Case No. D82/95

Penalty tax – profits tax – private limited company – error or mistake in tax return – fraudulent conduct of former directors.

Panel: William Turnbull (chairman), Gordon Macwhinnie and Nigel A Rigg.

Date of hearing: 15 May 1995.
Date of decision: 27 November 1995.

The taxpayer requested the Commissioner to correct an additional profits tax assessment pursuant to section 70A of the Inland Revenue Ordinance. The taxpayer claimed that the profits had been mis-stated due to the fraudulent conduct of its former directors. No witnesses were called on behalf of the taxpayer.

Held:

The onus of proof upon the taxpayer is a heavy one if he subsequently seeks to show that the return was submitted in error. If the taxpayer cannot rebut the inference that he knew the facts which gave rise to the disputed profit being stated and treated as the taxpayer's profits in his return then he has failed to establish and error for the purposes of section 70A of the Ordinance. The taxpayer has not discharged the onus of proof.

Appeal dismissed.

[Editor's note: The taxpayer has filed an appeal against this decision.**]**

Cases referred to:

D6/91, IRBRD, vol 5, 556
FCT v Hayden [1944] 7 ATD 440 (HCA)
Permanent Trustee Company of New South Wales Ltd v Commissioner of Taxation [1940] 2 AITR 109 (HCA)
Doughty v Commissioner of Taxes [1927] AC 327
D14/88, IRBRD, vol 3, 206
Radio Pictures Ltd v Commissioners of Inland Revenue [1937] 12 TC 106
Carriemore Six Wheelers Ltd v Commissioners of Inland Revenue [1944] 26 TC 301
Robertson v Minister of Pensions [1948] 2 All ER 767
Hoystead v Commissioner of Taxation [1926] AC 155 (PC)

Sun Yau Investment Co Ltd v CIR 2 HKTC 17
D18/88, IRBRD, vol 3, 241
Carriemore Six Wheelers Ltd v Inland Revenue Commissioners [1944] 2 All ER 158
British Commonwealth International Newsfilm Agency v Mahoney [1962] 1 WLR 560
Inland Revenue Commissioners v Falkirk Ice Rink Ltd [1975] STC 444
McGowan v Brown and Cousins [1977] 1 WLR 1403

Doris Lee for the Commissioner of Inland Revenue.
Gordon Fisher instructed by Ernst & Young for the taxpayer.

Decision:

This is an appeal by a company against a determination of the Commissioner in which he refused a request by the company to correct, pursuant to section 70A of the Inland Revenue Ordinance (the Ordinance), an additional profits tax assessment for the year of assessment 1980/81.

The facts as agreed by the parties to this appeal are as follows:

1. The Taxpayer was incorporated as a private limited company in Hong Kong on 4 December 1979. At all material times its paid up capital was $5. At all material times the Taxpayer's shareholders were ABC Limited ['ABC'] and DEF Limited ['DEF'] which were wholly owned subsidiaries of XYZ Limited ['XYZ'] and PQR Limited. T Limited, a service company of the Taxpayer's and XYZ's auditors ['the auditors'], was a shareholder until 24 March 1980 when its share was transferred to PQR Limited ['PQR'].

2. At all material times the Taxpayer's directors were ABC, DEF, PQR, and AJV. T Limited was also a director until 21 March 1980 when it resigned. On this date PQR and AJV were appointed. ABC and DEF were already directors by this date. Each of these companies (save for PQR) was owned and/or controlled by Mr X either through XYZ or otherwise. In the case of PQR, at all material times its two issued shares were held by Mr X and his close associate, Ms Y; and its directors were Ms Y and Mr X. Mr X resigned as director on 16 June 1980 (but shareholdings did not change) and was replaced by ABC, DEF and KLM Limited. Mr X and Ms Y were at all material times the only shareholders and directors of the latter company.

3. In the absence of any profits tax return for the year of assessment 1980/81, the assessor, on 3 November 1981, raised on the Taxpayer the following profits tax assessment for the year of assessment 1980/81, estimated pursuant to section 59(3) of the Ordinance:

Estimated assessable profits	$500,000
Tax payable thereon	$82,500

No objection was lodged against this assessment.

4. On 9 January 1982 the Taxpayer submitted its profits tax return for the year of assessment 1980/81 covering the basis period ended 31 December 1980. This return disclosed assessable profits of $132,881,885.

