Case No. D28/07

Salaries tax – notice of appeal late for 1 day – whether reasonable cause for an extension – finality of agreed assessment – burden of proof – sections 66(1)(A), 68(4), 64(3) and 70 of Inland Revenue Ordinance ('IRO')

Panel: Anthony So Chun Kung (chairman), Diana Cheung Han Chu and Edward Cheung Wing Yui.

Dates of hearing: 14, 15 June and 17 August 2007.
Date of decision: 5 October 2007.

Subsequent to an agreed assessment, the assessor issued an adjustment for an error under section 70A.

The taxpayer considered the subsequent adjustment rendered the agreed assessment not conclusive and claimed exemption from salaries tax on the ground that he rendered all services outside Hong Kong.

The assessor considered the agreed assessment as final and conclusive and refused to correct the subsequent adjustment which was upheld by the Deputy Commissioner.

The taxpayer appealed yet he was late in giving his notice of appeal for one day.

Held:

1. The taxpayer was late in his notice of appeal for one day. The one month period should end on the day when the written notice of the appeal had reached the Board, not when it was posted.

2. It is reasonable for a taxpayer to rely on an answer obtained from the Office of the Board and acted on it. The taxpayer was misled and thus by reasonable cause to be late from giving notice of appeal hence one day extension allowed.

3. The taxpayer was not entitled to re-open the Revised-assessment dated 23 June 2006 which was final and conclusive and the subsequent revision on 24 July 2006 was proper and correct.

- The Proposed Revised-assessment of 17 May 2006 was in plain language and a simple offer for settlement. The taxpayer should not have misread or been misled to sign his Acceptance on 27 May 2006.

- The Revised-assessment on 23 June 2006 was made under section 64(3) and by operation of section 70, must have become final and conclusive for all purposes.

- The adjustment made on 24 July 2006 was a correction made pursuant to section 70A as 'an error or omission' which would not disturb or affect the finality of the settlement agreement made between the taxpayer and the Revenue.

4. The taxpayer did render services in connection with his employment in Hong Kong.

- The taxpayer admitted to have interviewed people for his ex-employer, Company C, in Hong Kong.

- The taxpayer did during his employment with Company C, carry business samples from China to Hong Kong.

Appeal dismissed.

Cases referred to:

D2/04, IRBRD, vol 19, 76
D41/05, IRBRD, vol 20, 590
D3/91, IRBRD, vol 5, 537
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
Ng Kuen Wai trading as Willie Textiles v Deloitte 5 HKTC 211
Extramoney Limited v Commissioner of Inland Revenue 4 HKTC 394
Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17

Taxpayer in person.
Lau Wai Sum and Leung To Shan for the Commissioner of Inland Revenue.

Decision:

The appeal

1. Upon being informed that Mr A ('the Taxpayer') did render services in Hong Kong, the assessor proposed a revised assessment in assessing appropriate income of the Taxpayer which proposal the Taxpayer accepted. Subsequent to such an agreed assessment, the assessor issued an adjustment for an error under section 70A. The Taxpayer considered the subsequent adjustment rendered the agreed assessment not conclusive and claimed exemption from salaries tax on the ground that he rendered all services outside Hong Kong.

2. The assessor considered the agreed assessment final and conclusive under sections 64(3) and 70 of the Inland Revenue Ordinance Chapter 112 ('IRO') and refused to correct the subsequent adjustment and the Deputy Commissioner of Inland Revenue in the determination dated 13 February 2007 ('the Determination') upheld the assessor's position. Against such Determination, the Taxpayer appeals to this Board.

3. Before disposing of the Taxpayer's appeal, we have to first decide whether we shall extend time because the Taxpayer was one day late in giving his notice of appeal to the Board.

Preliminary issue: Late notice of appeal

4. Section 66 of the IRO provides,

> *'(1) Any person …who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –*
>
> *(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefore and the statement of facts; or*
>
> *(b) Such further period as the Board may allow under subsection (1A),*
>
> *Either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the commissioner's written determination together with a copy of the reasons therefore and of the statement of facts and a statement of the grounds of appeal.*
>
> *(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may*

> *extend such period as it thinks fit the time within which notice of appeal may be given under subsection (1). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.*
>
> …
>
> *(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'*

5. In D2/04, IRBRD, vol 19, 76, 80, the Board decided that the one month period for the taxpayer to give notice of appeal should start from the date when the written determination of the Commissioner was transmitted to the taxpayer. If the transmission was done by post, that would mean the day the post reached the address of the taxpayer:

