# Case No. D25/06

**Profits tax** – assessment excessive – material errors and omissions – sections 59(2)(b), 66(3), 68, 70 and 70A of the Inland Revenue Ordinance – section 52 of the Inland Revenue (Amendment) Ordinance 1956 – Departmental Interpretation and Practice Note No 21 – costs – frivolous and vexatious appeal

Panel: Kenneth Kwok Hing Wai SC (chairman), Winnie Kong Lai Wan and Kumar Ramanathan.

Date of hearing: 22 September 2005.
Date of decision: 26 May 2006.

The assessor, based on the appellant's tax returns filed for his firm (the Firm), raised on the taxpayer profits tax assessments for the relevant years of assessment. The taxpayer did not object to the profits tax assessments. The assessor then informed the taxpayer that he would conduct an audit on the taxpayer and the Firm. Subsequently the assessor raised on the taxpayer an additional profits tax assessment.

The taxpayer's then authorised representative (the Former Representative), on behalf of the taxpayer, objected to the additional profits tax assessment on the ground that 'it is estimated and may be excessive'. After exchange of correspondence between the assessor and the Former Representative, the taxpayer by a letter dated March 2004, offered to settle the audit. The offer was accepted by the assessor and on 14 June 2004, the assessor issued to the taxpayer profits tax assessments for the relevant years of assessment.

The Commissioner then notified the taxpayer that she intended to impose additional tax in respect of the incorrect tax returns filed by him for the relevant years and that he could make representations if he so wished. Messrs D, the newly appointed authorised representative of the taxpayer, claimed that there was a misunderstanding because the taxpayer thought that the audit case was to be settled with an understatement of profits, and not tax. Messrs D on behalf of the taxpayer lodged an objection against the profits tax assessments issued on 14 June 2004. Messrs D claimed that the assessments were excessive and that there were material errors and omissions in the calculation of the Firm's assessable profits. Messrs D further claimed that the taxpayer did not receive any of the computations for the assessments issued on 14 June 2004 and asserted that the Revenue did not follow its usual practice of inviting the taxpayer to attend a meeting to discuss about the settlement of the audit. The assessor informed the taxpayer that the assessments issued on 14 June 2004 were based on the taxpayer's proposal. The assessment was a revised assessment issued upon settlement of objection. Since no objection had been lodged against the

assessments within the statutory one-month time limit, the assessments had become final and conclusive in terms of section 70 of the Ordinance.

In the course of the hearing, counsel for the taxpayer applied under section 66(3) of the Ordinance to amend the grounds of appeal and to add a new ground of appeal.

**Held:**

1. Section 70A is not a back door provision for objections and appeals out of time. It seems clear that section 70A may apply to cases where agreements have been reached between the taxpayer and the assessor. A taxpayer who wishes to invoke section 70A must satisfy the following:

   (1) the tax charged for the year of assessment in question is excessive; and

   (2) the excessiveness is:

      (a) by reason of an error or omission in:
         (i) any return; or
         (ii) statement submitted in respect thereof; or

      (b) by reason of an error or omission in the calculation of the amount of the … profits assessed or in the amount of the tax charged.

   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 those assessments were excessive. The way to go about it is to show us actual figures, actual sales figures and actual purchases figures. Instead of showing us any actual figures, the taxpayer kept messing around with formulas and figures. In the absence of any evidence on the correct amount of profits and the correct amount of tax, the taxpayer has not begun to prove that the tax charged in the assessments sought to be corrected were excessive. This reason is by itself fatal against the taxpayer and the appeal must and does fail.

2. There are other reasons why this appeal is hopeless. There is no allegation of any error or omission in the tax returns in question. Neither of the documents referred to in the first draft amended ground of appeal is a statement submitted ' in respect of' any of the tax returns in question. In D137/02, the Board held that a proposal submitted by a taxpayer to settle a tax audit is not a statement within the meaning of section 70A.

3. The next reason why this appeal must fail is that we are bound by authority to dismiss this appeal. In Sun Yau Investment Co Ltd v Commissioner of Inland Revenue, Mantell J dismissed the appeal and stated (at page 21) that 'In my judgment, the wording of 70A is perfectly plain. It covers the case where there has been a miscasting by the assessor on the material 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 assessment sought to be corrected in this appeal was assessments estimated under section 59(2)(b) of the Ordinance. His estimate was based on the taxpayer's written offer dated March 2004 which was clear and unequivocal. The assessor was not in error, let alone arithmetical error, simply because his assessment did not coincide with a figure he would have reached had other information been available to him.

4. The proposed amendments are devoid of material particulars on the correct amount of profits, the correct amount of tax and the amount of excessiveness in the tax charged. In the exercise of our discretion, the Board declines to allow the amendments sought.

5. This is one of the most frivolous and vexatious appeals the Board has come across in its experience. It is thoroughly unmeritorious. Pursuant to section 68(9), the Board orders the taxpayer to pay the amount of $5,000 as costs of the Board.

**Appeal dismissed and costs order in the sum of $5000 imposed.**

Cases referred to:

D56/04, IRBRD, vol 19, 456
D137/02, IRBRD, vol 18, 239
Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17
Extramoney Limited v Commissioner of Inland Revenue 4 HKTC 394
Willie Textiles v Deloitte Touche Tohmatsu and CIR 5 HKTC 211
Hebei Enterprises Limited and others v Livasivi & Co. (a firm) and others, HCA 20094/1998, 3 June 2004, unreported

Ronnie Koo Counsel instructed by Messrs Tsang & Wong, solicitors, and assisted by Lui Siu Tang of Messrs Lui Siu Tang & Company, certified public accountants, for the taxpayer.
Lee Yun Hung, Wu Man Fai and Wong Siu Suk Han for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 12 July 2005 whereby:

(a) the assessor's Notice of Refusal dated 23 December 2004 to correct the Revised Profits Tax Assessment for the year of assessment 1997/98 was upheld and the Revised Profits Tax Assessment for the year of assessment 1997/98 under Charge Number 3-4099211-98-8, dated 14 June 2004, showing assessable profits of $3,313,969 with tax payable thereon of $447,385 was confirmed;

(b) the assessor's Notice of Refusal dated 23 December 2004 to correct the Additional Profits Tax Assessment for the year of assessment 1998/99 was upheld and the Additional Profits Tax Assessment for the year of assessment 1998/99 under Charge Number 3-2285516-99-6, dated 14 June 2004, showing assessable profits of $3,380,144 with tax payable thereon of $507,021 was confirmed;

(c) the assessor's Notice of Refusal dated 23 December 2004 to correct the Additional Profits Tax Assessment for the year of assessment 1999/2000 was upheld and the Additional Profits Tax Assessment for the year of assessment 1999/2000 under Charge Number 3-2217166-00-4, dated 14 June 2004, showing assessable profits of $3,223,869 with tax payable thereon of $483,580 was confirmed;

(d) the assessor's Notice of Refusal dated 23 December 2004 to correct the Profits Tax Assessment for the year of assessment 2000/01 was upheld and the Profits Tax Assessment for the year of assessment 2000/01 under Charge Number 3-2231424-01-5, dated 14 June 2004, showing assessable profits of $4,122,016 with tax payable thereon of $618,302 was confirmed; and

(e) the assessor's Notice of Refusal dated 23 December 2004 to correct the Additional Profits Tax Assessment for the year of assessment 2001/02 was upheld and the Additional Profits Tax Assessment for the year of assessment 2001/02 under Charge Number 3-3440602-02-2, dated 14 June 2004, showing assessable profits of $3,960,915 with tax payable thereon of $594,137 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 trading in a firm name ('the Firm') objected to the assessor's refusal to correct the Revised Profits Tax Assessment for the year of assessment 1997/98, the Additional Profits Tax Assessments for the years of assessment 1998/99, 1999/2000 and 2001/02, and the Profits Tax Assessment for the year of assessment 2000/01 under section 70A of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance'), claiming that the assessments were excessive and that there were material errors and omissions in the calculation of the Firm's assessable profits.

4. On 26 June 1996, the appellant took out a business registration in the name of the Firm which was said to carry on a trading business commencing on 1 June 1996. At all relevant times, the appellant was the Firm's sole-proprietor.

5. The appellant was also the shareholder and director of a company incorporated in Hong Kong on 29 June 2001 ('the Hong Kong Company'). The Hong Kong Company commenced to carry on a business of trading in vacuum forming packaging products in Hong Kong on 1 November 2001.

6. The assessor, based on the appellant's tax returns filed for the Firm, raised on the appellant the following Profits Tax Assessments/loss computation:

| **Year of assessment** | **Profit/(Loss) per return** | **Loss b/f** | **Net assessable profits/(losses)** |
|---|---|---|---|
| 1997/98 | $86,513 | $8,248 | $78,265 |
| 1998/99 | 46,336 | - | 46,336 |
| 1999/2000 | 42,943 | - | 42,943 (Note) |
| 2000/01 | (241,396) | - | (241,396) |
| 2001/02 | 651,854 | 241,396 | 410,458 |

Note: In the Firm's Profits Tax computation for 2000/01, the profit of $42,943 was restated to as a loss of $137,057 after taking into account the deduction of hire purchase interest and depreciation allowances.

7. The appellant did not object to the Profits Tax Assessments and did not express any disagreement with the loss computation set out in paragraph 6 above.

8. By letter dated 27 May 2003, the assessor informed the appellant that he would conduct an audit on the appellant and the Firm covering the years of assessment 1997/98 to 2001/02.

9. On 11 June 2003, the assessor and other officers visited the Firm's business premises. During the visit, the appellant was informed that the assessor would first examine the accounting books and records of the Firm for the year of assessment 2001/02. If irregularities were detected in that year and on the premise that the Firm's mode of operation remained unchanged, the Revenue would take the view that similar irregularities might occur in the other years, too. Unless the contrary could be proved, the Revenue would base on the findings of the year under audit to project the discrepancies for the other years. The appellant disclosed that he had a 40% equity interest in a company which was a foreign investment enterprise in the Mainland ('the China Company'). The penal provisions contained in the Ordinance were also explained to the appellant. During the visit, the appellant provided the assessor with accounting books and records of the Firm for the years of assessment 1997/98 to 2001/02 for examination.

10. After the meeting of 11 June 2003, the appellant provided the assessor with some accounting records of the China Company for the two years ended 31 December 2000 and 2001.

11. On 16 October 2003, the appellant appointed Mr A of Messrs B ('the Former Representative') as his authorised representative.

12. Having examined the Firm's accounting records (especially those for the year 2000/01 which were more complete) and the accounting records of the China Company, the assessor, in a meeting with the Former Representative on 22 October 2003, brought to the attention of the Former Representative the following areas in which there were irregularities in the Firm's accounts for the year of assessment 2000/01:

(a) the amount of money deposited into the bank accounts of the Firm and the appellant was greater than the reported turnover of the Firm;

(b) the amount of purchases recorded in the Firm's ledger was smaller than that shown in the Firm's accounts submitted to the Revenue;

(c) purchases made by the Firm on behalf of the China Company were included as the Firm's purchases; and

(d) some of the expenses were domestic and private expenditures or otherwise non-deductible.

13. Subsequent to the meeting with the assessor on 22 October 2003, the Former Representative collected from the assessor some of the China Company's accounting records for examination.

14. By letter dated 2 February 2004, the Former Representative informed the assessor that the appellant accepted that the purchases and expenses of the Firm had been overstated.