5. The return for the year of assessment 1980/81 disclosed, inter alia, the following details:

   (a) dividends received of $7,664,464;

   (b) share dealing profits of $182,096,691;

   (c) management and finance fee paid $46,000,000; and

   (d) dividend paid $90,000,000

6. The Auditors Report to the 1980/81 accounts stated that the accounts '… give a true and fair view of the state of affairs of the Company at 31 December 1980 and of the profit and of the changes in financial position for the period ended in that date'. The audit report was not qualified in any way.

7. The assessor accepted the return as lodged and on 15 January 1982 he raised on the Taxpayer the following additional assessment for the year of assessment 1980/81:

	$
Profit per return	132,881,885
Less: Profit previously assessed	500,000
	132,381,885
Tax payable thereon	21,843,011

8. No objection was raised against the additional assessment as set out in the preceding fact and on 16 February 1982 the Taxpayer's time for objecting expired. On 13 April 1982, XYZ paid the tax plus a 5% surcharge of $1,092,150 as levied by notice dated 25 March 1982.

9. On 25 November 1983 three partners of an accountancy firm, were appointed as joint liquidators of XYZ.

10. On 31 March 1987, the solicitors for the Taxpayer and the joint liquidators ['the Solicitors'] requested the assessor, inter alia, to correct an error or mistake in the return for the year of assessment 1980/81 pursuant to section 70A of the Ordinance.

11. The basis of the Taxpayer's claim as set out in the Solicitors' letter of 31 March 1987 can be summarised to the effect that the profits of the Taxpayer had been mis-stated due to the fraudulent conduct of its former director, Mr X, acting in breach of his fiduciary duty to the Taxpayer. The letter enclosed certain documentary evidence which, according to the solicitors, showed that the profits in question were fictitious and had been fraudulently and falsely declared to the Inland Revenue Department. It went on to say that Mr X later caused the tax which was assessed on the fictitious profits to be paid by XYZ to maintain the illusion.

12. By letter dated 2 May 1987 the assessor asked the Solicitors whether any charge or complaint (of a criminal nature) had been made against the auditors. On 17 May 1987 the Solicitors replied that to their knowledge there were none.

13. In 1987, the Taxpayer and XYZ filed a High Court Action ['the High Court Action'] against the auditors for negligence. The Taxpayer complained that the auditors were negligent in their audit of the Taxpayer's 1980 accounts in that they reported without qualification such accounts to be true and fair when the Taxpayer's 1980 Profits and Loss Account purporting to show net profits before tax of $140,546,349 was incorrect insofar as it overstated the profit by an amount of $101,688,640.10, that is, the disputed profit. Judgment in the Action and on the auditors' counterclaim was delivered on 15 January 1994.

14. Except for the Taxpayer, the disputed profit was not included in the accounts of any other company of the group, including ABC, and none of these companies has paid tax in respect of this profit.

At the hearing of this appeal the Taxpayer and the Commissioner were represented by counsel.

On behalf of the Taxpayer counsel made the following submission:

1. Preliminary

1.1 The appeal concerns section 70A of the Ordinance (Chapter 112) and relates to the Taxpayer's 1980/81 year of income. Specifically, the appeal is concerned with the meaning of 'error' in section 70A(1) of the Ordinance and in the phrase:

'…if… it is established to the satisfaction of an assessor that the tax charged for that year is excessive by reason of an error … in any return or statement submitted in respect thereof … the assessor shall correct such assessment.'

The proviso to section 70A(1) of the Ordinance is not a matter for contention in the appeal.

1.2 It is submitted that if an error be found, factually, to have occurred, that is to say, if it can (on a reasonable basis) be relevantly established to the satisfaction of an assessor that the tax charged was excessive, then section 70A(1) mandates that the assessment be corrected; see D6/91, IRBRD, vol 5, 556.

1.3 It is further submitted that, in the present case, what the Taxpayer has to demonstrate in order that it can be said that the assessor, again in the present case, was wrong, pursuant to section 70A(2) of the Ordinance, in refusing to correct the Taxpayer's assessment on account of the asserted 'error', is as follows. The Taxpayer must demonstrate:

(a) that there were profits which were included in the Taxpayer's assessment for the year of assessment 1980/81;

(b) that those profits ('the disputed profits') ought not to have been therein included; and

(c) that (a) occurred despite (b) and in circumstances where (a) was occasioned by an error in the Taxpayer's return.

