Case No. D91/02

Salaries tax – application under section 70A of the Inland Revenue Ordinance ('IRO') for correction of the assessment – intention of section 70A of the IRO – powers of assessor to correct errors – what sort of error envisaged by section 70A – whether that error on the part of the assessor constituted an arithmetical error or omission in the calculation of the amount of the assessable income within the meaning of section 70A – erred in construing the word 'entitled' as 'paid' is not the sort of error envisaged by section 70A – laxity on the part of the appellant in processing its case – repeated opportunities to rectify the error – failed to properly exercise his rights to challenge the assessment under sections 64(1) and 66 of the IRO – sections 9A(1), 51(1), 59(2), 64(1), 66, 68, 70 and 70A of the IRO.

Panel: Ronny Wong Fook Hum SC (chairman), Ng Yook Man and Ronald Tong Wui Tung.

Date of hearing: 17 August 2002.
Date of decision: 27 November 2002.

The appellant was employed by Company A, a company incorporated in Hong Kong on 20 July 1984 and became a public company on 27 November 1991, as an executive director for a period of three years from 1 January 1989 to 31 December 1991.

Between 1991 and 1996, Company B, a company incorporated on 20 June 1990, was appointed to act as consultant to Company A respectively under three contracts of different durations. The appellant was appointed director of Company B since 5 September 1990.

The relationship between Company A and the appellant or Company B turned sour in the final quarter of 1996. Company A allegedly made their last payment on 4 November 1996. Litigation ensued between Company A and Company B.

By various assessments between 14 March 1997 and 29 June 1998, the appellant was assessed salaries tax as well as additional salaries tax for the years of assessment 1990/91, 1991/92 to 1994/95 and 1996/97. The Commissioner invoked section 61A of the IRO. The service fees paid by Company A to Company B were treated as income of the appellant.

The appellant, through different tax representatives at different periods, objected to these assessments. However, the appellant failed to conduct his case with due attention. It was poorly and inefficiently handled.

Ultimately, by a determination dated 29 September 2000 ('the September 2000 Determination'), the Commissioner confirmed the assessments levied against the appellant for the years of assessment 1990/91 to 1996/97.

By notice dated 4 December 2000, the appellant wrote to the Board protesting against 'the oversight of Inland Revenue Department on the assessment and the review of the year 1996/97'. He applied to the Board on 13 March 2001 for extension of time to give notice of appeal against the September 2000 Determination. By its decision dated 11 April 2001, the Board (differently constituted) refused the appellant's application.

On 20 June 2001, the appellant filed an application under section 70A of the IRO for correction of the assessment for the year of assessment 1996/97. The assessor refused to correct the assessment on 13 July 2001. By a determination dated 2 May 2002 ('the May 2002 Determination'), the Commissioner confirmed the refusal of the assessor. This appeal related to the appellant's challenge against the May 2002 Determination.

However, the appellant was wholly unprepared at the hearing on 17 August 2002. The Board granted him permission to submit a written closing submission after the hearing. This he did on 28 August 2002. The Revenue submitted their reply on 31 August 2002.

Held:

1. The relevant provisions in the IRO are contained in sections 9A(1), 51(1), 59(2) and 64(1) of the IRO.

2. Section 66 of the IRO provides that any person who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may appeal to the Board of Review.

3. Section 68 of the IRO regulates the hearing and disposal of appeals before the Board of Review.

4. Section 70 of the IRO provides for the circumstances under which the assessments or amended assessments are to be treated as final and conclusive.

5. Section 70A of the IRO provides for the circumstances under which an assessor is empowered to correct errors.

6. The intention of section 70A of the IRO was not to enable matters to be re-opened at the whim of the taxpayers. It was an emergency provision to protect the rights of

taxpayers where a genuine mistake has been made (see D3/91, IRBRD, vol 5, 537 at 541).

7. A taxpayer must establish that the tax charged for the relevant year of assessment is excessive by reason of either:

   (a) an error or omission in any return or statement submitted in respect thereof; or

   (b) an arithmetical error or omission in the calculation of the amount of the assessable income.