However, the Former Representative claimed that some of the monies deposited into the bank accounts of the Firm and the appellant were sales proceeds of the China Company and trust money held by the appellant for a Chinese resident. The Former Representative considered that these monies should not be included as the trading receipts of the Firm. However, the Former Representative reckoned that the appellant did not have sufficient information in relation to the trust money and that he was willing to pay tax thereon. It was also claimed that prior to 19 July 1999 the appellant did not keep money on behalf of the Chinese resident. On that premise, the Former Representative prepared a computation showing an understatement of profit in the amount of $5,579,316 for the year of assessment 2000/01 which amounted to 85.69% of the reported sales of the Firm. In the same computation, the Former Representative adopted this percentage of understatement to extrapolate the understatement for the period from 19 July 1999 to 31 March 2002. In extrapolating the profit understated for the period from 1 April 1997 to 18 July 1999, the Former Representative adopted a ratio of 58.05% which was arrived at after excluding the trust money.

15. On 3 February 2004, the assessor informed the Former Representative that some of the figures used in its computation were incorrect and a revised computation was sent to the Former Representative for consideration.

16. On 9 March 2004, the assessor raised on the appellant an Additional Profits Tax Assessment for the year of assessment 1997/98 with additional assessable profits of $3,227,456.

17. By notice dated 10 March 2004, the Former Representative on behalf of the appellant objected to the 1997/98 Additional Profits Tax Assessment on the ground that 'it is estimated and may be excessive'

18. By letter dated 18 March 2004, the Former Representative provided the assessor with further information and documents in respect of the trust money.

19. On 25 March 2004, the assessor sent to the Former Representative a draft computation of profit understated for the year of assessment 2000/01 with the sale proceeds of the China Company and the trust money excluded. The profit understated for the year of assessment 2000/01 was computed as follows:

| | |
|---|---|
| Understatement of sales | $884,285 |
| Overstatement of purchases | 2,940,717 |
| Overstatement of expenses | 538,410 |
| Total profit understated | $4,363,412 |
| Reported sales | $6,510,814 |
| Ratio of understatement | 67.02% |

The ratio of 67.02% was adopted to extrapolate the understatement for the years of assessment 1997/98, 1998/99, 1999/2000 and 2001/02. The total understatement of profits for the years of assessment 1997/98 to 2001/02 amounted to $17,594,663 while the amount of tax undercharged for the corresponding years amounted to $2,622,171.

20. By a letter dated March 2004 (exact date not stated) and received by the Revenue on 30 March 2004, the appellant, after confirming that the Firm's sales had been understated and that the purchases and expenses had been overstated, offered to settle the audit in the following terms:

> 'In order to bring about a conclusion to this field audit I would like to propose that the income shown above as deriving from [the China Company] and [a named person] be deleted from the computation which using your basis of calculation will give rise to an additional tax liability for the years of assessment 1997/98 to 2001/02 of $2,622,171.
>
> I appreciate that the question of the penalty to be paid as a result of my mistakes will have to be submitted to the Commissioner of Inland Revenue for her determination and I trust that before this determination is made I shall be permitted to make representations.'

21. The assessor accepted the appellant's proposal and on 14 June 2004 issued to him the following Profits Tax Assessments for the years of assessment 1997/98 to 2001/02:

| | | |
|---|---|---|
| (a) | Year of Assessment 1997/98 | |
| | Assessable profits | $3,313,969 |
| | Tax payable thereon | $447,385 |
| (b) | Year of Assessment 1998/99 | |
| | Assessable profits | $3,380,144 |
| | Tax payable thereon | $507,021 |
| (c) | Year of Assessment 1999/2000 | |
| | Assessable profits | $3,223,869 |
| | Tax payable thereon | $483,580 |
| (d) | Year of Assessment 2000/01 | |
| | Assessable profits | $4,122,016 |
| | Tax payable thereon | $618,302 |
| (e) | Year of Assessment 2001/02 | |
| | Assessable profits | $3,960,915 |

Tax payable thereon $594,137

22. On 22 June 2004, the Former Representative sent to the assessor an email saying that he was then in Country C and that he had 'received copies of the assessments issued to [the appellant] for the years of assessment 1997/98 to 2001/02'. He further asked for an explanation of the amount of tax payable for the year of assessment 1997/98. In the email, the Former Representative also said that the appellant might not be able to settle all the tax by the due date and requested for an extension of time for payment.

23. By an email dated 23 June 2004, the assessor explained to the Former Representative the calculation of tax payable for the year of assessment 1997/98 and informed the Former Representative of the procedure of applying for instalment payment.

24. The appellant did not lodge any notice of objection against the assessments as stated in paragraph 21 above. Pursuant to section 70 of the Ordinance, those assessments have thus become final and conclusive.

25. By letter dated 22 July 2004, the Former Representative applied on behalf of the appellant to pay the tax demanded under the assessments issued on 14 June 2004 by 'monthly instalments spread over a three year period'. In support of the application, copies of recent bank statements and passbooks of the appellant, his wife and the Hong Kong Company were provided.

26. On 4 August 2004, the appellant applied to the Collector to pay the balance of tax then payable (amounting to $2,179,733) by monthly instalments of $60,000.

27. By notice dated 6 August 2004, the Commissioner of Inland Revenue informed the appellant that she intended to impose additional tax in respect of the incorrect tax returns filed by him for the years of assessment 1997/98 to 2001/02 and that he could make representations if he so wished.

28. By letter dated 26 August 2004, the appellant informed the assessor that he had appointed Messrs D as his authorised representative.

29. By letter dated 2 September 2004 to the assessor, Messrs D claimed that there was a misunderstanding because the appellant thought that the audit case was to be settled with an understatement of profits, and not tax, of $2.6 million. Messrs D on behalf of the appellant lodged an objection against the Profits Tax Assessments issued on 14 June 2004 [paragraph 21 above].

30. By letter dated 14 September 2004, Messrs D claimed that the appellant did not receive any of the computations for the assessments issued on 14 June 2004. Messrs D further asserted that the Revenue did not follow its usual practice of inviting the appellant to attend a meeting to discuss about the settlement of the audit.

