Case No. D6/91

Error or omission – meaning of determination – application of section 70A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Joseph S Brooker and Chiu Chun Bong.

Date of hearing: 1 March 1991.
Date of decision: 19 April 1991.

The taxpayer applied to re-open certain tax assessments under the provisions of section 70A of the Inland Revenue Ordinance. Two preliminary points arose. One related to the meaning and interpretation to be given to the facts found in the Commissioner's determination. The other related to the procedure to be adopted and the application of section 70A.

Held:

The Commissioner's determination means what it says and where the Commissioner in his statement of facts quotes from letters received from the taxpayer or its advisers, the Commissioner does not admit or deny the truth of what is quoted. The onus of proof is placed upon taxpayers and it was suggested that before the hearing of the appeal the taxpayer should find out what facts are agreed or admitted by the Commissioner.

Section 70A can only apply where there is an error or omission as set out therein. There must be evidence before the Board of such an error or omission and to be able to decide this question the Board must hear the case. It is not correct to say that section 70A only applies where there is an error of fact. An error of law is equally an error capable of being corrected under section 70A.

Preliminary ruling on section 70A issued allowing the taxpayer to proceed further on the substance of the appeal.

[Editor's note: The taxpayer subsequently withdrew from the appeal. This decision can usefully be read with D3/91 at page 540 in this volume.]

Case referred to:

Exxon Chemical International Supply SA v CIR 3 HKTC 57

Jennifer Chan for the Commissioner of Inland Revenue.
Charles Smith of East Asia Tax Management Services Ltd for the taxpayer.

Preliminary Ruling:

This appeal is by a taxpayer against a determination of the Deputy Commissioner refusing to allow the Taxpayer to correct an alleged error or omission made in its profits tax return for the year of assessment 1987/88 pursuant to the provision of section 70A of the Inland Revenue Ordinance.

At the commencement of the hearing of the appeal two preliminary questions arose and it was decided by this Board that it was appropriate to make decisions on the two preliminary points because depending upon the decision of this Board thereon, the appeal might or might not proceed further.

The first point related to the facts before this Board. The representative for the Taxpayer submitted that he was entitled to rely upon the statement of facts quoted or set out in the Deputy Commissioner's determination and which were the facts upon which the Deputy Commissioner reached his determination. On the other hand the representative for the Commissioner stated that in this case as in many previous cases the Commissioner did not admit the truth of the statements quoted or set out in the Deputy Commissioner's determination. The Deputy Commissioner had made his determination based upon them and assumed they were true but without any admission with regard thereto.

This is a point where has frequently come before the Board of Review in the past. The Board of Review has pointed out to the Commissioner's representative how difficult it is for the Board to perform its statutory duties in such circumstances. The Board does not have the benefit of pleadings as it would if this were a civil case brought before the courts. The Board of Review starts hearing cases with the Commissioner's determination, notice and grounds of appeal before it. Where then, is this Board to start its statutory duty of ascertaining the facts?

Section 64(4) of the Inland Revenue Ordinance places an obligation upon the Commissioner (with includes the Deputy Commissioner as in this case) when making his determination to give his reasons therefore and 'a statement of the facts upon which the determination was arrived at'. It would appear that this Board should start its statutory duty of ascertaining the facts by first making reference to 'the facts upon which the determination was arrived at' as set out in the Commissioner's determination. So far as we are aware that is the procedure adopted by most, if not all, Boards of Review when they sit.

It is customary for the Commissioner, after setting out in factual form such matters as the details of the Taxpayer, the content of the tax return and other similar non-contentious matters, to quote extensively from letters received from the Taxpayer or its

advisers, which letters have frequently being sent to the Inland Revenue Department in answer to specific questions raised by an assessor. It is typical and it will be noted that instead of stating information given to the assessor as facts or stating that information given to the assessor is disputed by the Commissioner, the Commissioner simply places on record 'as a matter of fact' that he or his assessor or department have received a letter from a stated signatory bearing a specific date which letter contained certain information. The only 'fact' found is the existence and receipt of the letter but not its content.

At the hearing of other appeals and in this particular appeal, the representative of the Commissioner quite rightly pointed out that the Deputy Commissioner had not admitted the truth of any of the statements made by or on behalf of the Taxpayer in correspondence prior to the determination being made. She said that the Commissioner required the Taxpayer to prove the truth of all of the facts on which the Taxpayer wished to rely.