8. In relation to an error or omission in any return or statement submitted, the error or omission must be in the return or statement submitted by a taxpayer (see D93/89, IRBRD, vol 6, 342).

9. In respect of both limbs 7(a) and (b) aforementioned, an error or omission must be established:

   (a) The meaning of 'error' as defined by the Oxford English Dictionary has been judicially approved by Chan J (as he then was) in Extramoney Limited v Commissioner of Inland Revenue 2 HKTC 394. It means 'something incorrectly done through ignorance or inadvertence; a mistake'.

   (b) A deliberate act in the sense of a conscientious choice of one of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for cannot be regarded as an error within section 70A (see Extramoney Limited v Commissioner of Inland Revenue at 429).

   (c) The deliberate act may be the act of the taxpayer. There was therefore no error or omission if rectification was sought on the basis of:

      (i) a change of opinion of the auditors or accountants in respect of the accounts;

      (ii) a change of mind of the directors of the company in connection with how any part of the accounts should be made up; and

      (iii) different treatment of certain items in the accounts by those preparing or approving the accounts.

(See Extramoney Limited v Commissioner of Inland Revenue at 429).

(d) The deliberate act may be the deliberate and conscious act on the part of the assessor (see D25/01, IRBRD, vol 16, 224). For this reason, the mere fact that an estimated assessment does not coincide with a figure that the assessor would have reached had other information been made available to him does not constitute an error (see Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17).

(e) It did however cover the case where:

(i) it can be proved that the profits stated in the accounts of a taxpayer had in fact not been made although each case must be considered in its own factual matrix (see Extramoney Limited v Commissioner of Inland Revenue at 429);

(ii) there has been a miscasting by the assessor on the material available to him (see Sun Yau Investment Co Ltd v Commissioner of Inland Revenue at 21).

10. The appellant contended that the assessment for the year of assessment 1996/97 should be corrected by reason of error(s) in:

(a) the 1996/97 Return;

(b) the 1996/97 Assessment; and

(c) the September 2000 Determination.

11. In relation to the 1996/97 Return:

(a) The appellant said that he was not aware of section 9A of the IRO when he submitted the 1996/97 Return on 26 June 1997. It was therefore not a deliberate and conscientious decision on his part not to include in the 1996/97 Return the amount of $581,000 which he received from Company A.

(b) The Board rejected this submission of the appellant. Through Accountants' Firm E, the appellant challenged the Revenue's stance of 'disguised employment' on 26 March 1997 in relation to the year of assessment 1990/91. The appellant must have been aware of the issues involved when taking that stance. There was no material difference between the years of

assessment 1990/91 and 1996/97. In any event, ignorance of the law was no defence.

12. In relation to the September 2000 Determination:

(a) Accountants' Firm G and the appellant did not see fit to comment on the draft statement of facts prepared by the Revenue which formed the basis of the September 2000 Determination. The Board deplored the laxity on the part of the appellant. His present predicament was largely the product of his failure to attend timeously to his own fiscal affairs.

(b) The Board's observation in subparagraph (a) above did not detract from the fact that the September 2000 Determination was based on the erroneous factual assumption that $996,000 was **paid by Company A to Company B** for the year ended 31 March 1997.

(c) As a result of the decision of the Board dated 11 April 2001, no valid appeal had been lodged by the appellant against the September 2000 Determination. By virtue of section 70 of the IRO, the 1996/97 Assessment 'shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income'.

(d) It had however been pointed out by the Board in BR5/71, IRBRD, vol 1, 30 that notwithstanding the provisions of section 70 the assessment may be corrected in cases of certain errors or omissions with section 70A of the IRO.

13. In relation to the 1996/97 Assessment:

(a) The Revenue said that the 1996/97 Assessment was an estimated assessment made pursuant to section 59(2)(b) of the IRO. The 1996/97 Assessment was therefore a deliberate and conscientious decision on their part. On the basis of Sun Yau Investment Co Ltd v CIR, the Revenue argued that there was no error which called into play section 70A.

(b) The Board found it difficult to accept this case of the Revenue. The 1996/97 Assessment made express reference to section 9A and not section 59(2)(b) of the IRO. The Revenue submitted that their reliance on the latter provision was implicit. The Board disagreed. Section 9A provided that the remuneration shall be treated as being received by the relevant individual 'at the time that it is **paid** … to the corporation'. This was a question of fact. It did not involve any estimation on the part of the assessor.