31. By letter dated 20 September 2004, the assessor informed the appellant that the assessments issued on 14 June 2004 were based on the appellant's proposal as mentioned in paragraph 20 above. The 1997/98 assessment was a revised assessment issued upon settlement of objection. Furthermore, since no objection had been lodged against the assessments for the years 1998/99 to 2001/02 within the statutory one-month time limit, the assessments for these years of assessment had become final and conclusive in terms of section 70 of the Ordinance. Having regard to paragraphs 25 and 26 above, the assessor did not accept the claim that the appellant had no knowledge of the amount of tax payable under the settlement.

32. By letter dated 24 September 2004, Messrs D claimed that the appellant was frequently out of Hong Kong for business trips and he got an influenza in early July. At the same time, the Former Representative was in Country C and thus no objection was lodged within the one-month period. Messrs D provided to the assessor copies of the appellant's passport and email correspondence between the Former Representative and the appellant's wife. Below is a reproduction of the emails:

(a) Email dated 17 June 2004 to the Former Representative

'I have just received 5 payment vouchers for year 97/98, 98/99, 99/00, 00/01,01/02. I also receive (*sic*) 2 Refund Set-off advice for year 97/98 and 01/02.

I am confused now as to what all these means. I thought we have already paid the tax for year 97/98, why are they asking for another payment?

What exactly is the outcome of the assessor (*sic*) against our proposal? What about the penalty?'

(b) Email dated 17 June 2004 from the Former Representative

'I am still in [Country C] but [a named person] has e-mailed me copies of the assessments which I will look at and get back to you. The only tax payable is for 1998/99, 1999/2000, 2000/2001 and 2001/2002. The assessments are not that clear. Nothing heard from the assessor about penalties but the tax demanded seems lower than expected.'

33. The assessor ascertained that during the period from 14 June 2004 to 27 July 2004, the appellant traveled outside Hong Kong for a total of 14 days (counting part of a day as being one day) as follows:

**No of days**

| **Date of departure** | **Date of arrival** | **outside Hong Kong** |
|---|---|---|
| 15-6-2004 | 15-6-2004 | 1 |
| 16-6-2004 | 16-6-2004 | 1 |
| 21-6-2004 | 22-6-2004 | 2 |
| 24-6-2004 | 25-6-2004 | 2 |
| 26-6-2004 | 26-6-2004 | 1 |
| 28-6-2004 | 28-6-2004 | 1 |
| 29-6-2004 | 30-6-2004 | 2 |
| 3-7-2004 | 3-7-2004 | 1 |
| 8-7-2004 | 8-7-2004 | 1 |
| 10-7-2004 | 10-7-2004 | 1 |
| 13-7-2004 | 13-7-2004 | 1 |

34. By letter dated 12 November 2004, the assessor informed Messrs D that she was not satisfied that the appellant was prevented by absence from Hong Kong, sickness or other reasonable cause to object against the assessments and rejected the appellant' s late objection.

35. By letter dated 16 November 204, Messrs D requested the assessor to reconsider the appellant' s late objections.

36. By letter dated 22 November 2004, the assessor informed Messrs D that the appellant' s late objection would not be accepted and advised that, should the appellant be dissatisfied with the decision, he could seek remedies through judicial review. We add by way of footnote that the appellant' s application for judicial review has now been dismissed by the Court of First Instance.

37. By letter dated 8 December 2004, Messrs D contended that since the appellant had objected to the 1997/98 assessment, he should be able to disagree with the relevant assessment issued on 14 June 2004. In addition, Messrs D applied to correct the assessments referred to in paragraph 21 above under section 70A of the Ordinance on the ground that 'there was material error and omission made in the calculation of the amount of the profits assessed'. Messrs D elaborated its claims as follows:

(a) the assessor had erroneously computed the amount of profits understated for the year 2000/01;

(b) in accordance with Departmental Interpretation and Practice Notes No. 21, part of the Firm' s trading profits should not be chargeable to Profits Tax as the goods were sold in the Mainland; and

(c) in accordance with the same Departmental Interpretation and Practice Notes, only 50% of the Firm's manufacturing profits should be chargeable to profits tax.

38. By notice dated 23 December 2004, the assessor refused to correct the relevant assessments issued on 14 June 2004 [paragraph 21 above].

39. By five letters all dated 10 January 2005, Messrs D objected to the assessor's Notice of Refusal dated 23 December 2004.

***Further agreed facts***

40. In the course of her closing submission, Ms Ronnie Koo sought the respondent's agreement that the document at pages 102 – 103 of the appellant's bundle was sent by the assessor to the former Representative. This was accepted by Mr Lee Yun-hung and we find it as a fact.

***Unmeritorious applications made ostensibly on the advices of Messrs D***

41. In about August 2004, Messrs D were appointed the appellant's tax representatives in place of the Former Representative and the appellant's approach in his dealings with the Revenue changed.

42. In his evidence in chief, the appellant verified on oath the truth of these statements in his witness statement dated 9 September 2005:

(a) '[Mr E] advised me that the (*sic*) attempt should be made to re-open the assessments and advised me of the right to object.'

(b) 'On the advice of [Mr E] and as a separate matter, I agree that he lodged a claim under s.70(A) (*sic*) of the Inland Revenue Ordinance on the ground that error or omission has been made in respect of the returns or statements for the 5 years of assessment such that the assessments should be corrected. The total discrepancy of profits of $618,654(before adjusting for the omitted production cost or making the 50:50 apportionment) instead of $17,596,663 was computed by [Mr E].'

43. According to the two letters dated 22 and 31 August 2005 from Messrs D, Mr F was counsel for the appellant.

44. The first salvo was to object to the assessments referred to in paragraph 21 above. The appellant was out of time and the late objection failed, see paragraphs 34 and 36 above.

