Case No. D 2/82

Board of Review:

L. J. D'Almada Remedios, J.P. *Chairman*; D. Barrett; H. F. C. Hobson; J. D. Mackie, *Members*.

3 May 1982.

Profits Tax – objection to computation – whether assessment where no tax payable – loss carried forward – right to object only when first assessment made – whether s. 70A of Inland Revenue Ordinance can be invoked where time for objection or appeal has passed.

The appellant had incurred legal fees in making representation to the government for the installation of radio telephone in taxis. In the Profits Tax computation for 1975/76, the assessor disallowed these fees as deductible expenses. The appellant wrote and objected. Since there were no assessable profits the assessor took the view that there was no Assessment against which an objection could be made under s. 64 of the Inland Revenue Ordinance. The situation remained unchanged in 1976/77 however in 1977/78 an Assessment was raised which took into account some losses of previous years but not the legal fees. The appellant failed to object in the prescribed period. Eight months after the assessment became final the appellant tried to reopen the issue and asked the assessor to correct the assessment under s. 70A of the Inland Revenue Ordinance. The assessor refused. The appellant appealed to the Board.

Held:

(i) The right to object only arises if an assessment was made. The assessor was correct in saying that as no tax was payable then no objection under s. 64 could lie.

(ii) It follows that disagreement as to quantum of loss can only be determined by an objection to the first subsequent assessment to tax.

(iii) s. 70A of the Ordinance is not available as a remedy since the taxpayer cannot show that there was an error or omission in his return or that there was an arithmetical error or omission in the assessor's calculation.

Appeal dismissed.

Woo Sai-hong for the Commissioner of Inland Revenue.
Lawrence Lo of Mak Hing Cheung & Co. for the Appellant.

Reasons:

In the Profits Tax Computation submitted by the Appellant for the year of assessment 1975/76, a claim was made for a deduction of $10,000 being the legal fee incurred by the Appellant for representation to Government regarding the installation of radio telephones in taxis. The assessor adjusted this computation by adding back the legal fee on the ground that in his view it was not an allowable expenses. The Appellant promptly wrote to the assessor and objected to the adjusted computation. The assessor in reply gave his reasons for the disallowance (which we need not go into) and stated that as no notice of assessment was issued, the Appellant's letter cannot be regarded as an objection under section 64 of the Inland Revenue Ordinance. For that year, the Appellant derived no profit but sustained a loss in its business. The Appellant was, therefore, not assessed to tax. The situation remained unchanged, in the following year 1976/77.

For the year 1977/78, the assessor raised a Profits Tax Assessment on the Appellant in the sum of $5,601 with tax thereon in the sum of $952. In so doing, the loss for the previous year was brought forward but in arriving at the assessable profits no allowance was made for the deduction of the legal fee to which we have referred.

The Notice of Assessment for the year 1977/78 was issued on the 19 July 1978. No objection was lodged within the prescribed period of one month.

However, on the 7 May 1979, some eight months after the Notice of Assessment had become final, the Appellant attempted to re-open the issue by claiming that the loss brought forward by the assessor was incorrect and, therefore, required the assessor to correct the assessment under section 70A of the Ordinance.

The question we have to decide is whether the Appellant's right to object or appeal is time-barred and if so, whether it can be circumvented by invoking the provisions of section 70A.

The Appellant's argument is founded on two grounds: Firstly, when the assessor initially disallowed the deduction by re-adjusting the computation for the year 1975/76, it was objected to well within time. Consequently, the Appellant was entitled to pursue its objection or appeal or, alternatively, claim a correction when the Appellant became assessable to tax for the year 1977/78. Secondly, the Appellant says that the assessor's disallowance of the deduction claimed was due to a misconception of the nature of representation made to Government and, accordingly, it is entitled to have the assessment corrected under section 70A if it can be shown that the assessment was the result of a 'mistake of fact'.

We accept the Revenue's reply to the Appellant's first argument which is that an objection to the Commissioner only lies where a person is aggrieved by an assessment (See

sections 62 and 64). We are informed that an assessment is not issued unless there is tax payable. This appears to us to be in keeping with the scheme of the Ordinance. A person is only assessed to tax if profits are made in which event a Notice of Assessment is issued. For the year 1975/76, the Appellant sustained a loss in its business so there was no Notice of Assessment. The assessor's computation of the loss for that year sent to the Appellant for comment is not an 'assessment' but merely an indication of what view the assessor takes. Any observations made in reply by the Appellant can only be treated as such and not as an 'objection' under section 64 since no assessment has been issued on which he can object.

In the circumstances, we agree with the view of the Commissioner's representative that where there is no assessment to tax because a loss has been incurred, any disagreement or dispute as to the quantum of loss to be carried forward for set off under section 19(2) against subsequent profits can only be determined on objection to the first subsequent assessment to tax. We are concerned in this reference with the 1977/78 assessment. As the Appellant had failed to object to the assessment when a profit was shown, the assessment became final and conclusive under section 70 of the Ordinance. The Appellant was, therefore, time-barred in regard to an objection under section 64.

We will now deal with whether the Appellant can invoke section 70A to have the assessment corrected. The Appellant says it is entitled to have the assessment corrected if there was a 'mistake of fact' giving rise to an excessive assessment. By that the Appellant means that if the disallowance of the legal fee was occasioned by a misunderstanding of the facts but for which the expense would have been allowed, the assessment can be corrected.

The remedy contemplated by section 70A is only available if a taxpayer can show either: (i) that there was an error or omission in the return he has submitted, or (ii) there was an arithmetical error or omission in the calculation of the amount of assessable income or profits assessed or tax charged. Neither of these two prerequisites exist in the present case. There was no error or omission in the return submitted by the Appellant; nor was there any arithmetical error in the calculation of income or profits. The assessor's refusal to treat the legal fee paid as an allowable deduction is not an 'omission in the calculation of assessable income' in the context of the section. It was a deliberate act or stand taken by the assessor and brought to the notice of the Appellant.

In the result, the Appellant has failed to satisfy the conditions specified in the section on which it can seek a correction of the assessment. This appeal must therefore be dismissed and the assessment confirmed.