(c) The following heads of evidence lent further support to this view:

(i) The notation in the 1996/97 Assessment referred to $996,000 'received' through Company B. The assessor did not say 'estimated to have been received' through Company B.

(ii) By their letter dated 11 June 1999, the assessor asked Accountants' Firm G to reconcile an alleged inconsistency on the basis of Company A's alleged report that '$996,000 **was paid** to [Company B] for the year 1996/97' (emphasis supplied).

(iii) The Board had not seen the draft statement of facts sent by the Revenue to Accountants' Firm G and the appellant on 11 June 1999 and 5 November 1999. The Board had little doubt that the draft proceeded on the basis that $996,000 was paid by Company A to Company B. It was probable that this accounted for inaccuracy in paragraph 1(6)(c) of the September 2000 Determination.

(d) Given the circumstantial evidence outlined above, it was incumbent upon the Revenue to give evidence to support its contention that the 1996/97 Assessment was the outcome of an estimation on their part pursuant to section 59(2) of the IRO. The Revenue placed no such evidence before us. The Board found on a balance of probabilities that the 1996/97 Assessment was not based on any estimation but on an erroneous reading of the response from Company A dated 10 October 1997.

14. The error so found by the Board was not an error or omission in any return or statement submitted in respect thereof. The question was whether that error on the part of the assessor constituted an arithmetical error or omission in the calculation of the amount of the assessable income within the meaning of section 70A. The Board had borne in mind the propositions that it outlined in paragraph 9(e) above. Those propositions must however be viewed in the context of the express wordings in section 70A. Bearing in mind the wordings in question, the Board did not think the error was within the meaning of that section. No mathematic was involved. The assessor did not perform any calculation. He simply erred in construing the word 'entitled' as 'paid'. This was not the sort of error envisaged by section 70A.

15. The appellant had repeated opportunities to rectify this error. He did not properly exercise his rights to challenge the 1996/97 Assessment under sections 64(1) and 66 of the IRO. Had he properly exercised those rights, it would have been

apparent to all concerned that this was not a case of no payment but a case of delayed payment.

Appeal dismissed.

Cases referred to:

D3/91, IRBRD, vol 5, 537
D93/89, IRBRD, vol 6, 342
Extramoney Limited v Commissioner of Inland Revenue 2 HKTC 394
D25/01, IRBRD, vol 16, 224
Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17
BR5/71, IRBRD, vol 1, 30

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer represented by his tax representative.

Decision:

Background

1. Company A is a company incorporated in Hong Kong on 20 July 1984. It became a public company on 27 November 1991.

2. By an agreement dated 30 December 1988 ('the 1988 Agreement'), the Appellant was employed by Company A as an executive director for a period of three years from 1 January 1989 to 31 December 1991. The 1988 Agreement provided that the Appellant would be paid remuneration of $300,000 per annum or such higher amounts that might from time to time be agreed between the parties.

3. Company B is a company incorporated on 20 June 1990. The Appellant and his mother were appointed directors of Company B on 5 September 1990. The Appellant's mother resigned her directorship on 1 March 1994. One Madam C was appointed director of Company B on the same day.

4. Company B entered into three agreements with Company A:

(a) An agreement dated 6 November 1991 ('the 1991 Agreement') whereby Company A appointed Company B to act as consultant to Company A for

three years commencing from 1 August 1991. Company B was to make available to Company A on a full time basis the services of the Appellant. Company A was to pay Company B $300,000 per annum by 12 equal monthly payments of $25,000 each in arrears.

(b) An agreement dated 15 August 1994 ('the 1994 Agreement') in terms similar to the 1991 Agreement. The 1994 Agreement covered a period of 20 months commencing from 1 August 1994. The annual fee was raised to $558,000.

(c) An undated agreement ('the 1996 Agreement') whereby Company A appointed Company B as consultant for five years from 1 April 1996. Company A was to pay Company B consultancy fees of $996,000 per annum. Such fees were to accrue on a day to day basis and to be payable by 12 equal monthly payments in arrears.