45. The second salvo was to apply for judicial review. The application was thrown out by the Court of First Instance.

46. Undaunted, the appellant sought to invoke section 70A. The assessor was unimpressed and rejected the application, see paragraph 38 above.

47. The fourth salvo was to object under section 70A(2). The objection failed, see paragraph 1 above.

***The original grounds of appeal***

48. The grounds of appeal in the letter dated 4 August 2005 by Messrs D, in exactly the same words as were used by them, read as follows:

> '(1) The tax charged for the aforesaid revised assessment/ additional assessments /assessment are excessive by reason of an error or omission in a statement submitted in respect of the profits tax returns of the abovenamed client for the years of assessment 1997/98 to 2001/02 inclusive ['The Statement']. The Statement was the statement received by the Inland Revenue Department on 30 March 2004 and referred to in paragraph (18) of the Commissioner's Determination. The additional tax liability as stated in the Statement, namely, $2,622,171 for the years of assessment 1997/98 to 2001/02 was incorrect and in excess of the correct amount of tax undercharged for the aforesaid years of assessment.
>
> (2) Without prejudice to other errors or omissions in the Statement, the Statement wrongly adopted the computation prepared by the Assessor mentioned in paragraph (17) of the Commissioner's Determination in computing the tax undercharged for all relevant years of assessment. The said Assessor's computation was incorrect and the amount of tax undercharged as shown in the said computation was in excess of the correct amount of tax undercharged for all relevant years of assessment.
>
> In particular and without prejudice to other errors or omission in the said computation, the ratio of 67.02% of reported sales applied in the said computation in computing the amount of understated profits was incorrect and excessive.
>
> (3) Further or in alternative to the aforesaid grounds of appeal, the tax charged for the aforesaid revised assessment/ additional assessments /assessment are excessive by reason of an arithmetical error or omission in the calculation of the amount of the assessable profits and/or the amount of tax charged for the years

> of assessment 1997/98 to 2001/02 inclusive. In particular and without prejudice to an (*sic*) other arithmetical errors or omissions, there was an arithmetical error or omission in the computation of the ratio of understated profits to reported sales in the computation of the Assessor mentioned in paragraph (17) of the Commissioner's Determination. The ratio of 67.02% on reported sales adopted in computing the understated profits in the said computation was incorrect, excessive and wrongly computed.'

49. If Messrs D had intended to refer to paragraph 1(18) of the Determination in the first ground of appeal, the document is the one referred to in paragraph 20 above.

50. If Messrs D had intended to refer to paragraph 1(17) of the Determination in the second and third grounds of appeal, the document is the one referred to in paragraph 19 above.

***Applications by Messrs D to postpone appeal hearing***

51. By letter dated 22 August 2005, Messrs D wrote to the Clerk to the Board of Review requesting that the fixing of the date for the Board's hearing be postponed:

> 'For the information of the Board, [the appellant] has applied and is granted leave to apply for judicial review of the Inland Revenue's decision to refuse late objection against all relevant assessments in question ... A date for hearing of the judicial review application by the Court of First Instance, High Court, will be fixed shortly. In case that (*sic*) [the appellant] succeeds in his judicial review application, the s.70A application will not be necessary because the issues in the objection will essentially (*sic*) the same as those in the s.70A application. In the circumstances, we request that the fixing of the date of the Board's hearing be postponed until the judicial review application has been dealt with by the High Court, Court of First Instance.'

52. If the contention of Messrs D were correct, the appeal before us should be dismissed without further ado since the Court of First Instance has already thrown out the application for judicial review.

53. By letter dated 23 August 2005, the Clerk replied pointing out that whether or not an assessment should be corrected under section 70A and whether or not a taxpayer should be allowed to object to an assessment out of time were two different issues and gave notice that the appeal against the Determination referred to in paragraph 1 above would be heard by the Board on 22 September 2005.

54. By letter dated 27 August 2005, the Clerk gave the parties formal notice of hearing.

55. By letter dated 31 August 2005, Messrs D wrote to the Clerk to the Board of Review in these terms:

> 'We refer to your letter dated 27 August 2005. On behalf of our client we would advise that on 29 September (*sic*) 2005 [Mr F] informed our client that he will be absent from Hong Kong shortly and thus he is not available to prepare for the case for the purpose to (*sic*) adduce evidence and cite authorities in support of the appeal. Our client is now looking for another counsel and would therefore appreciate if the committee (*sic*) would allow for (*sic*) adjournment of the hearing fixed at 22 September 2005 for three weeks later.'

56. By letter dated 1 September 2005, the Clerk informed Messrs D that the chairman was not persuaded to re-schedule the hearing since the appellant had sufficient time between 23 August and 22 September 2005 to prepare for the hearing of the appeal.

***The appeal hearing***

57. At the hearing of the appeal, the appellant was represented by Ms Ronnie Koo (who did not appear in the judicial review proceedings), counsel, instructed by Messrs Tsang & Wong, solicitors, and assisted by Mr Lui Siu-tang of Messrs Lui Siu Tang & Company. At the beginning of the hearing, Mr Lui Siu-tang took the liberty of addressing the Board as if he were having the conduct of proceedings. Mr Lui Siu-tang could of course have attended as the appellant's tax representative, but the appellant had chosen to retain counsel as his tax representative. We told Mr Lui Siu-tang to speak through counsel and he complied with our direction.

58. The respondent was represented by Mr Lee Yun-hung, chief assessor, leading a senior assessor and an assessor.

59. The appellant was the only witness called by Ms Ronnie Koo.

60. Mr Lee Yun-hung did not call any witness.

61. In the course of the hearing, Ms Ronnie Koo applied under section 66(3) of the Ordinance to amend the grounds of appeal and to add a new ground of appeal.