> *'7.…The question is whether those words mean that the intended appellant has one month from the date when the process of transmission begins (that is, when Commissioner dispatched his determination), or whether he has the one month period after the process of transmission has been completed. In our view, the latter meaning is more consonant with the legislative intention. We derive support from the fact that the words used are "after transmission to him" and the Chinese "**送交其本人後**". These words appear to us to be more consistent with a requirement that the process of transmission has ended, and not merely begun. Furthermore, it seems to us that, unless the intention is clear, we should not impute to the legislative an intention that time begins to run even before the determination could have reached the taxpayer for him to have any chance of dealing with it. We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.'*

6. According to the postal record, the Determination was delivered to the Taxpayer's address on 15 February 2007. Time should therefore start to run after the process of transmission had been completed, i.e. on the following day, 16 February 2007 and should end upon expiry of one month thereafter on 15 March 2007.

7. The Notice of Appeal of the Taxpayer however reached the Board on 16 March 2007, one day after the expiry of the one month period.

8. The Taxpayer in the hearing testified that his notice of appeal was posted by his wife on 15 March 2007 just before the post office closed. He argued that the one month period for giving his notice of appeal should end on the day of his posting thereof and not the day when his notice should have reached the Board.

9. In D41/05, IRBRD, vol 20, 590, 592, the Board, however, decided that the one month period should end on the date when the taxpayer's notice of appeal had reached the Board, for otherwise the Board could not 'entertain' such notice:

> *'11. In our Decision, in the context of section 66, giving notice of appeal to the Board means actual service of the notice on the Clerk.*
>
> *12. The wording of the phrase which follows the phrase 'give notice to the Board' is:*
>
> > *"no such notice shall be entertained unless it is given in writing to the clerk to the Board".*
>
> *13. This phrase excludes oral notice. It also excludes notice which has not been received. The reason is simple. A notice which has not been received cannot be "entertained".'*

10. We agree with the decision of the Board in D41/05. The one month period should end on the day when the written notice of appeal had reached the Board, not when it was posted. The Taxpayer was therefore late in his notice of appeal for one day.

11. Under section 66(1)(b), no late notice shall be entertained unless the Board shall have allowed extension. Under section 66(1A), the Board may not extend time unless an appellant was prevented from giving timely notice of appeal on three grounds, (i) by illness or (ii) he was absent from Hong Kong, or (iii) other reasonable cause.

12. The Taxpayer in this case was neither ill nor absent from Hong Kong during the material period from 16 February 2007 to 15 March 2007. He must show other reasonable cause why the Board should allow him time extension for giving his notice of appeal late.

13. In D3/91, IRBRD, vol 5, 537, 540-541, the taxpayer therein was late in giving his notice of appeal for one day. The Board refused to allow delay for even one day:

> *'…The delay in filing the second notice of appeal was only one day but that is not the point. Time limits are imposed and must be observed. Anyone seeking to obtain the exercise of the discretion of a legal tribunal must demonstrate that they are "with clean hands" and that there are good reasons for the extension*

> *of time. We were told by the new tax representatives that the delay was caused because counsel's opinion was being sought. At the hearing of the appeal, the managing director who represented the Taxpayer appeared to assume that he would be automatically granted an extension of time and did not have to justify the matter in any way. This is simply not good enough. In a case of this nature we see no reason for exercising our discretion in favour of the Taxpayer and accordingly dismiss the appeal on this ground.'*

14. In the hearing the Taxpayer was asked why he was late with his notice of appeal. He said that he had called the Office of the Clerk to the Board of Review ('the Office of the Board') and was told that the one month period ended on the day as shown by the postal stamp. He relied on such a reply to time the posting of his notice of appeal on 15 March 2007.

15. As decided in D41/05 (paragraphs 9 and 10 above refer), the one month period under section 66(1) of the IRO should end on the day when the written notice of appeal had reached the Board, not when it was posted. The Taxpayer was wrong in believing that the last day of service was the date shown on the post office endorsement on the postal stamp instead of the date of receipt by the Board.