5. The relationship between Company A and the Appellant or Company B turned sour in the final quarter of 1996. Company A allegedly made their last payment on 4 November 1996. By letter dated 27 January 1997, Solicitors' Firm D, then solicitors acting for Company B, demanded $207,500 from Company A. By another letter dated 28 February 1997, Solicitors' Firm D purported to accept the repudiation of Company A.

6. On 14 March 1997, the Revenue raised additional salaries tax assessment on the Appellant for the year of assessment 1990/91. The Commissioner invoked section 61A of the IRO. The service fees paid by Company A to Company B were treated as income of the Appellant. By letter dated 26 March 1997, Accountants' Firm E, then tax representative of the Appellant, objected against the additional assessment for the year of assessment 1990/91 on the ground that 'the so-called "disguised employment" was not established in our client case'.

7. Company B instituted proceedings against Company A in an action ('the Action'). According to its statement of claim dated 21 April 1997, Company B claimed against Company A $6,227,126.82. This included a claim of $41,500 for the 15 November 1996 period and a claim of $83,000 for each of the four months between December 1996 and March 1997 totaling $373,500. On the basis of consultancy fees of $996,000 per annum, it is implicit from these averments that Company B was paid a total of $622,500 up to 15 November 1996 ($996,000 − $373,500).

8. On or about 26 June 1997, the Appellant submitted his return for the year of assessment 1996/97 ('the 1996/97 Return'). Save for 'Director fee' from Group F, the Appellant did not report any other income to the Revenue in respect of that year.

9. Accountants' Firm G became the Appellant's tax representative by August 1997. In a letter dated 15 August 1997, Accountants' Firm G 'claimed a number of argument points that

[the Appellant] should not be taxed under Section 9A of the IRO'. Section 9A is a provision that came into force on 18 August 1995. Accountants' Firm G further submitted for the Revenue's consideration a copy of the statement of claim in the Action.

10. The Revenue made inquiries with Company A. By letter dated 10 October 1997, Company A provided the Revenue a schedule showing the amount of remuneration that the Appellant was 'entitled'.

11. By various assessments dated 21 October 1997, the Appellant was assessed salaries tax for the years of assessment 1991/92 to 1994/95 and additional salaries tax for the year of assessment 1995/96. Accountants' Firm G objected against these assessments by their letter dated 29 May 1998.

12. By notice of assessment dated 29 June 1998 ('the 1996/97 Assessment'), the Appellant was assessed salaries tax for the year of assessment 1996/97. The following notation can be found in the box for 'Assessor's Notes' in this notice:

> ' Assessed under section 9A of the Inland Revenue Ordinance to include the income of $996,000 received through [Company B] from [Company A]'.

13. Accountants' Firm G objected against the 1996/97 Assessment by letter dated 10 July 1998. Accountants' Firm G argued that 'the arrangement in question is not a form of disguised employment and ... it should not be caught either under Section 61A or 9A of the Inland Revenue Ordinance'. Accountants' Firm G further pointed out that '... the last payment made by [Company A] to [Company B] was on 4th November 1996 ... As such, the total income received by [Company B] from [Company A] for the period from 1st April 1996 to 4th November 1996 was HK$622,500'. By a further letter dated 15 July 1998, Accountants' Firm G sought to amend their earlier letter of 10 July 1998. They pointed out that the total income 'received by [Company B] from [Company A] for the period from 1st April 1996 to 4th November 1996 should be HK$581,000 instead of HK$622,500'. The difference between $622,500 and $581,000 is $41,500.

14. By notice dated 10 August 1998, the Revenue informed the Appellant that in the light of his objections, salaries tax in the sum of $62,250 was held over. This sum was arrived at on the basis of 15% of the difference between $996,000 (annual consultancy fees) and $581,000 (amount acknowledged by Accountants' Firm G on 15 July 1998 to have been paid by Company A for the period between 1 April 1996 and 4 November 1996).

15. By letter dated 11 June 1999, the assessor requested Accountants' Firm G to comment on their 'draft statement of facts' to be submitted to the Commissioner for his determination of the Appellant's objections for the years of assessment 1990/91 and 1996/97.