62. The draft amended grounds of appeal, as formulated (and we add that we have made a conscious decision not to unduly burden our Decision with the use of the word "*sic*") read as follows:

> '(1) The tax charged for the aforesaid revised assessment/ additional assessments /assessment are excessive by reason of an error or omission in a statement

submitted in respect of the profits tax returns of the abovenamed client for the years of assessment 1997/98 to 2001/02 inclusive [' The Statement' ]. The Statement was the statement received by the Inland Revenue Department on 2nd February 2004 and 30 March 2004 referred to in paragraphs (12 & 18) of the Commissioner' s Determination (p.20, 31-34 & p.40-41 of A Bundle). The additional tax liability as stated in the Statement, namely, $2,622,171 for the years of assessment 1997/98 to 2001/02 was incorrect and in excess of the correct amount of tax undercharged for the aforesaid years of assessment.

(2) Without prejudice to other errors or omissions in the Statement, the Statement wrongly adopted the computation prepared by the Assessor mentioned in paragraph (17) of the Commissioner' s Determination (p.22 of A Bundle) in computing the tax undercharged for all relevant years of assessment. The said Assessor' s computation was incorrect and the amount of tax undercharged as shown in the said computation was in excess of the correct amount of tax undercharged for all relevant years of assessment.

In particular and without prejudice to other errors or omission in the said computation, the ratio of 67.02% of reported sales applied in the said computation in computing the amount of understated profits was incorrect and excessive. The Assessor and the Former Representative when assessed the taxable profits of the Applicant, omitted to include the purchases made by [the China Company] for and on behalf of [the Firm], which were deductible expenses under section 16 of Inland Revenue Ordinance.

(3) Further or in alternative to the aforesaid grounds of appeal, the tax charged for the aforesaid revised assessment/ additional assessments /assessment are excessive by reason of an arithmetical error or omission in the calculation of the amount of the assessable profits and/or the amount of tax charged for the years of assessment 1997/98 to 2001/02 inclusive. In particular and without prejudice to an other arithmetical errors or omissions, there was an arithmetical error or omission in the computation of the ratio of understated profits to reported sales in the computation of the Assessor mentioned in paragraph (17) of the Commissioner' s Determination. The ratio of 67.02% on reported sales adopted in computing the understated profits in the said computation was incorrect, excessive and wrongly computed.

(4) The arithmetical formula in calculating the purchase belonged to [the China Company] erroneously devised or omitted by the assessor. While the assessor has adopted the reported sales of [the China Company] of $7,867,916 (together with the reported sales of [the Firm] as well), the assessor has omitted to take into account of the reported purchase of [the

China Company] of $6,634,241. (Please refer to the relevant paper paginated as 50 in the Revenue's Document Bundle R1). The assessor should have taken into account of the reported purchase of [the China Company] (i.e. $6,634,241) if he insist to take into account of the reported sale of [the Firm] (i.e. $7,395,099) and [the China Company] (i.e. $7,867,916) for the year 2000. Therefore the apportionment of the total purchases of [the Firm] and [the China Company] (i.e.$4,698,764+$6,634,241=$11,333,005) between [the Firm] and [the China Company] should be calculated as follows:-

**[The Firm] :**

(4,698,764 + 6,634,241) x 7,395,099 / (7,395,099 + 7,867,916) = 5,490,966
*note 2 *note 1 *note 4 *note 3

**[the China Company] :**

(4,698,764 + 6,634,241) x 7,867,916 / (7,395,099 + 7,867,916) = 5,842,039
*note 2 *note 1 *note 3 *note 4

Therefore, there is in fact an excess of [the China Company] reported purchase over the apportioned purchase is $792,202(see calculation as below) instead of an amount of purchase $2,422,161 as calculated and claimed belonged to [the China Company] by the assessor.

6,634,241-[(4,698,764 + 6,634,241) x 7,867,916 / (7,395,099 + 7,867,916)] = 792,202
*note 1 *note 2 * note 3 *note 4

Note:

1. Reported purchases of [the China Company] was $6,634,241;
2. Reported purchases of [the Firm] was $4,698,764;
3. Reported sales of [the China Company] was $7,867,916;Computed sales of [the Firm] by the assessor was $7,395,099'

63. If the draftsman had intended to refer to paragraph 1(12) of the Determination in the first draft amended ground of appeal, the document is the one referred to in paragraph 14 above.

64. Mr Lee Yun-hung opposed this application.

65. The parties had no objection to the Board's suggestion to defer its decision on whether to allow the appellant to rely on the proposed amended grounds until when the Board gives its decision on the appeal.

66. After Ms Ronnie Koo had concluded her submissions, we invited her to submit on costs under section 68(9) of the Ordinance which she did.

***The Board' s Decision***

***Onus of proof***

67. Section 68(4) provides that:

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

68. As the onus of disturbing the assessment lies on the appellant, failure to discharge the onus may be decisive against the appellant, see D56/04, IRBRD, vol 19, 456, a decision of a panel chaired by Mr Kenneth Kwok Hing-wai SC, at paragraphs 29 – 34 and the cases there cited.

***Legislative history of section 70A***

69. Section 52 of the Inland Revenue (Amendment) Ordinance 1956, No. 49 of 1956, amended the principal Ordinance by the addition of the following section:

> *'70A Notwithstanding the provisions of section 70, if within six years of 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 was in the calculation of the amount of the assessable income or profits assessed thereby or in the amount of tax charged thereby the assessor shall correct such assessment:*
>
> *Provided that the provisions of this section shall not apply if the notice of assessment by which the excessive tax is charged is dated prior to the 1st day of April, 1955'*

70. By 1964, doubt had arisen as to whether the wording of the section added in 1956 might not be capable of a wider application than was intended. A bill (Bill No. 15/64) was introduced in 1964 to repeal and replace the 1956 version of section 70A. The objects and reasons were:

> *'9. The second main object of this Bill is dealt with in clause 11. It is essential, under any tax system, that finality as regards assessments be achieved. In Hong Kong this is provided by section 70 of the Inland Revenue Ordinance, but to safeguard the position of taxpayers who for one reason or another disagree with their assessments, an assessment*

