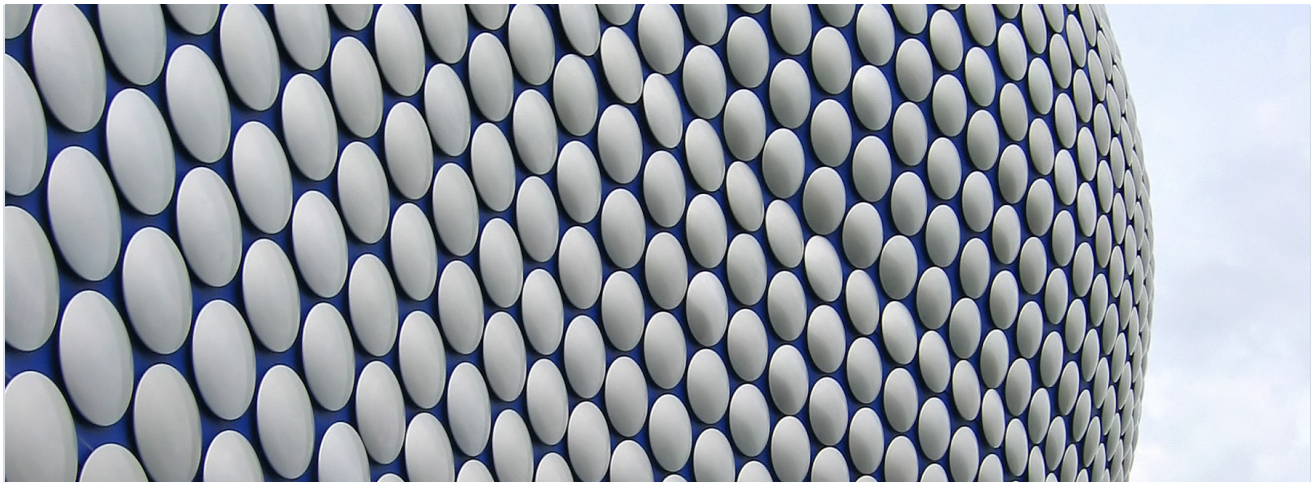


# COURT OF FIRST INSTANCE RULED ON TAXPAYER'S RIGHTS TO CORRECT ERRORS

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## ABOUT MAZARS

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## BACKGROUND

On 28 March 2014, the Court of First Instance ("the CFI") handed down its judgment in Good Mark Industrial Limited ("Good Mark") v the Commissioner of Inland Revenue ("the CIR").

In this case, the Inland Revenue Department ("IRD") issued a protective additional assessment for the year of assessment 2003/2004 to Good Mark immediately before the expiration of the six years' statutory time limit for raising assessments under Section 60 of the Inland Revenue ordinance ("IRO").

Good Mark lodged a valid objection under Section 64 of the IRO against the protective additional assessment and sought to re-open under Section 70A of the IRO the earlier assessments issued for the same year of assessment for which no objection had previously been lodged.

The CIR refused to entertain the Section 70A claim lodged by Good Mark in respect of the earlier assessments. Good Mark applied to the CFI for judicial review of the CIR's decision.

## THE FACTS IN BRIEF

Good Mark filed its profits tax return for the year of assessment 2003/2004 on 16 August 2004 and the IRD issued an assessment on 17 September 2004 (“the Original Assessment”) based on the profits reported in the tax return. Good Mark did not lodge an objection against the Original Assessment.

On 28 January 2005, the IRD issued an additional assessment (“the First Additional Assessment”) to Good Mark to disallow the tax deduction of certain bad debts arising from non-trading activities. No objection was lodged by Good Mark.

On 17 March 2010, the IRD issued a protective additional assessment (“the Second Additional Assessment”) to Good Mark to disallow depreciation allowances and deduction for expenditure for fixed assets.

In April 2010, Good Mark lodged an objection against the Second Additional Assessment within the objection time limit. Good Mark also sought to reopen the Original and First Additional Assessments for the year of assessment 2003/2004 under Section 70A of the IRO.

### SECTION 70A

Section 70A was introduced to overcome the possible hardship of Section 70 of the IRO.

Section 70 states that if no valid objection or appeal has been lodged within the time period limited by the IRO, or where an “assessment” has been determined on objection or appeal, or an appeal to the Board of Review has been withdrawn, the assessment made or agreed shall be “final and conclusive” for all purposes of the IRO.

Section 70A permits the re-opening of an “assessment” within six years from the end of the relevant year of assessment or six months after the date of the notice of assessment whichever is the later, if it can be established to the satisfaction of the assessor that the tax charged for that year of assessment is excessive by reason of an error or omission.

It should be noted that when Good Mark submitted its claim, the six years’ time limit had already lapsed. In order to persuade the IRD to accept the Section 70A claim as valid, it had to rely on the six months from the date of the notice of assessment proviso.

In October 2012, the CIR delivered his determination in confirming the Second Additional Assessment raised by the assessor and denied to reopen the Original and First Additional Assessments under Section 70A.

In November 2012, Good Mark lodged an appeal against the determination on the Second Additional Assessment, which is yet to be finalized, and applied for a judicial review of the CIR’s decision not to reopen the two earlier assessments.

## GOOD MARK’S CONTENTIONS

Good Mark argued that once the Second Additional Assessment was raised, Section 70A of the IRO was engaged. The correction can cover excessive assessment arising from “errors and omissions” going beyond the “relevant notice of assessment” to any other assessment(s) for the whole of the related year of assessment, i.e. year of assessment 2003/2004.

Good Mark also argued that a narrow construction of Section 70A, which restricts the right to revise the relevant notice of assessment, is unfair to taxpayers and there should be parity between the CIR and taxpayers. Given that the CIR was empowered to further assess a taxpayer’s tax liability at any time within 6 years after the expiry of the year of assessment concerned under Section 60, it would be unfair to taxpayers if their rights to object was restricted to the “relevant notice of assessment” as they could not re-open other assessment(s) for the same year.

## THE CIR'S VIEWS

The CIR was of the view that the earlier assessments could not be corrected under Section 70A on the following grounds:

- a. The IRO is an assessment-based statutory regime; and
- b. The earlier assessments were final and conclusive by virtue of Section 70 for all purposes if no valid objection or appeal has been lodged within the time limit.

## THE CFI'S JUDGMENT

The CFI considered that there was no reason for the court to review the CIR's decision and rejected Good Mark's application.

The judge pointed out in the case of a "reassessment" (e.g. the Second Additional Assessment in this case), a taxpayer's rights to object is limited by Section 64(1)(c) of the IRO to any fresh liability brought about by the reassessment. In view of the restrictions imposed by Section 64(1)(c) and finality of Section 70, Section 70A should not be intended to confer the taxpayer a right to seek general correction of assessment(s) for the same year of assessment since this would render Section 64(1)(c) functionless.

The CFI concluded that Section 70A should have been intended to have a narrow coverage, i.e. the assessor was obliged to correct only "an error or omission" in the latest notice of assessment.

## COMMENTS

It should be noted that if a protective additional assessment for a particular year is raised by the IRD prior to the six years' statutory time limit for raising assessments under Section 60, the taxpayer's rights to object (under Section 64) or to reopen (under Section 70A) the additional assessment is limited to the fresh liability created by that additional assessment. The tax liabilities created by earlier assessments for the same tax year cannot be reopened after the expiry of six years statutory time limit under Section 70A.



The content of this newsletter is only for general guidance on matters of interest and is not meant to be comprehensive. The application and impact of laws can vary widely based on the specific facts involved. Readers are advised to consult their tax advisors before making any business decisions.

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