

Case No. D42/05

Salaries tax – personal assessment – application to correct – sections 42(2)(b), 64(1) and 70A of the Inland Revenue Ordinance ('IRO').

Panel: Andrew J Halkyard (chairman), Julia Frances Charlton and Vernon F Moore.

Date of hearing: 4 August 2005.

Date of decision: 8 September 2005.

The appellant filed his Tax Return – Individuals which contained, amongst other things, details of income liable to salaries tax and a claim that the appellant incurred a business loss. The appellant elected for personal assessment when a salaries tax assessment had already been issued to him. The assessor issued a profits tax computation to the appellant which stated that there were no assessable profits/(assessed loss) for the year of assessment. At the same time the assessor raised to the appellant a personal assessment which only charged to tax the appellant's income liable to salaries tax. Also at the same time, the assessor issued to the appellant a letter explaining her views on the claimed business loss and reminded the appellant to submit the notice of objection **within one month** from the date of the assessment if he wanted to object. The appellant did not object to the personal assessment within the one month period set out in section 64(1) of the IRO. The appellant subsequently applied to correct the personal assessment under section 70A on the ground of 'the Assessor's omission or error to grant a tax setoff in respect of my Business Loss'.

Held:

1. Section 70A does not apply in this case. The assessor's refusal to treat the claimed loss for the purposes of setoff in the appellant's personal assessment is neither an 'arithmetical error' nor an 'omission in the calculation of the amount of [assessable income] or in the amount of the tax charged' in the context of section 70A. Rather it was a deliberate act or stand taken by the assessor that was unambiguously brought to the attention of the appellant. In the event, the best way for the appellant to challenge the assessor's refusal was to object to that assessment within the statutory one month period.

Appeal dismissed.

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Cases referred to:

D2/82, IRBRD, vol 1, 410
D25/01, IRBRD, vol 16, 224
B/R 126/04 (unreported)
D30/89, IRBRD, vol 4, 346

Taxpayer represented by his representative.

Lai Wing Man and Wong Kai Cheong for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Deputy Commissioner's refusal to correct, pursuant to section 70A of the Inland Revenue Ordinance ('the IRO'), the 2001/02 personal assessment raised on the Appellant. The Appellant claims that the Deputy Commissioner should have allowed his claim to setoff his business loss in his personal assessment.

The facts

2. The facts are not in dispute. They are contained in the Deputy Commissioner's determination dated 1 June 2005, and we so find. In relevant part, they can be summarised as follows:

- (1). 9 August 2002: The Appellant filed his 2001/02 Tax Return – Individuals with the Inland Revenue Department ('IRD'). That return contained, amongst other things, details of income liable to salaries tax (now not in dispute) and a claim that the Appellant incurred a business loss in the amount of \$128,844.
- (2). Thereafter, the assessor raised queries on the Appellant, asking for details and documents to support his claim for the business loss. The Appellant responded to these enquiries.
- (3). 27 August 2002: The Appellant elected for personal assessment for the year of assessment 2001/02. At that time, a salaries tax assessment for the year had already been issued to the Appellant.
- (4). Thereafter, the assessor continued to raise queries on the Appellant and requested further documents relating to the claimed business loss. Having examined the documents and information submitted by the Appellant, the assessor took the view that the Appellant did not carry on business during the year of assessment 2001/02. Therefore, the assessor did not accept the

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Appellant's claim to be granted relief for business loss under personal assessment.

(5). 6 July 2004:

(a) The assessor issued a 2001/02 profits tax computation to the Appellant which stated:

'According to the Return and information submitted, there are no Assessable Profits / (Assessed Loss) for the [2001/02] year of assessment.

If you disagree with the computation, please let me know in writing stating the reasons.'

(b) At the same time, the assessor raised on the Appellant a 2001/02 personal assessment which only charged to tax the Appellant's income liable to salaries tax.

(c) Also at the same time, the assessor issued to the Appellant a letter explaining her views on the claimed business loss and reminded the Appellant of his right to object should he feel aggrieved by the personal assessment. That letter stated in relevant part:

'Claim for Business Loss

I have examined all the documents and information submitted by you. I am of the opinion that there was no business carried on during the year. ... A formal notice of no assessable profits (loss) is enclosed [item (a)] and Assessment for Personal Assessment is enclosed [item (b)]. If you want to object, please submit the notice of objection **within one month** from the date of the assessment.' (**emphasis as per original**)

(6). The Appellant did not object to the personal assessment within the one month period set out in section 64(1) of the IRO.