*does not become final and conclusive under section 70, until the objections, if any, raised by the taxpayer have been disposed of on appeal in accordance with the successive rights of appeal granted to every taxpayer or agreement is reached between the taxpayer and the assessor, or , if no objection is raised, until the time limited for raising objections has expired. Section 70A, however, creates an exception to this finality and conclusiveness in permitting the correction of errors and omissions in assessments within six years or, in certain cases, within a longer period. This section, which was added to the Ordinance in 1956, was intended to cover only errors and omissions by the taxpayer in any return or statement made by him which, if they had not been made, would have resulted in a reduced original liability, or errors and mistakes purely of an arithmetical or similar nature, but doubt has arisen as to whether, on its present wording, it may not be capable of a wider application than that intended. If it were to have a wider application, it would not only make appeal provisions, referred to above, of little practical use; it would also, for practical purposes, negate that finality and conclusiveness, provided by section 70, which is essential. Clause 11 of this Bill, therefore, seeks to replace section 70A, with effect from the date when this section was originally enacted, by similar provisions more clearly stating the original intention.'*

71. The current version of section 70A provides as follows:

*'(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: (Amended 56 of 1993 s. 29)*

*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. (Added 35 of 1965 s. 36)*
>
> *(Replaced 28 of 1964 s. 11)'*

***Board' s Decision on the section 70A application***

72. It is clear from the above that the current section 70A is not a back door provision for objections and appeals out of time.

73. It seems clear that section 70A may apply to cases where agreements have been reached between the taxpayer and the assessor, see paragraph 70 above.

74. A taxpayer who wishes to invoke section 70A must satisfy the following:

(1) the tax charged for the year of assessment in question is excessive; and

(2) the excessiveness is:

(a) by reason of an error or omission in:

(i) any return; or

(ii) statement submitted in respect thereof; or

(b) by reason of an error or omission in the calculation of the amount of the ... profits assessed or in the amount of the tax charged.

75. The assessments sought to be corrected are those referred to in paragraph 21 above.

76. To succeed, the appellant must first prove the correct amount of profits and the correct amount of tax in order to establish that the tax charged in those assessments were excessive. The way to go about it is to show us actual figures, actual sales figures and actual purchases figures.

77. Instead of showing us any actual figures, the appellant and Mr E kept messing around with formulas and figures:

(a) In the letter dated 2 September 2004 referred to in paragraph 29 above, Messrs D claimed that the appellant thought that the audit was to be settled on the basis of understated profits of $2.6 million.

(b) 3 months later, in the letter dated 8 December 2004 referred to in paragraph 37 above, Messrs D came up with the figure of $309,327 as understatement of assessable profits and the figure of $112,661 as tax undercharged.

(c) In paragraph 16 of his witness statement dated 9 September 2005, the appellant stated that he 'told [Mr E] that it was possible that the total understated profits amounted to $2.6 million but definitely not the tax undercharged in the amount of $2.6 million.'

(d) In paragraph 22 of the same witness statement, the total discrepancy of profits was drastically reduced to $618,654 – 'The total discrepancy of profits of $618,654 (before adjusting for the omitted production cost or making the 50:50 apportionment) instead of $17,596,663 was computed by [Mr E].'

(e) 11 days later, in paragraph 7 of his 2nd witness statement dated 20 September 2005, the appellant came up with this version – 'If the IRD rectifies the error and omission by taking into account of the above, the correct profits tax for me should be $715,133 which is closed (*sic*) to $618,654 as computed in my tax representatives letter dated 8 December 2004 to the Inland Revenue Department and also stated in the paragraph 22 of my 1st witness statement. Please refer to the last page of the exhibit "YEA-11" for the detailed calculation.' The appellant's assertion is misleading. In paragraph 22 of his first witness statement, he alleged that $618,654 was the 'total discrepancy of profits'. In YEA-11, $715,133 was said to be the amount of 'tax undercharged'.

78. Faced with such approach, Ms Winnie Kong Lai-wan observed in the course of the opening of the appellant's case:

'Ms KONG: To be very honest, up to this moment I am still very confused as to what dispute or what formula you are talking about. There are so many formulas presented by the accounting firm and you keep revising the formula. Up to today it has been a long process and you should have decided as to the basis of error and how much should be the actual, instead of by formula, you should have an actual number. I'm quite surprised that you are still using the formula to calculate the actual sales and the actual purchases.

MISS KOO: As to the purchases, there is only one formula used by both sides.

MS KONG: Why are you using a formula if there is an error, I don't understand to this moment. You have so many days to determine your actual purchases. I am confused with the figures and formula presented by the appellant up to this moment.'

79. The appellant made no attempt to tell us what the amounts of understated profits, or profits, were. If the appellant's case was that there was no understatement of profits, he should and would have said that there was no understatement of profits. Instead, what he said in cross-examination was:

'Q. Have you any idea about the amount of understated profit made by [the Firm] over the five year period?

A. No, I cannot answer the question.

...

Q. ... my question for you at the moment, the question is now at this very moment, do you have any idea as to the amount of the understated profits made by [the firm]?

A. I told you earlier I cannot answer this question.

Q. Are you saying that you have no idea?

A. I cannot answer you this question.

...

CHAIRMAN: He says he doesn't know what the profits are; that is what he says. If that is not what he says it will come out in re-examination.

MR LEE: I see.

CHAIRMAN: You have drawn his attention to different figures and given him a chance to reconcile the figures. He said he can't tell you.'

80. Ms Ronnie Koo told us that she had no re-examination.

81. In the absence of any evidence on the correct amount of profits and the correct amount of tax, the appellant has not begun to prove that the tax charged in the assessments sought

to be corrected were excessive. This reason is by itself fatal against the appellant and the appeal must and does fail.