In such an event as (c), then section 70A(1) operates and the assessor ought to have corrected the Taxpayer's assessment for the year of assessment 1980/81.

2. Ambit and Rationale behind Section 70A of the Ordinance

2.1 As to the ambit/meaning of section 70A of the Ordinance, see the decision in Case D6/91, IRBRD, vol 5, 556. It is submitted that the 'error' in the present case is an error of fact: 'a wrong supposition as to a fact is a mistake of fact': see FCT v Hayden [1944] 7 ATD 440 (HCA); and Case D6/91: section 70A covers 'of law **or** fact'.

2.2 Section 70A deliberately creates an exception to the finality and conclusiveness of section 70 of the Ordinance in that, in presently relevant

terms, it permits the corrections of errors (and omissions) in assessments, generally within 6 years. The section is intended to cover errors (and omissions) made by a taxpayer in any return or statement made by him **which, if it had not been made, would have resulted in a reduced original liability to tax.**

2.3 Therefore, it is submitted that section 70A recognises that, statutory deeming provisions aside, a man is not taxed on income which was neither his nor which was never received by him. Indeed, it is submitted that the rationale and logic behind section 70A goes even further than the well-recognised maxim that 'for income tax purposes, receivability without receipt is nothing.' See Permanent Trustee Company of New South Wales Ltd v Commissioner of Taxation [1940] 2 AITR 109 (HCA).

2.4 Entirely consistent with the foregoing is the proposition that the Crown/Commissioner 'is not entitled to take a mere bookkeeping entry as conclusive evidence of the existence of a taxable profit.' Indeed, that is what section 70A is intended to contra-demonstrate. See Doughty v Commissioner of Taxes [1927] AC 327. See also at paragraph 3.3 below.

3. Status of Accounts

3.1 Accounts are not definitive: see Case D14/88, IRBRD, vol 3, 206.

3.2 Where accounts are properly prepared, and profits are returned for taxation, the onus of proof upon the taxpayer is a heavy one if he subsequently seeks to show that the return was submitted in error: see Case D14/88. It is submitted that no such 'heavy' onus lies upon a taxpayer whose accounts were not properly prepared. It is permissible and proper to rewrite accounts where the same have been prepared otherwise than in accordance with sound commercial accounting principles, for example, negligently: Case D14/88.

3.3 The rights of the Crown/Commissioner do not depend upon the bookkeeping of the taxpayer; **nor** can a taxpayer's liability be made to depend upon his system of accounts, or the entries made therein: see Gunn's Commonwealth Income Tax Law and Practice, at paragraph [33]. See, also, at paragraph 2.4 above.

4. What is an Error?

4.1 An error is something done incorrectly through, for example, ignorance or inadvertence; a mistake in judgement, action, etc. Also, the holding of mistaken notions or beliefs: see Oxford English Dictionary, at entry: 'Error' 3 and 4.

4.2 'Error' (mistake) is thus to be contrasted with an action which is wrongful, wilful, false, reckless and/or improper. An 'error' (mistake) can be deliberate,

in the sense that maker thereof is conscious of his actions – provided that he does not do the act with the intention of obtaining a material advantage by wrongful means. See Osborn's Concise Law Dictionary, at entries: 'fraud' and 'misfeasance'.

4.3 As to deliberate 'errors', in the sense of the makers thereof being conscious of their actions: see Radio Pictures Ltd v Commissioners of Inland Revenue [1937] 12 TC 106; and Permanent Trustee Company of New South Wales Ltds v Commissioner of Taxation.

4.4 The decision in Carriemore Six Wheelers Ltd v Commissioners of Inland Revenue [1944] 26 TC 301, is no authority whatsoever on the question of the relevance or otherwise of 'deliberateness' in the context of 'error'. And see: Whiteman & Wheatcroft on Income Tax, at paragraph 23-27.

5. The Crown and Estoppel

5.1 Estoppel binds the Crown/Commissioner; any such doctrine 'has long been exploded': Robertson v Minister of Pensions [1948] 2 All ER 767. See, also, Hoystead v Commissioner of Taxation [1926] AC 155 (PC).