It appears to us that the intention of section 64(4) of the Inland Revenue Ordinance is to require the Commissioner, or his Deputy, to admit the truth of the facts on which he based his determination. Alternatively the facts in dispute can be so stated. We understand from the representative for the Commissioner that the 'Facts upon which the determination was arrived at' is prepared in consultation with taxpayers and that many taxpayers request the inclusion of additional matters which are representations and not agreed or admitted facts. Perhaps the entire procedure requires review.

The question for this Board to make its ruling is whether or not the Taxpayer is entitled to rely upon the truth of the statements of alleged fact quoted in the Deputy Commissioner's determination. As these have not been admitted by the Commissioner the answer must be negative. The onus of proof is placed upon taxpayers in all appeals. The Deputy Commissioner had not admitted the truth of representations made to him or his assessors. Though it is not for this Board to tell parties how to handle cases it would appear to us that a meeting between the representative for the Taxpayer and the representative for the Commissioner would be of assistance in ascertaining what facts are capable of being agreed or admitted by the Commissioner and what facts are disputed.

Having dealt with the first question relating to evidence we now turn to the second preliminary point which related to the meaning of section 70A of the Inland Revenue Ordinance. Section 70A including the headnote reads as follows:

> '70A. Power of assessor to correct errors
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> (1) Notwithstanding the provisions of section 70, if, upon application made within six years after 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 by reason of any arithmetical error or omission in the calculation of the amount of the assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment:
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> 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.
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> (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.'

It is perhaps surprising that the meaning of section 70A has rarely come before the Board of Review. The question for consideration is whether or not there is any limit upon the application of section 70A. Section 70 of the Inland Revenue Ordinance states that assessments are to be final and conclusive for all purposes of the Ordinance. That is a sweeping and draconian section. It is clear that section 70A was introduced to overcome the possible hardship of section 70. Section 70A is limited to correcting errors or omissions in any return or statement submitted in respect thereof. It also makes reference to arithmetical errors or omissions but these are not relevant to the appeal before us. If section 70A is to be taken at its face value then it is without limit. Any taxpayer can come before the Board of Review and say that a mistake has been made in a tax return and ask to have set aside any assessment which has been made based on that tax return. Apparently the Commissioner has drawn a distinction between mistakes of fact which would come within section 70A and mistakes of law or interpretation which do not. In the present case he says that the Taxpayer with full knowledge of all of the facts has filed a tax return which has been accepted by the assessor. An assessment has been issued. Subsequently a new tax adviser takes over the affairs of the Taxpayer and takes a different view from the original tax adviser. Having taken this different view, the new adviser then seeks to re-open the tax affairs of the Taxpayer by using section 70A of the Inland Revenue Ordinance. The Commissioner considers this to be abuse of section 70A and maintains that under the provisions of section 70 the assessment is final and conclusive.

The representative for the Taxpayer disagrees with this interpretation. He points out that if he is right in the view which he takes of the facts, then the Taxpayer was not subject to tax in Hong Kong because it was not carrying on business in Hong Kong or if

it was its profits did not arise in nor were derived from Hong Kong. In such circumstances, he points out, that the Taxpayer has been assessed to tax and has paid tax which should not have been assessed or paid. He says that this is totally unjust and that section 70A has been introduced into the Ordinance to remedy such injustice.

The submission made by the representative for the Taxpayer appears most attractive until one begins to analyse what the results may be. Clearly there must be finality in taxation matters. This is the clear intention of section 70. This Commissioner is entitled to accept the truth of tax returns made by taxpayers. If an individual submits a return or statement to the Commissioner which says that he is liable to tax then it is reasonable that the Commissioner should so assess the individual to tax and that should be the end of the matter. In the case before us the taxpayer has submitted a tax return, has been duly assessed the tax, and has duly paid tax on the profits which he has volunteered to the Commissioner. Unless there is clear evidence that a mistake has been made and that great injustice had taken place the Taxpayer should not be permitted to re-open the matter. Whilst it may be that such should be the situation we must look at the clear wording of section 70A. It has no such limitations. There is a safeguard in the provision which relates to the practice generally prevailing at the time when the return or statement was made but it does not have any safeguard stating that only mistakes of fact and not law can be corrected.