82. There are other reasons why this appeal is hopeless. The appellant made no attempt to satisfy the requirement that any excessiveness in the tax charged was:

> (a) by reason of an error or omission in:
>
> (i) any return; or
>
> (ii) statement submitted in respect thereof; or
>
> (b) by reason of an error or omission in the calculation of the amount of the ... profits assessed or in the amount of the tax charged.

83. There is no allegation of any error or omission in the tax returns referred to in paragraph 6 above.

84. There is no allegation that any statement has been submitted 'in respect of' any of the tax returns referred to in paragraph 6 above. Neither of the documents referred to in the first draft amended ground of appeal is a statement submitted 'in respect of' any of the tax returns referred to in paragraph 6 above.

85. In D137/02, IRBRD, vol 18, 239, a decision of a panel chaired by Mr Kenneth Kwok Hing-wai, SC, the Board held that a proposal submitted by a taxpayer to settle a tax audit is not a statement within the meaning of section 70A. Ms Ronnie Koo did not argue that D137/02 was wrongly decided or distinguishable. We agree with the decision and the reasoning of the Board in D137/02 and hold that neither of the documents referred to in the first draft amended ground of appeal is a statement within the meaning of section 70A.

86. We turn now to 'arithmetical error'. It is meaningless and totally unhelpful for the draftsman of the grounds of appeal to include the wholly uninformative and open-ended phrase of 'without prejudice to other errors or omission' without identifying any.

87. Plainly, there is no arithmetical error in the calculation of the amount of the profits assessed or in the amount of the tax charged. An approach which is said to be erroneous is not an arithmetical error.

88. The next reason why this appeal must fail is that we are bound by authority to dismiss this appeal. In Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17, the taxpayer did not submit any profits tax return for 1980/81 and the assessor issued an estimated assessment. There was no valid objection within the statutory time limit. The taxpayer lodged an

application under section 70A to re-open the 1980/81 assessment on the basis that it was excessive by reason of an arithmetical error or omission in the calculation of the amount of the assessable profits. On appeal to the High Court, Mantell J dismissed the appeal and stated (at p. 21) that:

> *'In my judgment, the wording of 70A is perfectly plain. It covers the case where there has been a miscasting by the Assessor on the material 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. As was said by Mills Owns J. in* ***Mok Tsze Fung v Commissioner of Inland Revenue*** *[1962] HKLR 166 at p. 183-184:*
>
> > *' 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.'*
>
> *The object of the Ordinance is to achieve finality within the timetable and procedures laid down. Various safeguards and appeal procedures are provided. One of those safeguards is provided by Section 70A where in a proper case, the Assessor is required to correct his own arithmetical error. That is not this case.'*

89. The assessments sought to be corrected in this appeal were assessments estimated under section 59(2)(b) of the Ordinance. His estimate was based on the appellant' s written offer dated March 2004 which was clear and unequivocal. The assessor was not in error, let alone arithmetical error, simply because his assessment did not coincide with a figure he would have reached had other information been available to him.

90. The March 2004 letter brings us to a more recent High Court case. Patrick Chan J (as he then was) held in Extramoney Limited v Commissioner of Inland Revenue 4 HKTC 394 at page 429 that:

> *'In my view, for the purpose of section 70A, the meaning of "error" given in the Oxford English Dictionary (p. 277) would be appropriate, that is, "something incorrectly done through ignorance or inadvertence; a mistake". I do not think that a deliberate act in the sense of a conscientious choice of one out of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within section 70A.'*

91. The Extramoney case is also binding on us.

92. On the appellant's own evidence his wife told him that the Revenue was demanding to get back $5 million in tax and that the Former Representative could negotiate it down to $2 million odd. In his email dated 17 June 2004 (see paragraph 32(b) above) the Former Representative stated that 'the tax demanded seems lower than expected'. By the March 2004 letter, the appellant proposed to conclude the field audit by offering an additional tax liability of $2,622,171. In our Decision, we find that the appellant knew perfectly well what he was offering; and that it was a deliberate act and a conscientious choice to compromise the tax audit. It cannot be regarded as an error under section 70A.

93. If what Mr Recorder Chan SC said under the section heading of 'Negligence' at pages 218 – 219 in Willie Textiles v Deloitte Touche Tohmatsu and CIR 5 HKTC 211 formed part of the *ratio* (a point which was not argued before us and which we would prefer to leave open), then it is binding on us and is another reason why the appeal must be dismissed.

***Board's decision on application for leave to amend the grounds of appeal***

94. In Hebei Enterprises Limited and others v Livasiri & Co. (a firm) and others, HCA 20094/1998, 3 June 2004, unreported, Deputy Judge Poon, in giving reasons for having dismissed an application to amend the pleadings, began by stating the applicable principles. These include the following. The proposed amendment must be sufficiently intelligible. It is incumbent on the party seeking amendment to ensure adequate particularity. It is no answer to an objection that a proposed amendment lacks particulars, to say that particulars can be given later. This is particularly so in the case of late amendments. See paragraphs 3 – 10 and the cases there cited.

95. We consider that these principles are equally applicable to an application under section 66(3), especially in respect of late applications.

96. The proposed amendments are devoid of material particulars on the correct amount of profits, the correct amount of tax and the amount of excessiveness in the tax charged.

97. The fourth proposed amended ground is not intelligible.

98. In the exercise of our discretion, we decline to allow the amendments sought.

***Brief comments on the proposed grounds***

99. Even if we had allowed the amendments, the appeal would fail for the same reasons as those given above.

***Disposition***

100. We dismiss the appeal, confirm the refusal to correct and also confirm the assessments sought to be corrected as confirmed by the Deputy Commissioner.

***Costs***

101. This is one of the most frivolous and vexatious appeals we have come across in our experience. It is thoroughly unmeritorious. Pursuant to section 68(9), 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.

***Acknowledgment***

102. We thank the team led by Mr Lee Yun-hung for their assistance. We have considerable sympathy for Ms Ronnie Koo who was saddled with this hopeless appeal.