16. The taxpayer in Chow Kwong Fai v. Commissioner of Inland Revenue [2005] 4 HKLRD 687 was late for three months. Reason given was that he misunderstood section 66(1) of the IRO and took time to prepare a detailed statement of facts. The Court of Appeal dismissed the appeal and held that misunderstanding on the part of the taxpayer could not be a reasonable cause for allowing extension of time. Cheung JA at paragraph 45 of the judgment said,

> *'In this case the determination provided by the Commissioner to the appellant consisted of three sections: first, "Facts upon which the determination was arrived at", second, "The determination" and third, "Reasons therefore". All this fits the description of the documents required to be supplied by the Commissioner to the appellant under s.66(1)(a). Any misunderstanding on the part of the appellant that he had to prepare a statement of facts which took him beyond the one month limit must be a unilateral mistake on his part* (emphasis added). *Such a mistake cannot be properly described as a reasonable cause which prevented him from lodging the notice of appeal within time. Hence, despite the fact that the Board had not dealt with this issue, in my view, it had not overlooked any relevant factor which might vitiate the decision.'*

17. Similar to the taxpayer in Chow Kwong Fai, the Taxpayer made a mistake. He misunderstood section 66(1) of the IRO. He wrongly believed that the last day of service was the date shown on the endorsement on the postal stamp and the one month period would end on the date of posting instead of the date when the Board received his notice of appeal.

18. But is the Taxpayer's mistake or misunderstanding similar to that of the taxpayer in Chow Kwong Fai, unilateral on his part? After carefully considering his testimony, we find his mistake not.

19. We believe on a balance of probabilities that the Taxpayer did telephone the Office of the Board and was told by someone that they took the date as shown by the endorsement on the postal stamp as the date of service. Such was a misrepresentation by a staff in the Office of the Board. We believe the Taxpayer did rely on such a misrepresentation. We believe that he would have delivered his notice of appeal which was dated 13 March 2007 to the Board earlier if he had been correctly told that the date of service was the date when his notice of appeal had reached the Board.

20. Cheung JA in Chow Kwong Fai at paragraphs 40-42 of the judgment said,

> *'40. In this case the appellant said that he had a reasonable cause which prevented him from lodging the notice of appeal within the one month period imposed by s.66(1). Whether there is reasonable cause will depend on the facts of an individual case. The appellant relied on the misrepresentation by a staff in the office of the Board as providing him with the reasonable cause.*
>
> *41. If there was indeed a misrepresentation, then clearly it constituted a reasonable cause which was a relevant factor for the Board's consideration in deciding whether or not extension of time should be granted.*
>
> *42. Looking at the matter objectively it is fair to say that the Board had not dealt with this aspect of the case. However, whether an appeal should be allowed or not will depend ultimately on whether the appellant has established a reasonable cause by reason of the misrepresentation. If he has not, then, irrespective of whether the Board had dealt with this point or not, it will not assist him at all.'*

21. On the matter of service of notice, it is reasonable for a taxpayer to rely on an answer obtained from the Office of the Board and acted on it. The misunderstanding on the part of the Taxpayer, namely, that the date of service is the date shown by the postal stamp, was reasonably caused by the misrepresentation of a staff of the Office of the Board. Accordingly, we find that the Taxpayer was misled and thus by reasonable cause was late from giving notice of appeal by one day. The Taxpayer has satisfied the requirement of section 66(1A) and we allow him one day time extension in his giving of notice of appeal.

22. We now proceed to consider the substantive application of the Taxpayer.

Substantive issues

23. The Taxpayer submitted a statement of grounds of appeal which reached the Board on 16 March 2007 [B1]. Subsequently he sent in a further clarification statement which reached the Board on 29 May 2007 [A1], a further bundle of documents on the day of hearing on 14 June 2007 [A2], and a written submission on the day of hearing on 17 August 2007. The Taxpayer also called a Mr B, one of his former colleagues in Company C, to give evidence for him on 14 June 2007.

24. In his notice of appeal, the Taxpayer abandoned his argument on the exchange rate adopted by the Revenue [B1/1].

25. In the hearing on 17 August 2007, the Taxpayer also abandoned his argument against the assessment of interest of HK$1,006.00 dated 23 June 2006 [B1/41].

26. There are two issues remaining, (i) is the Taxpayer entitled to re-open an assessment which he had agreed under section 64(3) of the IRO? If the answer is in the affirmative, (ii) whether he rendered all services outside Hong Kong during the year of assessment 2004/05?

Re-open an agreed assessment?

The relevant facts

27. The Board finds the following facts undisputed and relevant:

(1) Company C is a private company incorporated in Hong Kong. At all material times, Company C was carrying on business in Hong Kong.

(2) The Taxpayer was employed by Company C with effect from 24 November 2003. His employment ceased on 24 January 2005.