5.2 In the present case, it is submitted that the Commissioner is estopped from denying that the factual findings of the Judge in the High Court Action are true – insofar as those factual findings bear upon the matters the subject of the within appeal: see Halsbury's Laws of England, vol 16, 4th edition, at paragraph 951; and Words & Phrases Legally Defined, under the entry: 'Estoppel' (and, specifically, under the subheading 'Issue estoppel').

Counsel for the Taxpayer referred us to the judgment in the High Court Action, which he said was not binding on the Board but constituted evidence before the Board. He pointed out that the Commissioner had been made a party to those proceedings. He submitted that the Commissioner was estopped from denying the truth of what the judge had found in the High Court Action. (Counsel for the Commissioner challenged the role which the Commissioner had played in those proceedings.) Counsel for the Taxpayer quoted at length from the judgment and submitted that the judge had found as a matter of fact that the disputed profit did not exist. Counsel said that the judge found that the auditors of the Taxpayer had been negligent. However in assessing damages the judge had to ascertain to whom they were responsible. In the end they were responsible to Mr X who knew all about everything and therefore did not suffer any loss.

Counsel for the Taxpayer said that the judge found that he had no jurisdiction to decide whether the Taxpayer had been properly assessed to tax which was a question for this Board alone to decide. However the judge had clearly and forcefully found as a fact that the Taxpayer had not made the disputed profit. He had found this after hearing lengthy evidence in a case which had lasted for six weeks. Counsel submitted that in the interests of

justice and public policy it would not make sense to call again the same witnesses to prove the same matters.

No witnesses were called before this Board of Review to give evidence on behalf of the Taxpayer.

Counsel for the Commissioner made the following submission:

On 9 January 1982, the Taxpayer furnished a profits tax return which disclosed an assessable profit for the period 4 December 1979 to 31 December 1980 of $132,881,885. Accompanying the return and forming part of it, were the Taxpayer's accounts for the basis period. Stated as income in the Profit and Loss Account and brought into the computation of assessable profit was $182,096,691 stated as the 'profit on the sale of quoted shares'.

Pursuant to section 59(2)(a) of the Ordinance, the assessor accepted the return and assessed the Taxpayer by way of an additional assessment to tax of $21,843,071 which assessment became final.

Of the profit on the sale of quoted shares of $182,096,691, the Taxpayer by this appeal now claims that $101,688,640 (the disputed profit) whilst a profit on the sale of quoted shares was not a profit made by him and should not have been brought in to the computation of assessable profit. The fact that it was, it is said amounts to an error in the return by reason of which the tax charged for that year of assessment is excessive by the proportion of which the tax element in the disputed profit bears to the tax element of the assessable profit.

THE CONDUCT OF THE APPEAL

Section 68(4) of the Ordinance provides that the onus of proving that the assessment appealed against is excessive is upon the Taxpayer. Within the context of this case, it is submitted that the burden is particularly high not least because the Taxpayer is now saying that there was an error but calling no primary evidence in support, in spite of the fact there is evidence that if those who controlled the Taxpayer at the time were to give evidence, they would say that there had been no error at all.

Further it is submitted the Board should treat the findings of the Court in the High Court Action with some degree of circumspection. That is not to say the findings are not important and may be adopted if they correspond with the conclusion of the Board but the issue the Court had to resolve, namely whether the Auditor was negligent, was completely different from the issue raised by this appeal, as indeed were the evidential criteria. By way of example in the High Court, when the Auditor said that Mr X had told him the disputed profit was the Taxpayer's it was evidence only to establish that the conversation had taken place. By section 68(7) of the Ordinance, no such constraints apply to the Board who could accept the evidence as establishing the disputed profit was the Taxpayer's.

IDENTIFYING AN ERROR

The quoted shares the sale of which are said to have made the disputed profit were shares in a publicly listed company which was a company within the Group and the only publicly listed company of the Group. The shares had been purchased in the name of ABC a subsidiary of XYZ. The Taxpayer was a wholly owned subsidiary of ABC who at all material times was also his director. ABC through its director Mr Z by resolution passed at an adjourned annual general meeting adopted the Taxpayer's Accounts and signed the profits tax return as true and having … 'disclosed the whole of the assessable profit arising during the basis period for the year of assessment.'

