any event, we are not satisfied on the facts that there was any error or omission at all. This is a case where the Revenue investigated the Appellant's tax affairs. The Appellant was represented throughout the investigation by professional accountants. The exercise was to ascertain the correct amount of the Appellant's taxable income during the period under investigation. The correct amount of the Appellant's taxable income was the issue and the only issue. Represented and advised by professional accountants, the Appellant made the 2000 Proposal on 28 March 2000. There is no evidence of any error or omission on the part of the Appellant about the terms or practical effect of the 2000 Proposal. The 2000 Proposal was approved by the Commissioner. There is no allegation of any error or omission on the part of the Commissioner. The Commissioner must be taken to be capable of understanding the perfectly simple proposal in the 2000 Proposal and to decide for himself whether to accept the proposal in the light of all circumstances known to the Revenue.

Appellant's allegation of 'duress'

53. Before we leave this appeal, we must dismiss the Appellant's allegation of 'duress' as groundless and utterly irresponsible.

54. The Appellant alleged that the 2000 Proposal was made under 'duress' and reference was made to 'the interview on 27.9.1999 (para. 7)'. We take it that the Appellant intended to refer to paragraph 7 of the note of the interview which took place on 27 September 1999. The note of interview was accepted by Mr Lee Chi-shing, Caesar, as correct. According to paragraph 7, what the senior assessor said to Miss D of Accountants' Firm 3 was to the effect that if Miss D required a longer period of time to collect additional information, this would lengthen the time required for completion of the case and when the time should come for the Commissioner to decide on penalty matters, this would be a factor for consideration. In our decision, this was a perfectly permissible statement for the senior assessor to have made. We cannot discern any possible threat. In any event, there is absolutely no evidence of any adverse effect on Accountants' Firm 3. The objective fact is that the 2000 Proposal was not made until 28 March 2000, more than six months after the meeting on 27 September 1999.

Disposition

55. We dismiss the appeal and confirm the refusal to rectify under section 70A and further confirm the assessments as confirmed by the Commissioner.

Costs order

56. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the IRO, we order the Appellant to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.