(3) The Taxpayer filed his tax return for the assessment year 2004/05 on **31 May 2005** [B1/11-16];

(4) On **7 October 2005** the Revenue issued him (i) Notice of deduction of home loan interest [B1/18], (ii) Notice of assessment and demand [B1/19-20]; and (iii) Payment voucher [B1/21] for the assessment year 2004/05;

(5) The Taxpayer filed his objection dated **28 October 2005** (the 'Objection') [B1/24];

(6) The Revenue issued a Standover notice on **8 November 2005**, holding over tax on the condition that 'in the event that the tax held over becomes payable upon finalization of the objection, you will also be required to pay interest on the amount so payable' [B1/26];

(7) The Revenue offered a revised assessment with computation (the 'Proposed Revised-assessment') on **17 May 2006** [B1/29-32, 110-112] inviting the Taxpayer to settle his objection of 28 October 2005 by signing back a reply slip (the 'Acceptance');

(8) The Taxpayer signed the Acceptance [B1/30] on **27 May 2006** and returned the same to reach the Revenue on 6 June 2006;

(9) The Revenue issued a revised assessment to the Taxpayer on **23 June 2006** (the 'Revised-assessment').

Taxpayer's Acceptance

28. Save those mentioned above, there has been no other correspondences between the Revenue and the Taxpayer at the material time when the Taxpayer signed and sent back the Acceptance.

29. The Proposed Revised-assessment of the Revenue dated 17 May 2006 states,

> 'This Department received your Objection on 28 October 2005. We apologize (for being late) because this Department has to obtain information from [Company C] ("ex-employer"), to enable us to reply to your Objection.
>
> Please take notice of the following tax legislation:
> Section 8(1)(a): …
> Section 8(1A)(b)(ii): …
> Section 8(1B): …
> Section 8(1A)(c): …
>
> By reason that during the employment period (i.e. 1 April 2004 to 24 January 2005) you stayed in Hong Kong for over 60 days, and according to the information provided by your ex-employer, this Department discovered that you did during your above employment period provide services to your ex-employer in Hong Kong, including attending meetings, reporting to and accepting orders from superiors, carrying samples, finished products or parts between China and Hong Kong, and carrying out other ancillary and liaising works, accordingly exemption under section 8(1B) and 8(1A)(b)(ii) is not applicable. Further according to the information

provided by your ex-employer, during your employment period, your total income should be $626,091, and part of your income in December 2004 had been charged with PRC tax, therefore, this Department now proposes to revise your above assessment as follows:

	$
Total salary income [Please refer to the copy Notification (IR56F; dated 7/12/05) enclosed]	626,091
Less:	
Payment in lieu of notice	58,750
Income excluded under s.8(1A)(c) (Note)	100,210
Assessable Income	476,131
Less:	
Approved charitable donations	5,000
Home loan interest	12,710
Net Assessable Income	449,421
Less:	
Married Person's allowance	200,000
Child allowance	60,000
Net Chargeable Income	189,421
Tax Payable thereon	27,084

(Note: Income excluded $11,820 ÷ 1.0616 x 9 = $100,210)

If you are prepared to accept the proposed revised assessment to settle the objection, please sign the reply slip provided herein and return it to this Department.

If you do not accept the proposed revised assessments, please notify this Department in writing and state your grounds, and provide the facts and supporting documents to support your objection. If you do not agree to the total amount of income reported by your ex-employer, you have to provide documentary evidence in support that your true income was $558,341 as reported by you.

Please reply within 21 days from the date of this letter.'

30. The Proposed Revised-assessment of 17 May 2006 was a reply directed at the Taxpayer's Objection of 28 October 2005. The Revenue was revising its assessment of 7 October 2005 after receiving the Notification (IR56F) of 7 December 2005 and other information given by Company C, employer of the Taxpayer at the material time.

31. The wordings of the Proposed Revised-assessment were so clear that there could not

be any shade of doubt. The Taxpayer could either accept or reject the Proposed Revised-assessment.