The assessor asked Accountants' Firm G to provide full details of payments for each of the years under objection. The assessor further said this:

> ' According to your letter dated 15 July 1998, the amount received from [Company A] for the period from 1 April 1996 to 4 November 1996 was $581,000. However, [Company A] reported that the sum of $996,000 was paid to [Company B] for the year 1996/97. Please reconcile the discrepancy and provide documentary evidence to show that the amount claimed by you is correct'.

There was no response by Accountants' Firm G to this letter. They ceased to act for the Appellant in about October 1999.

16. By letter dated 5 November 1999, the Revenue invited the Appellant to comment on their draft statement of facts. There was no response from the Appellant.

17. On or about 2 November 1999, Solicitors' Firm D wrote to Solicitors' Firm H (solicitors for Company A) offering to settle the Action. One of the terms proposed was payment by Company A of 'HK$1,369,500 which sum represents payment to [Company B] for the period from early November 1996 to the end of March 1998 under the undated Service Agreement in question'. The sum of $1,369,500 was probably arrived at by adding the sum of $373,500 referred to in paragraph 7 above to the sum of $996,000 being consultancy fees for one year. Company A and Company B managed to conclude a settlement between them. The terms of their compromise were embodied in a consent summons in the Action dated 29 February 2000. Company A was to pay $1,300,000 in three separate instalments to Company B in full and final settlement of Company B's claims. The instalments were scheduled to be paid on 30 April 2000 ($300,000); 30 September 2000 ($700,000) and 30 October 2000 ($300,000). Company A duly paid Company B the instalments so prescribed.

18. By a determination dated 29 September 2000 ('the September 2000 Determination'), the Commissioner confirmed the assessments levied against the Appellant for the years of assessment 1990/91 to 1996/97. In paragraph 1(6)(c) of the September 2000 Determination, the Commissioner stated that:

> ' The following amounts of consultancy fees were paid by [Company A] to [Company B]:

		year ended 31.3			
1992	1993	1994	1995	1996	1997
$300,000	$444,000	$510,600	$558,000	$613,800	$996,000'.

19. By notice dated 4 December 2000, the Revenue demanded payment from the Appellant the sum of $62,250 which was the amount of tax held over pursuant to its notice of 10 August 1998 referred to in paragraph 14 above.

20. By letter dated 7 December 2000, the Appellant wrote to this Board protesting against 'the oversight of Inland Revenue Department on the assessment and the review of the year 1996/97'. He applied to this Board on 13 March 2001 for extension of time to give notice of appeal against the September 2000 Determination. By its decision dated 11 April 2001, this Board (differently constituted) refused the Appellant's application.

21. On 20 June 2001, the Appellant filed an application under section 70A of the IRO for correction of the assessment for the year of assessment 1996/97. The assessor refused to correct the assessment on 13 July 2001. By a determination dated 2 May 2002 ('the May 2002 Determination'), the Commissioner confirmed the refusal of the assessor. The appeal before us relates to the Appellant's challenge against the May 2002 Determination.

22. The Appellant was wholly unprepared at the hearing on 17 August 2002. We granted him permission to submit a written closing submission to us after the hearing. This he did on 28 August 2002. The Revenue submitted their reply on 31 August 2002.

The relevant provisions in the IRO

23. Section 9A(1) of the IRO provides that:

> *'Where a person ("relevant person") carrying on ... a trade, profession or business ... has entered into an agreement, whether before, on or after the appointed day, under which any remuneration for any services carried out under the agreement on or after that day by an individual ("relevant individual") for the relevant person ... is paid ... to –*
>
> *(a) a corporation controlled by –*
>
> *(i) the relevant individual;*
>
> *(ii) ...*
>
> *(iii) ...*
>
> *then ... for the purpose of this Ordinance –*
>
> *(i) the relevant individual shall be treated as having an employment of profit with the relevant person ...*

(ii) the relevant individual shall be treated as an employee of the relevant person, and the relevant person shall be treated as the employer of the relevant individual ...

(iii) any such remuneration shall be treated as being –

(A) income derived by the relevant individual from an employment of profit with the relevant person; and

(B) received by and accrued to the relevant individual at the time that it is paid or credited to the corporation ... referred to in paragraph (a) ...'