By section 51(5) of the Ordinance any person signing the return which by definition also includes the Accounts … 'shall be deemed to be cognizant of all matters therein.' For the purposes of this appeal the effect of the provision is that if the disputed profit had not been made by or on behalf of the Taxpayer the Board must find that this was within the knowledge of the Taxpayer. It must also follow that the insertion of the disputed profit into the Taxpayer's Accounts and the statement that it was the Taxpayer's profit was deliberate rather than in error.

It is not any error in a return which should allow for the correction of an assessment pursuant to section 70A of the Ordinance. In Sun Yau Investment Co Ltd v CIR 2 HKTC 17 at page 21, it was said … 'The assessor is not in error, let alone mathematical error simply because his assessment does not coincide with a figure he would have reached had other information been available to him.' It is submitted that establishing the Taxpayer was in error is no more than a first step and it is the reasons that gave rise to the error which determine whether or not the tax charged was excessive.

In D18/88 the proceeds of the compulsory acquisition of land from a taxpayer were stated as trading profits in his accounts. It was said that there had been a mistake in the preparation of the accounts and the land had been held by the taxpayer as a long term investment. The Board said … 'They asked that the mistake be rectified under section 70A. No further explanation was given to us. We agree with the statement of the Chairman in another case … in Inland Revenue Appeal No 2 of 1985 that … "if the taxpayer wishes to challenge the accuracy of its own audited statements and tax declarations made by a director, it is not sufficient to say that … a mistake was made … Evidence to substantiate the mistake must be given in the strongest terms." No such evidence and no explanation was given to us as to how the mistake came to be made even though the accountant appeared before us as the taxpayer's representative.'

The point has already been made that there is no primary evidence in this appeal. Those who could have given an explanation Mr X, Mr Z, and others have not been called to say whether there was an error and if so how the mistake came to be made. If the disputed profit was not made by or on behalf of the Taxpayer it is submitted the Board could not consider whether or not the appeal should succeed without an explanation as to why the disputed profit was stated by it as its profit.

The High Court's finding that the auditors had been negligent in their preparation of the Taxpayer's accounts is not an error for the purposes of this appeal, however synonymous negligence may be with error, omission or mistake. The Taxpayer's case in the High Court Action against its auditor was by negligently failing to raise with the management of the Taxpayer and his parent XYZ, the need to qualify the 1980 Accounts by certifying instead that the same gave a true and fair view of their state of affairs and profits when they plainly did not do so, the auditors caused loss to the Taxpayer inasmuch as tax was assessed and paid on the disputed profit when the same was not in fact due. In the Judgement the Court found that the auditors had acted negligently towards the Taxpayer and by certifying the group accounts of XYZ which included the Taxpayer's Accounts as true and fair and likewise been negligent to them. It was XYZ that had actually paid the profits tax.

However the High Court awarded the Taxpayer nominal damages of $1 and ordered them to pay the auditors costs because the High Court found that if the auditors were negligent or otherwise in breach of duty or contract vis a vis the Taxpayer such conduct did not give rise to the payment of profits tax based upon the disputed profit. The High Court said:

> It is noteworthy that the ultimate victim of the Defendant's breach of duty did not give evidence. Being the living embodiment of each Plaintiff, Mr X could not conceal anything from himself or defraud himself. He was not misled by the Defendant's report on the 1980 Accounts of the Taxpayer. Put another way, there was no evidence to this effect. The one controlling beneficial owner already possessed full knowledge and information which it was the purpose of the statutory audit so to provide him.
>
> The Defendants say that Mr X had already given effect to his intention to inject the disputed profit into the Taxpayer prior to the signing of the auditor's report on 8 January 1982. There is no evidence to show that he would have reversed the injection if the Defendants were to have qualified their auditor's report on the Taxpayer's 1980 Accounts.'

ERROR

Whatever the facts are found to be if the Taxpayer cannot rebut the inference that he knew the facts which gave rise to the disputed profit being stated and treated as the taxpayer's profits in his return then he has failed to establish an error for the purposes of section 70A of the Ordinance.

In D18/88 the Board said

> *'In the present case, the taxpayer prepared it's accounts which were duly audited and approved and a tax return was filed with the assistance of professional advisers in which an officer of the taxpayer made a declaration that the return was correct. Some years later with the advice of a different tax*

adviser, the taxpayer decided that it should reclaim tax paid and sought to invoke the provisions of section 70A. In cases of this nature we would normally expect the Taxpayer and it's previous tax adviser to appear and give evidence specifically on the question of the nature of the error or omission which was made. If the error was that the taxpayer now took a different view for tax purposes of known facts, we would doubt whether or not such a change of opinion would constitute an error within section 70A.'