32. The wordings of the Acceptance slip were likewise simple and clear, as follows:

> 'To: The Commissioner of Inland Revenue
>
> I accept your proposed of revised assessment, in settlement of the Objection which I issued on 7 October 2005 against the assessment for year of assessment of 2004/05.
>
> Signed:
> Name: [The Taxpayer]
> Date:
> File No.: XXX-XXXXXXXX'

The original Chinese text is as follows:

> '**致：稅務局局長**
>
> **本人接納你建議的修訂評稅，以了結本人就**2005**年**10**月**7**日發出的**2004/05**課稅年度評稅提出的反對。**
>
> **簽署：**
> **姓名：** [The Taxpayer]
> **日期：**
> **檔案號碼：**XXX-XXXXXXXX'

33. By signing and returning the Acceptance slip dated 27 May 2006, the Taxpayer unequivocally accepted the Proposed Revised-assessment. Such an acceptance of his settled his Objection of 28 October 2005.

Finality of the Acceptance under Sections 64(3) and 70

34. Finality of an assessment made pursuant to an agreement between the Revenue and a taxpayer is governed under sections 64(3) and 70 of the IRO, which provides:

> *'S.64(3): In the event of the Commissioner agreeing with any person assessed, who has validly objected to an assessment made upon him, as to the amount at which such person is liable to be assessed, any necessary adjustment of the assessment shall be made.'*

> *'S.70: …where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3),…the assessment as...agreed to…shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value.'*

35. In Ng Kuen Wai trading as Willie Textiles v Deloitte 5 HKTC 211, 217, 219 a taxpayer in the course of an investigation reached an agreement with the Revenue. When the Revenue issued demands for additional profits tax calculated on the basis of the agreement reached, the taxpayer sought to rescind the agreement. The case subsequently reached Recorder Edward Chan SC of the Court of First Instance who dismissed the appeal of the taxpayer, and held:

> *'…the reason for entering into the agreement with the IRD was that (the taxpayer) would want to put an end to the investigation by the IRD on (the taxpayer's) or his group's liability for under reporting their tax liability in the tax returns of the relevant tax years. It is a binding compromise bona fide entered into by both (the taxpayer) and the IRD. There was ample consideration for this compromise and I see no reason for setting aside this contract…*
>
> *…*
>
> *…It would appear to me that the scheme of the Ordinance is that rather than the IRD owing a duty of care to the tax payers in assessing the tax payable, it is the duty of the tax payer to raise objection to the assessment made by the tax assessor by way of appeal. If he fails to do so, the assessment would become conclusive.… If there should be an agreement on the assessable profit, then he cannot later on object to the agreed assessable profit.…'*

36. In this case, the Revenue made an assessment on 7 October 2005. The Taxpayer made his Objection on 28 October 2005. As settlement, the Revenue offered the Proposed Revised-assessment on 17 May 2006. The Taxpayer accepted the offer by signing and returning the Acceptance on 27 May 2006. There was the agreement as to the necessary adjustment of the assessment of 7 October 2005. The Revenue then made the Revised-assessment as agreed on 23 June 2006. Such a Revised-assessment must be considered as made under section 64(3) of the IRO and by operation of section 70 of the IRO must have become final and conclusive for all purposes of the IRO. According to the authority of Ng Kuen Wai, the Taxpayer could not later on object to such an Revised-assessment and that would be an end to his Objection.

Was the Taxpayer misled to sign the Acceptance?

37. The Taxpayer however argued that the Acceptance he returned to the Revenue should not prevent him from continuing his Objection and accordingly the Revised-assessment

should not be final and conclusive. He wrote three letters to the Revenue, respectively on 12 July 2006 ('1st letter'), 23 July 2006 ('2nd letter') and 1 September 2006 ('3rd letter') (collectively 'the three letters').

38. In the starting paragraph of the 1st letter, the Taxpayer attempted to open up his Objection of 28 May 2005, by simply ignoring his Acceptance dated 27 May 2006 as if he had made no Acceptance on 27 May 2006 and his previous Objection was not yet settled. He wrote:

> 'Further to my previous objection…, I am making this objection <u>again</u> on the following ground(s):' (underline added)

39. The Revenue replied on 21 July 2006, pointing out that the Revised-assessment was made as a result of his Acceptance and that it had become final and conclusive:

> '…as you have signed the proposed computation issued to you on 17 May 2006 and the revised assessment has been issued on 23 June 2006 accordingly, I regret to inform you that your claim could not be entertained. The assessment has become final and conclusive.'

40. In response, the Taxpayer in his 2nd letter dated 23 July 2006 wrote:

> '2. Yes, I signed the proposed computation issued on May 17, 2006 because I trusted the Hong Kong Government is a fair Government but it seems to me that the Inland Revenue Department, or the assessor of this taxation file, if not the Hong Kong Government, would be interested only in charging civilians as much as he/she can, instead of making it a fair tax!...'