(7). 3 January 2005: The Appellant applied to correct the personal assessment under section 70A on the ground of 'the Assessor's omission or error to grant a tax setoff in respect of my Business Loss in the Year of Assessment 2001/02.'

(8). 1 June 2005: The Deputy Commissioner upheld the assessor's refusal to revise the personal assessment, agreeing with the assessor that the claimed business loss should not be taken into account in the personal assessment.

- (9). 11 June 2005: The Appellant lodged a valid appeal to the Board against the Deputy Commissioner's determination, arguing that the business loss setoff claimed by him should be allowed in the personal assessment.

Decision

3. We have decided to deal solely with the issue of whether as a matter of law the Appellant can invoke section 70A to have his personal assessment corrected. This is a straightforward and simple issue and our determination thereon is sufficient to dispose of this appeal. Our decision is that section 70A does not apply in this case and it was wrong for the Appellant to attempt to rely upon it.

4. The Appellant, through his representative, Ms A, contends that he is entitled to have the personal assessment corrected because he incurred a business loss which should have been allowed by the assessor by way of setoff under section 42(2)(b) of the IRO. The Commissioner, through her representative, Ms Lai Wing-man, responds by contending that there is no error or omission because the assessor deliberately disallowed the claimed loss and refused to include it in the personal assessment.

5. Ms A claims that the Appellant was confused by the various documents sent to him by the IRD. She particularly noted that the personal assessment simply left the profits tax section blank – instead of recording 'nil' or 'disallowed' in the relevant part of the assessment. This gave rise, Ms A submitted, to an error or omission. However, after examining the facts before us and looking at the chronological sequence of events, nothing could be clearer than the assessor's (1) categorical rejection of the Appellant's claim that he carried on business in 2001/02 and (2) the assessor's advice to the Appellant that, if he disagreed with the personal assessment (which we note is undoubtedly an assessment for the purposes of the IRO – including the objection and appeals provisions), then he should object to that assessment within the statutory period of one month as set out in section 64(1). The assessor's refusal to treat the claimed loss for the purposes of setoff in the Appellant's personal assessment is neither an 'arithmetical error' nor an 'omission in the calculation of the amount of [assessable income] or in the amount of the tax charged' in the context of section 70A. Rather, it was a deliberate act or stand taken by the assessor that was unambiguously brought to the attention of the Appellant (compare D2/82, IRBRD, vol 1, 410).

6. To support our decision, we adopt [as modified in its application to this appeal] the following statement from a previous decision of this Board, D25/01, IRBRD, vol 16, 224 at 234, cited to us by Ms Lai:

'We are of the view that in the present case, there was no "error" or "omission" or "arithmetical error" or "arithmetical omission" on the part of anybody within the meaning of section 70A of the IRO. It was a deliberate and

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conscious act on the part of the Taxpayer to claim that its profits ... were exempt from profits tax on the basis that such profits were made offshore [in this case, the deliberate and conscious claim was for a business loss to be taken into account for Personal Assessment purposes]. It was an equally deliberate and conscious act on the part of the Assessor to reject such claim for exemption and to raise the Assessment ... [in this case, the Assessor's deliberate and conscious actions to reject the Appellant's claimed business loss are clearly catalogued in the facts found, see particularly fact 5. above].'

In short, the conditions for section 70A to apply are simply not present in this case and therefore the section cannot be availed of by the Appellant.

7. For the sake of completeness, we note that neither of the two Board of Review decisions cited by Ms A assisted us. Specifically, the Board's decision on the Appellant's earlier appeal, B/R 126/04 (unreported), was confined solely to the question of his salaries tax liability and D30/89, IRBRD, vol 4, 346 (involving an assets betterment dispute) is just not in point.

8. In the event, the best way for the Appellant to challenge the assessor's refusal to grant business loss relief in the personal assessment was to object to that assessment within the statutory one month period. He did not do so. The authorities cited above, when applied to the facts of this case, clearly show that section 70A does not now entitle the Appellant to take 'a second bite of the cherry'. The Appellant has totally failed to convince us that the conditions set out in section 70A on which he can seek a correction of his personal assessment apply in this case. The appeal is hereby dismissed.