In the instant case if the Taxpayer knew the facts which lead him to state the disputed profit as his then for the purposes of this appeal he is doing no more than taking a different view for tax purposes of known facts. In Carriemore Sixwheelers Ltd v Inland Revenue Commissioners [1944] 2 All ER 158, where a taxpayer deliberately and for his own purposes was in error in the treatment of a receipt for tax purposes was held not to be an error allowing the correction of an assessment. And this was echoed in the High Court Action in the Judgment … 'If the Taxpayer deliberately chose to attribute the disputed profit so as to secure fiscal advantage for the Group, then it is a moot point whether the same fall to be considered an error or omission within the meaning of the section, so as to entitle the Taxpayer to claim a repayment of the overpaid tax.'

It is submitted that in the instant case there is an overwhelming inference that as part and parcel of a fiscal stratagem involving the Group the Taxpayer deliberately attributed the disputed profit to itself, XYZ paying the tax incurred thereby.

The ultimate holding company of ABC, the Taxpayer and F Limited was XYZ Nominee, through it's wholly owned subsidiary, XYZ. The Taxpayer was, and F Limited to all extents ad purposes was the wholly owned subsidiary of ABC. All the companies in the Group were owned and controlled by one man, Mr X who also through nominees held a controlling interest in the publicly listed flagship of the Group whose shares were the subject matter, the sale of which made the disputed profit.

The legal consequences of Mr X's ownership and control was that he was in substance each of the Group of companies and that his authority to act on behalf of each company was comprehensive. Moreover, up to the (early) 1980 Mr X had been an alternate director of ABC who were one of the corporate directors of the Taxpayer.

One of the principal activities of XYZ, ABC and the Taxpayer were share dealing and the shares or investments concerned almost exclusively the shares of the publicly listed company within the Group.

Counsel for the Commissioner then referred us in some detail to those parts of the Judgment in the High Court Action which he considered to be relevant but which in the interests of brevity, we do not set out in the decision.

Having taken us through the Judgment in the High Court Action in some detail counsel for the Commissioner summarised his case by saying that without an explanation from Mr X himself, the Board is left in a situation that it cannot be sure of what had really

happened and that the Taxpayer had failed to establish that the disputed profit was not made on its behalf.

Counsel for the Commissioner then pointed out that the only Accounts stating the disputed profit are the Taxpayer's. The disputed profit does not appear in the books or accounts of ABC and was not brought into their computation for profits tax. If it had appeared in ABC's profit and loss account, it would have been exigible to tax.

Counsel for the Commissioner also referred us to the following cases:

British Commonwealth International Newsfilm Agency v Mahoney [1962] 1 WLR 560

Inland Revenue Commissioners v Falkirk Ice Rink Ltd [1975] STC 444

McGowan v Brown and Cousins [1977] 1 WLR 1403

Having set out at some length the submissions made before us by counsel for the Taxpayer and counsel for the Commissioner we can now proceed to decide the case. This case is a dichotomy each part of which is deceptively simple. On the one hand we have a clear case like many previous ones where a Taxpayer appears to have changed its mind for tax purposes and wants to walk away from its audited accounts and tax return. The Taxpayer is a private limited company having its own existence and entity. It is different and independent from all and any other companies. It may be part of a large and complex group of companies but that is not relevant for taxation purposes in Hong Kong. Apparently the directors of the Taxpayer decided that it should participate in share trading activities. In the event it made a substantial profit from share trading and the profit was included in its accounts, the profit was audited by its auditors, its tax return was prepared, and the tax return was duly filed with and accepted by the Commissioner of Inland Revenue. That should have been an end of the matter and no further questions should have arisen.

The Taxpayer became embroiled in the affairs of the group of companies of which it was a part. Liquidators of the group took over the affairs of the Taxpayer although the Taxpayer was solvent and not placed in liquidation. As the Taxpayer was a subsidiary of other companies in the group which were insolvent the liquidators as part of their duties assumed responsibility for and took over control of the Taxpayer. They reviewed the accounts of the Taxpayer and apparently decided that on the facts and evidence before them it was possible to challenge the profit made by the Taxpayer. It would appear that the reason for challenging this profit was to try to recover the tax paid from the auditors of the Taxpayer in a negligence suit. The auditors then joined the Commissioner of Inland Revenue as a third party in the proceedings by making the Commissioner a defendant in proceedings which took place at the same time as the claim for negligence.