41. The Taxpayer admitted having signed and returned the Acceptance in his 2nd letter, but he kept on arguing that the Revised-assessment was not appropriate for some reasons. Nevertheless, the Taxpayer still gave no explanation why he should not be bound by his Acceptance.

42. The Revenue wrote back on 4 August 2006, again telling the Taxpayer that the Revised-assessment issued on 23 June 2006 had become final and conclusive:

> '…As you have signed the proposed computation dated 17 May 2006 and the revised assessment has been issued on 23 June 2006 accordingly, the assessment has become final and conclusive in terms of section 70 of the Ordinance…'

43. The Taxpayer in his 3rd letter dated 1 September 2006 wrote:

> '4. On this letter that I signed back on May 27, 2006, I was not given any options of paying the tax first to avoid any interest payment, and I was also NOT given any choice of choosing between accepting or rejecting the tax estimation, but I was asked to give an objection within a month which I did. In your letter, you did NOT tell me not to sign the estimation back if I carry on with objection. When I carefully read this same letter again, I found myself being misled to sign the letter back to tell you that I accept that was your estimation because of your presented reason (I did not mean to accept that was the amount I should pay) and I could file new objection by sending you my objection letter within a month! **This was exactly what I did by following your instructions.** (emphasis supplied) Had I given a choice of accepting or rejecting just like a lot other form designs, I most likely would not be misled….'

44. In his 3rd letter, the Taxpayer continued admitting having signed and returned the Acceptance, but blamed the Revenue for his signing, saying that the Revenue did not tell him not to sign if he wanted to continue his objection, and that the wordings of the Proposed Revised-assessment misled him to sign back only to confirm that the Proposed Revised-assessment was for reason therein presenting the Revenue's estimation and he was not accepting such an estimation as the amount he should pay, and therefore he still could file new objection within a month.

45. In the hearing, the Taxpayer repeated his above argument, blaming the Revenue for having misled him to believe that he could file an objection within a month only after signing back the Acceptance.

46. After considering all the evidence, we find that the Proposed Revised-assessment of 17 May 2006 was such a simple offer for settlement that any ordinary person in his ordinary state of mind could not have misread the same or be misled to sign back the Acceptance if in fact he rejected the offer. It is absurd for a highly educated person holding a postgraduate degree like the Taxpayer to lay blame on the Revenue because he had not been told by the Revenue not to sign it if he intended to carry on with his objection. It is also incredible to believe such a simple settlement offer could have misled the Taxpayer to believe that he was asked to accept an offer of Proposed Revised-assessment in order to enable him to continue another round of objection. We find that the Revenue's Proposed Revised-assessment of 17 May 2006 in its plain language could not have misled the Taxpayer in the alleged manner, or indeed, in any other manner. It is unreasonable for him to lay blame on the Revenue for his own choice of Acceptance. Even if the Taxpayer was really so misled, which we find he was not, we would have no sympathy for him at all because it could only be his own unilateral mistake to have accepted something which he in fact objected. Accordingly, the Taxpayer must be bound by his own act of Acceptance.

Does the correction for MPF affect the finality of the Revised-assessment?

47. Dissatisfied with the Revised-assessment of 23 June 2006, the Taxpayer in his 1st letter to the Revenue on 12 July 2006 said,

> 'My MPF contribution for the period was HK$10,000 which should be exempted from taxation…the contribution of MPF is made mandatory by law, I strongly recommend the Inland Revenue Department made the exemption of this levy automatic so as to serve the tax payer better…' [B1/45, paragraph 2].

48. The Revenue in its letter to the Taxpayer dated 21 July 2006 replied,

> 'I refer to your letter dated 12 July 2006.
>
> …
>
> In view that you have not claimed the mandatory contributions to recognized retirement schemes in the tax return for the Year of Assessment 2004/05 filed on 3 June 2005, a revised assessment will be issued to you under a separate cover to allow the mandatory contributions to recognized retirement schemes of $10,000 under section 70A of the Inland Revenue Ordinance.'

49. The Revenue issued a correction on 24 July 2006, revising the tax amount of the Revised-assessment [B1/60-63].

50. The Taxpayer in his Statement of Grounds of Appeal of 15 March 2007 wrote [B1/8]:

> '…Yet, after accepting the return slip, the IRD still found revision to my tax amount necessary on 24th July, 2006. This is obvious that the IRD did not treat that return slip final, but making it a final chance for me to react to the case. Is that normal?'