24. Section 51(1) of the IRO provides that:

'An assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish any return which may be specified by the Board of Inland Revenue for [salaries tax or profits tax].'

25. Section 59(2) of the IRO provides that:

'Where a person has furnished a return in accordance with the provisions of section 51 the assessor may either –

(a) accept the return and make an assessment accordingly; or

(b) if he does not accept the return, estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly'.

26. Section 64(1) of the IRO provides that:

'Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment ...'

27. Section 66 of the IRO provides that any person who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may appeal to the Board of Review.

28. Section 68 of the IRO regulates the hearing and disposal of appeals before the Board of Review.

29. Section 70 of the IRO provides that:

> *'Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income ... assessed thereby ... or where the amount of such assessable income ... has been determined on objection or appeal, the assessment as made ... or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income ...'*

30. Section 70A(1) of the IRO provides that:

> *'Notwithstanding the provisions of section 70, if, upon application made within 6 years after the end of a year of assessment or within 6 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 in the amount of the tax charged, the assessor shall correct such assessment'.*

Section 70A of the IRO

31. The intention of this section is not to enable matters to be re-opened at the whim of the taxpayers. It is an emergency provision to protect the rights of taxpayers where a genuine mistake has been made (see D3/91, IRBRD, vol 5, 537 at 541).

32. The taxpayer must establish that the tax charged for the relevant year of assessment is excessive by reason of either:

(a) an error or omission in any return or statement submitted in respect thereof; or

(b) an arithmetical error or omission in the calculation of the amount of the assessable income.

33. In relation to the first of the two limbs referred to in paragraph 32, the error or omission must be in the return or statement submitted by a taxpayer (see D93/89, IRBRD, vol 6, 342).

34. In respect of both limbs, an error or omission must be established:

(a) The meaning of *'error'* as defined by the Oxford English Dictionary has been judicially approved by Chan J (as he then was) in Extramoney Limited v Commissioner of Inland Revenue 2 HKTC 394. It means

' Something incorrectly done through ignorance or inadvertence; a mistake'.

(b) A deliberate act in the sense of a conscientious choice of one of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for cannot be regarded as an error within section 70A (see Extramoney Limited v Commissioner of Inland Revenue above cited at 429).

(c) The deliberate act may be the act of the taxpayer. There is therefore no error or omission if rectification is sought on the basis of:

(i) a change of opinion of the auditors or accountants in respect of the accounts;

(ii) a change of mind of the directors of the company in connection with how any part of the accounts should be made up; and

(iii) different treatment of certain items in the accounts by those preparing or approving the accounts.

(See Extramoney Limited v Commissioner of Inland Revenue above cited at 429).

(d) The deliberate act may be the deliberate and conscious act on the part of the assessor (see D25/01, IRBRD, vol 16, 224). For this reason, the mere fact that an estimated assessment does not coincide with a figure that the assessor would have reached had other information been made available to him does not constitute an error (see Sun Yau Investment Co Ltd v Commissioner of Inland Revenue 2 HKTC 17).

(e) It does however cover the case where

(i) it can be proved that the profits stated in the accounts of a taxpayer had in fact not been made although each case must be considered in its own factual matrix (see Extramoney Limited v Commissioner of Inland Revenue above cited at 429);

(ii) there has been a miscasting by the assessor on the material available to him (see Sun Yau Investment Co Ltd v Commissioner of Inland Revenue above cited at 21).

Errors relied upon by the Appellant

35. The Appellant contends that the assessment for the year of assessment 1996/97 should be corrected by reason of error(s) in:

(a) the 1996/97 Return;

(b) the 1996/97 Assessment; and

(c) the September 2000 Determination.

36. In relation to the 1996/97 Return:

(a) The Appellant says that he was not aware of section 9A of the IRO when he submitted the 1996/97 Return on 26 June 1997. It was therefore not a deliberate and conscientious decision on his part not to include in the 1996/97 Return the amount of $581,000 which he received from Company A.

