Case No. D3/91

Profits tax – grounds of appeal – late filing of notice of appeal – application to re-open assessment under section 70A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Francis Jerome Law and Richard Lee.

Date of hearing: 28 January 1991.
Date of decision: 8 April 1991.

The taxpayer was a private limited company carrying on business of property investment. There was a disagreement between the taxpayer and the assessor as to whether certain expenditure was of a revenue or capital nature. The assessor refused to allow the expenditure on the ground that it was of a capital and not revenue nature. The taxpayer through its tax representatives appealed to the Board of Review on the ground that the expenditure was deductible as being of a revenue nature. Alternatively, the tax representatives claimed that an industrial building allowance should be granted. The tax representatives proposed a compromise to the Commissioner which the Commissioner rejected. The tax representatives then notified the Board of Review that the appeal had been withdrawn.

New tax representatives were subsequently appointed and applied to re-open the question under section 70A of the Inland Revenue Ordinance on the ground that an error had been made due to the fact that no industrial building allowances had been granted. The assessor rejected the application on the ground that no error or omission had been made which would permit the matter to be re-opened under section 70A. The Commissioner upheld the decision of the assessor and the taxpayer gave notice of appeal to the Board of Review but was one day late in filing notice of appeal. The reason given for the delay was because counsel's opinion was being sought. The grounds of appeal were that the taxpayer was entitled to claim either depreciation or industrial building allowances in respect of its capital expenditure but made no reference to section 70A.

At the hearing of the appeal the taxpayer was represented by its managing director who was unable to give any satisfactory explanation with regard to the one day's delay in filing the notice of appeal and was unable to explain the nature of the error or omission which would enable the matter to be re-opened under section 70A.

Held:

The Board dismissed the appeal because the notice of appeal had been filed out of time and no acceptable grounds had been given to the Board for exercising its discretion to extend the time period. The Board went on to say that they would also have dismissed the appeal on a number of other grounds including the merits of the case and because no error or omission had been made which would justify the application of section 70A of the Inland Revenue Ordinance.

Appeal dismissed.

[Editor's note: This decision can usefully be read in conjunction with D6/91 reported at page 559 of this volume.]

Lee Yun Hung for the Commissioner of Inland Revenue.
Taxpayer represented by its managing director.

Decision:

This is an appeal by a limited company against the refusal by the Commissioner to allow the Taxpayer to re-open its tax assessment for the year of assessment 1986/87 under section 70A of the Inland Revenue Ordinance. The Taxpayer claimed that it wanted to claim certain expenditure as plant and machinery to be offset against its taxable profits by way of depreciation allowance. The facts of the case are as follows:

1. The Taxpayer is a private limited company incorporated in Hong Kong. It described its business as that of property investment.

2. For the year of assessment 1986/87 the Taxpayer objected to its profits tax assessment on the grounds that the loss brought forward from 1985/86 did not include an amount of $663,852 which the Taxpayer said should have been added to its carry forward loss. The Taxpayer claimed that the assessor had incorrectly considered certain expenditure to be of a capital nature.

3. On 2 May 1989 the Commissioner of Inland Revenue issued a determination increasing the Taxpayer's assessment for the year of assessment 1986/87 as he was of the opinion that the Taxpayer had incorrectly claimed certain capital items as revenue expenditure.

4. The tax representatives for the Taxpayer by letter dated 31 May 1989 gave notice of appeal on behalf of the Taxpayer to the Board of Review on the ground that no depreciation allowances had been granted to the Taxpayer for the year of assessment 1986/87. The tax representatives contended that the depreciation allowances should be granted in respect of fencing, a connecting bridge, internal access roads and drains as well as in respect of nearly all of the

expenditure disallowed by the Commissioner in his determination as being capital expenditure. Alternatively the tax representatives claimed that industrial building allowances should be granted to the Taxpayer.

5. On 31 May 1989 the tax representatives wrote to the Commissioner suggesting that the matter be compromised on the basis that certain expenditure be allowed and depreciation allowances granted. By letter dated 21 June 1989, the Inland Revenue Department rejected the proposal to compromise the matter. By letter dated 2 February 1990, the tax representatives advised the Board of Review that the Taxpayer was withdrawing its appeal.

6. By letter dated 16 March 1990, the new tax representatives wrote on behalf of the Taxpayer requesting that the 1986/87 assessment should be re-opened under section 70A of the Inland Revenue Ordinance because an error had been made due to the fact that no industrial building allowances had been granted and that the carry forward loss had therefore been understated.

7. The assessor rejected the claim by the new tax representatives on the basis that there was no error or omission in any return or statement submitted for 1986/87 and no arithmetical error or omission had been made in the calculation of the amount of assessable profits or in the amount of the tax charged.