51. The Taxpayer questioned the finality of his Acceptance of 27 May 2006 and the Revised-assessment of 23 June 2006 in light of a subsequent correction made by the Revenue on 24 July 2006 in allowing a deduction of his mandatory contributions of $10,000.

52. To the Taxpayer, because the tax amount was reduced by the correction of 24 July 2006, the previous Revised-assessment of 23 June 2006 could not be considered as final. It is obvious that the Taxpayer somehow misconstrued the correction made on 24 July 2006 as a fresh assessment in nullification of the previous Revised-assessment of 23 June 2006.

53. Plainly, by its letter dated 21 July 2006 (paragraph 48 above), the Revenue was telling the Taxpayer that because he had not in his tax return claimed deduction of his mandatory contributions of $10,000, the Revenue allowed the same under section 70A of the IRO as 'an error

or omission'. Such 'an error or omission' was certainly an error or omission in the tax return of the Taxpayer and the correction made on 24 July 2006 was a correction made pursuant to section 70A of the IRO, which provides:

> *'70A(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:…'*

54. Error or omission in the tax return of the Taxpayer as corrected pursuant to section 70A by the Revenue on 24 July 2006 certainly could not become an error or omission in the settlement agreement accepted by the Taxpayer on 27 May 2006. In the premise, the correction made by the Revenue on 24 July 2006 could not become a correction of the settlement agreement or the Acceptance thereof made by the Taxpayer on 27 May 2006.

55. Indeed, the word 'error' used in the context of section 70A of the IRO has been held as not referable to a deliberate act.

56. Patrick Chan J (as he then was) in Extramoney Limited v Commissioner of Inland Revenue 4 HKTC 394 at page 429 held:

> *'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.'*

57. Mantell J in Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17 at page 21 held:

> *'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 Owens 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.'*

58. In light of the authorities in Sun Yau and Extramoney, the section 70A adjustment made by the Revenue on 24 July 2006 could not be a correction of an error or omission in any settlement agreement. Such a correction could not disturb or affect the finality of the settlement agreement made between the Taxpayer and the Revenue, and the Taxpayer must be bound by his own act of Acceptance thereof.

59. For reasons as stated above, we find the Revised-assessment made by the Revenue on 23 June 2007 final and conclusive and the subsequent correction and revision thereof made by the Revenue on 24 July 2006 proper and correct. The Taxpayer may not re-open the Revised-assessment (as subsequently corrected) and we dismiss his appeal.

60. Having dismissed his appeal, we would have ended our decision here. For completeness, however, we would deal with the Taxpayer's claim that he rendered all services outside Hong Kong and accordingly should be exempted from income tax during the year of assessment 2004/05.

All services rendered outside Hong Kong?

61. It is not disputed that the Taxpayer was employed as a manager by a Hong Kong company, Company C, in Hong Kong during the year of assessment 2004/05. His income from Company C would therefore be assessable according to section 8(1)(a) of the IRO to Hong Kong salaries tax unless being exempted under section 8(1A)(b)(ii) or 8(1A)(c) of the IRO.

62. Section 8 provides:

'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-

(a) any office or employment of profit…

(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment-

(a) …

(b) excludes income derived from services rendered by a person who-

…

(ii) renders outside Hong Kong all the services in connection with his employment…

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where-

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.

(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.'

63. It is also not disputed that during the assessment year 2004/05, the Taxpayer stayed in Hong Kong for 172 days [B1/109, R1/40-48] and accordingly the 60 days exemption under section 8(1B) of the IRO could not apply. The Taxpayer must prove that he rendered no services in connection with his employment in any of the 172 days he stayed in Hong Kong to satisfy the exclusion under section 8(1A)(b)(ii) of the IRO.

64. Indeed, the Taxpayer in this appeal claims that he has rendered all the services in connection with his employment with Company C outside Hong Kong. He argues that his income thereof should be exempted from Hong Kong tax.

65. To support his claim that he has rendered no services in Hong Kong, he adduced a letter [B1/104] issued by Company C on 25 May 2005 which certifies as follows:

> 'This is to certify that (the Taxpayer) has joined us as Engineering Manager from 24-Nov-2003.
>
> (The Taxpayer) stations at our [City D] factory and is working there from Monday to Saturday every week. He does not need to work at Hong Kong office.'