A more difficult question to answer is whether section 70A can apply to a change of opinion or a different opinion. The representative for the Taxpayer says that no such situation arises in the present case or indeed can arise. He points out that the previous tax representative formed an opinion on the facts which was genuine and bonafide. He says that the opinion which they formed was erroneous and points out that different professional people can have different views of the same facts. He says that we should hear the case, should form our opinion on the evidence and facts and then decide whether or not the former tax representatives were correct or not. If they were correct then that is obviously the end of the matter. If however we decide that they were wrong and that the profits did not arise in and were not derived from Hong Kong or that the Taxpayer was not carrying on business in Hong Kong then we should order under section 70A that the error be corrected because clearly an error would have been made in the tax return filed with the Commissioner. The tax return stated that the Taxpayer was subject to tax on these profits whereas in reality it was not. Again the simplicity of the submission is attractive. However, what worries us is whether or not a different point of view can be an error or omission. Many judges and Courts of Appeal when reviewing decisions of the Board of Review have upheld the Board of Review decision because it is based on a view of the evidence and facts taken by the Board but the judges or Courts of Appeal have indicated that they do not necessarily agree with the decision that the Board has reached even though they do not set it aside. This indicated to us that there may well be more than one correct point of view on one set of facts. If this can be the case then we find it difficult to see how an error or omission could be stated to have arisen in a tax return in such circumstances.

We have given thought as to whether there is any estoppel on the Taxpayer. The answer would appear to be in the negative because the very intention of section 70A is

to allow a taxpayer to correct an error in a tax return or supporting statement. To say that a taxpayer is estopped from claiming an error in a tax return would negate entirely the meaning of section 70A.

Having given very careful thought and consideration to the question before us we have come to the decision that there is no limit on the meaning of section 70A as suggested by the representative for the Commissioner in this case. We have decided that there is no limitation on the application of section 70A to factual errors or omissions as opposed to legal errors or omissions. With regard to whether or not a change or difference of opinion can be an error or omission we make no general ruling or application to all cases. In our opinion each case must be heard and decided on its own merits. If the same facts are capable of two different interpretations both of which can be correct and are opinions only then there would in our opinion be no error or omission. If on the other hand there is only one true and correct interpretation then it is not a matter of opinion. In the case now before us it would appear to us that whether or not the profits arose in or were derived from Hong Kong and whether or not the Taxpayer was carrying on business in Hong Kong is a matter of fact and legal interpretation which can have one answer only. That answer is clearly yes or no. The Taxpayer has been assessed to tax and paid tax on the basis that the answer is affirmative. If however, having heard the case and all of the evidence, we were to decide that the answer should be negative then clearly an error has been made in the tax return and the matter is capable of being rectified under section 70A of the Inland Revenue Ordinance.

In summary we find on the two preliminary questions before us that the onus and obligation is upon the Taxpayer to prove its case and that the statements quoted in the Deputy Commissioner's determination are not facts admitted by the Commissioner. It is the obligation of the Taxpayer either to have such matters agreed or admitted by the Commissioner before the hearing of this appeal is resumed or to prove such matters to the satisfaction of this Board. Failure to do so is likely to lead to the dismissal of the appeal.

With regard to the meaning and applicability of section 70A we decide that this is an appropriate case to be heard so that we can decide whether or not an error or omission has been made and if the answer is affirmative then an order can be made to correct the error or omission. In making this ruling on this second preliminary point we do not indicate in any way whether or not we have any sympathy for the Taxpayer with regard to the merits of its appeal.

In the course of the submission made before us on the question of the interpretation of section 70A of the Ordinance reference was made to the case of Exxon Chemical International Supply SA v CIR 3 HKTC 57. In that case the Commissioner submitted that if the Board were to find in favour of the taxpayer, then he considered that an error had been made and should be rectified under section 70A. In that case the Board placed a caveat upon the matter because arguments had not been made before the Board and the point was conceded by the Commissioner. We can see little difference between the case before us today and the Exxon case. Had we taken a different view of the appeal now before us we would find it difficult to rationalize our decision in the light of the fact that the

Commissioner had considered in the Exxon case that such cases are appropriate for section 70A. Section 70A does not give the Commissioner any discretion to decide whether or not section 70A can or cannot be used.

We indicated to the parties when hearing these preliminary points that if we decided in favour of the Taxpayer with regard to the meaning of section 70A of the Ordinance then we would direct the Clerk to the Board of Review to fix a new day for the hearing of the case on the substantive issue of whether or not a mistake had been made, that is whether or not the Taxpayer was carrying on business in Hong Kong and if so whether the profit arose in or derived from Hong Kong. We accordingly now direct that a new day should be fixed to enable the Taxpayer to appear before us and adduce evidence and make submissions on the substance of the case.