A High Court judge heard evidence with regard to the claim for negligence against the auditors of the Taxpayer. The judge was persuaded by the evidence to form the view that the Taxpayer had not made the profit in question. However the judge was not

disposed to grant more than nominal damages against the auditors and declined to make any order with regard to the proceedings brought against the Commissioner of Inland Revenue for a refund of the tax paid.

As we have said this case is deceptively simple depending upon where you start to look at the facts. Without the High court judgment it is quite clear to this Board that the claim by the Taxpayer would have no substance whatsoever. On the other hand if one is to read into the judgment of the High Court what the liquidators who now control the Taxpayer would like us to do, then the claim by the Taxpayer to re-open the assessment would be valid. Clearly both points of view cannot be correct. What we must now do is to analyze the situation on the basis of the evidence before us and come to a reasoned decision based on both law and fact. This we will now do.

The judgment in the High Court Action is some 110 pages long. The conclusion of the judge so far as it concerns us is short and to the point. He said that the disputed profit did not form part of the trading profit of the Taxpayer for the 1980 period. He said that he found the auditors to have been negligent and in breach of their contractual and statutory duty in the audit of the Taxpayer's 1980 accounts and in certifying the Taxpayer's audited account for that period as being true and fair. The judge then finds that no loss flowed from the breach of duty by the auditors and awarded nominal damages against them of $1.

The High Court Action included a claim by the auditors against the Commissioner of Inland Revenue. The auditors sought an order from the judge directing the liquidators to pursue a claim by the Taxpayer against the Commissioner for repayment of the tax paid and that the Taxpayer prosecute an appeal to the Board of Review with due diligence with regard thereto. The judge in the High Court Action simply dismissed the counter claim in its entirety. However before doing so he carefully considered the matters before him. He went into the scheme of the Ordinance with regard to the jurisdiction of the High Court and he found as a matter of law that the High Court has no jurisdiction to entertain appeals with regard to taxation matters that have not come via the Ordinance from the Board of Review. He said that the statutory provisions state that once an assessment to tax has been made, changes thereto can only be made following the procedure laid down by the Ordinance. If an objection by a Taxpayer is not upheld by the Commissioner, the only recourse of the Taxpayer under the Ordinance is to lodge an appeal with the Board of Review. He said that the only where an appeal is transferred to the High Court under the provisions of section 66 of the Ordinance or where there is an appeal from the Board of Review's decision by way of case stated on a point of law can the High Court have any jurisdiction in the matter. He summarised what he had said in the following words:

> 'Put another way, the High Court is not made a primary fact-finding tribunal for the purposes of determining the correctness of tax assessments.'

He went on to say the following:

> 'The Legislative intent is plain that the Board should adjudicate finally on all matters of fact properly brought before it. The above statutory provisions have the effect, in my judgment, of establishing in the Ordinance a comprehensive code for deciding all disputes arising from a tax assessment, conferring in the process exclusive primary jurisdiction upon the Board of Review to determine such dispute on the facts.'

The judge considered what would be the position if he did have jurisdiction. He pointed out that matters of taxation had not been fully or comprehensively canvassed before him and said:

> 'If (the Taxpayer) deliberately chose to attribute the disputed profit to itself so as to secure fiscal advantages for (the group) then it is a moot point whether the same fell to be considered an error or omission within the meaning of the section so as to entitle (the Taxpayer) to claim a repayment of the overpaid profits tax. There is much relevant case law on the point.'

The judge referred to a number of cases which he said had not been fully ventilated and argued before him and to avoid prejudicing this Board of Review he declined to express any view on the matter.

Finally the judge in the High Court Action pointed out that the evidentiary rules which govern the Board of Review are different and much laxer than those which apply to the High Court. He pointed out that the Board is empowered to admit or reject any evidence adduced, whether in an oral or documentary form, including his own judgment which he assumed would be placed before us when the appeal was heard by us.

We are much indebted to the judge in the High Court Action for the very careful and thorough way in which he dealt with the many complex issues before him. He could not make it clearer that the matter now before us is for our decision and our decision alone. We may refer to his judgment as evidence but it is no more than that. It is in no way binding on us and is just one of the many pieces of evidence which we must carefully consider.