66. In the hearing, the Taxpayer called a Mr B, one of his former colleagues, as his witness to testify that they were China staff and they performed all their duties in China and were not required to work in Hong Kong.

67. In his submission to the Board dated 27 May 2007, the Taxpayer also submitted a calendar for the relevant period from 1 April 2004 to 31 January 2005 with notes written to the relevant boxes of those days he stayed in Hong Kong explaining what he was doing on those days to show that he had not rendered any services during his stay in Hong Kong. [A1, appendix Q]

68. His ex-employer Company C on the other hand in three replies to the Revenue respectively dated 15 November 2005 [R1/10], 15 December 2005 [R1/13-14] and 9 May 2007 [R1/17-18] state that although the Taxpayer did not need to work at the Hong Kong office, he was required to carry out certain duties in Hong Kong, as follows:

(i) Attended meetings
(ii) Reported to and took instructions from seniors.
(iii) Reported work progress.
(iv) Carried samples, finished products or accessories between China and Hong Kong.
(v) Performed other supporting and liaison work in Hong Kong.

69. The Taxpayer claimed that the above three replies of Company C were all incorrect and caused to be made up by his superior Mr E to hurt him.

70. However, in his 1st letter to the Revenue dated 12 July 2006, the Taxpayer wrote:

> '3.…During the entire 14 months of employment, I only went back to the Hong Kong office for 4 times for

3.1 Met colleagues
3.2 Chinese New Year banquet,
3.3 Taking back my personal belongings (after office hours),
3.4 Interviewing people after the office hour as a help (on Saturday afternoon, after office hour) which could have been done in China otherwise, and I did not obtain any extra payment for doing this. Please understand that this is very Chinese culture that

3.4.1 Bosses always made their people do more than just their job and the Hong Kong Government has done nothing so far to help these weak communities…it would be really unfair if we are further taxed because we are made to do something that we are not paid…

3.4.2 We have to help from time to time and there is no reward for this helps…. I understand that we only tax for earnings made in Hong Kong, and taxing the unrewarded part of work is actually punishing people to help each other, which is not clever in our society and would only make the weak communities to suffer more…' [B1/45-46]

71. Irrespective of all arguments and assertions, the Taxpayer did admit interviewing people in Hong Kong. We note that the only reasonable purpose for interviewing people must be to recruit employees for his ex-employer and that must fall within the scope of services of a manager irrespective of whether that was written in his contract and whether he was being separately rewarded for such interviewing services.

72. On the other hand, Company C in its reply dated 9 May 2007 to the Revenue also produced certain email records [R1/34] illustrating that the Taxpayer did carry samples to Hong Kong, the emails were as follows:

Email from Company C's customer:

'Dear All of [Company C]

…

Solve this problem immediately and give me samples again for approval (Cav#1 Cav#80) 40 pcs/Cav <Total: 320 pcs>

I hope you can send them for me on/before this Saturday (ETA HK)

..

> [XXX Ltd]
> [YYYY]'
>
> Email returned to Company C's customer by the Taxpayer:
>
> 'Dear [YYYY],
>
> I will hand carry some (samples) back tomorrow evening and might give them to you on Saturday after I go to [the trade show]!'

73. In the hearing, the Taxpayer claimed that the sample incident mentioned in the emails above involved only a few pieces of small device and he claimed that at the end of the day he did not pass over the few pieces of business samples to the customer. Despite such assertion, the Taxpayer could not deny the fact that he did during his employment with Company C carry business samples from China to Hong Kong. We find that carrying business samples by the Taxpayer in the circumstances of this case must constitute services rendered by the Taxpayer in connection with his employment and these were rendered in Hong Kong.

74. Having carefully reviewed all testimonies and evidence, we find that the Taxpayer did render services in connection with his employment with Company C in Hong Kong. That is the only reasonable deduction particularly in light of Taxpayer's own admission.

75. In the premise, the Taxpayer's assertions and arguments that he rendered no services in any of the 172 days he stayed in Hong Kong must fail and his claim for exclusion under section 8(1A)(b)(ii) of the IRO must be denied.

Conclusion

76. In this appeal, it is the Taxpayer who bears the burden of proof. Section 68(4) of the IRO provides:

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

77. For reasons stated above, we find that the Taxpayer has failed to discharge his onus. As a result, we dismiss the Appellant's appeal and confirm the revised assessment and charge number 9-1933236-05-5 dated 24 July 2006, showing net chargeable income of $179,421 with tax payable thereon of $25,084.