(b) We reject this submission of the Appellant. Through Accountants' Firm E, the Appellant challenged the Revenue's stance of 'disguised employment' on 26 March 1997 in relation to the year of assessment 1990/91. The Appellant must have been aware of the issues involved when taking that stance. There is no material difference between the years of assessment 1990/91 and 1996/97. In any event, ignorance of the law is no defence.

37. In relation to the September 2000 Determination:

(a) Accountants' Firm G and the Appellant did not see fit to comment on the draft statement of facts prepared by the Revenue which formed the basis of the September 2000 Determination. We deplore the laxity on the part of the Appellant. His present predicament is largely the product of his failure to attend timeously to his own fiscal affairs.

(b) Our observation in subparagraph (a) above does not detract from the fact that the September 2000 Determination was based on the erroneous factual assumption that $996,000 was **paid by Company A to Company B** for the year ended 31 March 1997.

(c) As a result of the decision of this Board dated 11 April 2001, no valid appeal had been lodged by the Appellant against the September 2000 Determination. By virtue of section 70 of the IRO, the 1996/97 Assessment 'shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income'.

(d) It has however been pointed out by this Board in BR5/71, IRBRD, vol 1, 30 that notwithstanding the provisions of section 70 the *assessment* may be corrected in cases of certain errors or omissions with section 70A of the IRO.

38. In relation to the 1996/97 Assessment:

(a) The Revenue says that the 1996/97 Assessment was an estimated assessment made pursuant to section 59(2)(b) of the IRO. The 1996/97 Assessment was therefore a deliberate and conscientious decision on their part. On the basis of Sun Yau Investment Co Ltd v CIR (above cited), the Revenue argues that there is no error which calls into play section 70A.

(b) We find it difficult to accept this case of the Revenue. The 1996/97 Assessment made express reference to section 9A and not section 59(2)(b) of the IRO. The Revenue submits that their reliance on the latter provision is implicit. We disagree. Section 9A provides that the remuneration shall be treated as being received by the relevant individual 'at the time that it is **paid** ... to the corporation'. This is a question of fact. It does not involve any estimation on the part of the assessor.

(c) The following heads of evidence lend further support to this view:

(i) The notation in the 1996/97 Assessment referred to $996,000 'received' through Company B. The assessor did not say 'estimated to have been received' through Company B.

(ii) By their letter dated 11 June 1999, the assessor asked Accountants' Firm G to reconcile an alleged inconsistency on the basis of Company A's alleged report that '$996,000 **was paid** to [Company B] for the year 1996/97' (emphasis supplied).

(iii) We have not seen the draft statement of facts sent by the Revenue to Accountants' Firm G and the Appellant on 11 June 1999 and 5 November 1999. We have little doubt that the draft proceeded on the basis that $996,000 was paid by Company A to Company B. It is

probable that this accounts for inaccuracy in paragraph 1(6)(c) of the September 2000 Determination.

(d) Given the circumstantial evidence outlined above, it is incumbent upon the Revenue to give evidence to support its contention that the 1996/97 Assessment was the outcome of an estimation on their part pursuant to section 59(2) of the IRO. The Revenue placed no such evidence before us. We find on a balance of probabilities that the 1996/97 Assessment was not based on any estimation but on an erroneous reading of the response from Company A dated 10 October 1997.

39. The error so found by us is not an error or omission in any return or statement submitted in respect thereof. The question is whether that error on the part of the assessor constitutes an arithmetical error or omission in the calculation of the amount of the assessable income within the meaning of section 70A. We have borne in mind the propositions that we outlined in paragraph 34(e) above. Those propositions must however be viewed in the context of the express wordings in section 70A. Bearing in mind the wordings in question, we do not think the error is within the meaning of that section. No mathematic was involved. The assessor did not perform any calculation. He simply erred in construing the word 'entitled' as 'paid'. This is not the sort of error envisaged by section 70A.

40. The Appellant had repeated opportunities to rectify this error. He did not properly exercise his rights to challenge the 1996/97 Assessment under sections 64(1) and 66 of the IRO. Had he properly exercised those rights, it would have been apparent to all concerned that this is not a case of no payment but a case of delayed payment.

41. For these reasons, we dismiss the Appellant's appeal.