We are a taxation tribunal and what we are now required to adjudicate is whether or not the Commissioner was right in upholding a decision by an assessor who refused to correct an assessment in accordance with an application made to him under section 70A of the Ordinance.

Section 70A confers a power on an assessor within six years of the tax year in question to correct his original assessment if satisfied that the same is excessive 'by reason of an error or omission in nay 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 profit assessed or in the amount of the tax charged'.

So far as we are concerned the relevant part of section 70A relates to an error claimed to have been made in a return filed with the Commissioner and the audited accounts filed in support thereof. What we must do is to look at the tax return and the audited accounts file therewith and see whether or not, for taxation purposes, there was an error.

We find it hard to identify any such error. We ask ourselves what is the error which it is claimed has been made in the tax return and accounts submitted therewith.

We remind ourselves that the onus of proof in taxation matters that come before us is squarely laid upon the Taxpayer by virtue of section 68(4) of the Ordinance.

In a nutshell the liquidators of a holding company came to assume control over the affairs of the Taxpayer long after the relevant time. They investigated the affairs of the Taxpayer and formed the opinion that the Taxpayer had incorrectly shown the disputed profit as being a profit made by it. Having come to this conclusion they then embarked upon a complex civil claim in negligence against the auditors of the Taxpayer in a forlorn attempt to recover from the auditors, inter alia, certain tax which had been paid on behalf of the Taxpayer by another group company. The fruit of their efforts was an award of damages of $1. The liquidators, having control of the Taxpayer, now come before this tribunal in a further attempt to recover the tax which was paid.

It is well known that there is no equity in taxation matters. It is likewise well known that persons can arrange their affairs as they wish for taxation purposes so long as they keep within the provisions of the Ordinance and its subsidiary legislation. The Commissioner has very limited power, if any, to interfere in the way that a person conducts his affairs for tax purposes. It is well known that for taxation purposes a profit can be ‘transferred’ from one person to another. The Commissioner is given powers under section 61, and 61A of the Ordinance to disregard certain matters or, in the case of section 61A, otherwise vary the effect of what the Taxpayer has done.

It seems to us that the Taxpayer when it filed its tax return in January 1982 did not make an error within the meaning of section 70A of the Ordinance. On the face of the tax return and the accounts submitted therewith, those then having the control of the affairs of the Taxpayer made a deliberate decision for the purpose of the Ordinance to attribute a profit to the Taxpayer. It may be that by so doing those concerned were being fraudulent or otherwise acting improperly. That is not our concern. There is nothing in the Ordinance which suggests that only profits which are made lawfully or legitimately are liable to be assessed to tax. It is not within our jurisdiction to express views on whether or not Taxpayers behave properly. Our jurisdiction is to decide what, if any, tax should be paid.

It appears to us that if the Taxpayer now wishes to establish that what it did before was an error within the meaning of the Ordinance, then the only persons who are in a position to give evidence to establish this as a matter of fact would be those who carried out the transaction at the time and who are alleged to have made the error in the first place. We find it very significant that no attempt has been made to call before us to give evidence any of those persons who would have been able to say quite simply and easily, yes an error was

made, or no an error was not made. Mr X could have been called to give evidence. Likewise those associated with him at the time could have been called to give evidence. No explanation was offered as to why none of these very relevant witness were called before us.

In the course of his submissions, counsel for the Commissioner pointed out to us that no other company within the group of which the Taxpayer was a member had claimed that the profit had been made by it. We would find the claim now being pursued by the group liquidators in the name of the Taxpayer to be much stronger, if as part of their explanation for the alleged error, they had been able to draw our attention to another company or person who had filed a tax return showing the same profit as taxable and assessable. What we have is a claim for a refund of tax on the basis that the Taxpayer did not make the profit but we have no suggestion as to who did make the profit. Not unnaturally the Commissioner would feel aggrieved if we were now to find as a fact for the purposes of the Ordinance that the affairs of the group in question can be rearranged for taxation purposes long after the event and by people who had no personal knowledge of what took place at the time.

For the reasons given we find that the Taxpayer has not discharged the onus of proof placed upon it by the Ordinance and has not established to our satisfaction that an error was made within the meaning of section 70A of the Ordinance. According this appeal is dismissed.