8. The new tax representatives for the Taxpayer objected to the assessor's refusal to amend the tax assessment for the year of assessment 1986/87 in accordance with section 70A of the Inland Revenue Ordinance and the matter was referred to the Commissioner of Inland Revenue. By his determination dated 12 November 1990, the Commissioner of Inland Revenue rejected the claim made by the new tax representatives on behalf of the Taxpayer to re-open the tax assessment for the year of assessment 1986/87 under the provisions of section 70A of the Inland Revenue Ordinance. In his determination he went on to state that even if the case was re-opened under section 70A of the Inland Revenue Ordinance, the Taxpayer would still not be entitled to claim either depreciation or industrial building allowances because the expenditure incurred by the Taxpayer chiefly consisted of land formation works, road and bridge construction, the purchase of a pre-fabricated warehouse and interest incurred on moneys borrowed. He stated that none of the expenditure constituted plant or machinery for the purposes of section 39B of the Inland Revenue Ordinance and accordingly no depreciation allowances were allowable. He further stated that no industrial building allowance was permissible because the Taxpayer had not incurred any expenditure on the construction of a building or structure as required by section 34 of the Inland Revenue Ordinance.

9. By letter dated 13 December 1990, the new tax representatives gave notice of appeal to the Board of Review against the determination of the Commissioner which was dated and issued on 12 November 1990. In the notice of appeal, the

new tax representatives stated that they were one day late in giving proper notice of appeal because the case was very complicated and their client was seeking counsel's opinion. The grounds of appeal were that the Taxpayer was entitled to claim either depreciation or industrial building allowances in respect of its capital expenditure. The capital expenditure was in the nature of plant and an industrial building or structure and therefore the Taxpayer was entitled to claim depreciation allowances.

At the hearing of the appeal, the managing director of the Taxpayer appeared and represented the Taxpayer. He was asked by the Board for an explanation with regard to the one day delay in giving notice of appeal and with regard to the counsel's opinion mentioned by the new tax representatives in their notice of appeal dated 13 December 1990. He was unable to give any satisfactory explanation.

With regard to the application under section 70A of the Inland Revenue Ordinance, the managing director was unable to explain to the Board the nature of the error or omission in any return or statement which would entitle the matter to be re-opened under section 70A of the Inland Revenue Ordinance.

With due respect to the Taxpayer, the new tax representatives and the managing director, we find that this appeal has no merit whatsoever. In the notice of appeal, there is no mention made of section 70A of the Inland Revenue Ordinance. It would appear that the new tax representatives when giving notice of appeal against the Commissioner's determination either conceded that they had no ground of appeal in relation to section 70A of the Inland Revenue Ordinance or hoped that the merits of their case in relation to section 70A would be disregarded and the substantive question relating to whether or not the Taxpayer was entitled to claim depreciation allowances or industrial building allowances would be allowed to proceed by default.

At the hearing of the appeal, the Commissioner's representative indicated that he could not consent to the granting of the extension of time of one day and left it to the Board of Review to decide whether or not an extension of time should be granted.

This case is a highly technical matter. There would appear to be no fault whatsoever on the part of the Commissioner and his staff in the way that they have handled the case. On the other hand the Taxpayer is the author of its own problems. First of all the Taxpayer had the opportunity of appealing this matter and took that opportunity by lodging an appeal with this Board of Review. For reasons which are unknown, the Taxpayer withdrew its appeal and by virtue of section 70 of the Inland Revenue Ordinance the assessment against which the Taxpayer had appealed became final and conclusive for all purposes of the Inland Revenue Ordinance. The withdrawal of the appeal was a voluntary act by the Taxpayer and no suggestion has been made that the original tax representatives were acting without instructions or in any way incorrectly. The Taxpayer appointed new tax representatives and decided that it wished to re-open the matter. Section 70A of the Inland Revenue Ordinance appeared a convenient and indeed the only way of proceeding to do this.

The intention of section 70A is not to enable matters to be re-opened at the whim of taxpayers. It is an emergency provision to protect the rights of taxpayers where a genuine mistake has been made. In the case before us there is no such mistake. Indeed the Taxpayer acting on advice and fully aware of all of the facts decided of its own volition to withdraw its appeal. Nothing could be clearer.

The first question which we have to answer is whether or not we should exercise our discretion to grant the Taxpayer extra time of one day for the purpose of filing a notice of appeal against a decision by the Commissioner rejecting the Taxpayer's application under section 70A of the Inland Revenue Ordinance. 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.

However so that the Taxpayer will not feel unduly aggrieved, we would also place on record that even if we were to grant the extension of time for filing notice of appeal, it would in no way assist the Taxpayer because we entirely agree with the decision of the Commissioner in all regards. This is not a case which comes within the ambit of section 70A of the Inland Revenue Ordinance. There is no justification whatsoever for re-opening the assessment on the ground that a mistake has been made. We have been given no evidence of any error or omission in any return or omission in any return made or any statement submitted. Indeed the contrary would appear to be the case. The alleged 'error' appears to have been the refusal of the assessor to allow claims made by the Taxpayer.

We also agree with the Commissioner in his finding that the assessment was originally correct and that the Taxpayer was not entitled to any depreciation allowances or industrial building allowances.

For the reasons given, this appeal is dismissed and the assessment appealed against is confirmed.