INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D103/96

Salaries tax – dealer representative of stock broking firm – dealer representative liable for losses of whatever nature suffered by firm arising from client transactions – whether dealer representative working on own account – whether commission income subject to profits tax or salaries tax – Inland Revenue Ordinance sections 8(1) and 14(1).

Panel: Andrew Halkyard (chairman), Gerald To Hin Tsun and Alexander Woo Chung Ho.

Dates of hearing: 7 and 31 October 1996.
Date of decision: 17 March 1997.

The taxpayer was appointed as a Dealer Representative of a stock broking firm. He was thus registered with the Securities & Futures Commission as a Dealer's Representative of the Firm. He was also registered with the Stock Exchange as a Sales Representative of the Firm. Under the terms of his engagement he was liable to the Firm for all losses of whatever nature suffered by the Firm arising from transactions of his clients processed by the Firm. The taxpayer was remunerated solely by way of commission paid by the Firm. The Firm did not treat the taxpayer as ordinary office staff. He received no employee benefits from the Firm other than under a modest medical benefits scheme. The taxpayer argued that he carried on business on his own account and that his commission should be liable to profits tax rather than salaries tax.

Held:

(1) Neither the Securities Ordinance nor the Stock Exchange Rules preclude the conclusion that a Dealer's Representative can carry on business on his own account (Securities Ordinance, section 2 definitions of 'dealer' and 'dealer's representative' and section 50 and Rules of the Stock Exchange, rules 330-341 considered). Accordingly, whether the taxpayer was an employee or independent contractor of the Firm cannot simply be answered by reference to those provisions and rules.

(2) Whether the taxpayer held an employment with the Firm must be determined by looking at the overall picture and asking whether he carried on business on his own account (Lee Ting-sang v Chung Chi-cheung [1990] 2 AC 374 applied).

(3) The inference of control present in this case was not sufficient to conclude that the taxpayer must be an employee of the Firm (Market Investigations v Minister of Social Security [1969] 2 QB 173 considered).

(4) The taxpayer was, to a large degree, integrated into the business of the Firm. However, that conclusion was not determinative and the modern approach indicated by the cases is that all relevant factors must be taken into account (Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] QB 497 considered).

(5) On the totality of facts the taxpayer carried on business on his own account and was not an employee of the firm. The critical factor supporting this conclusion was that, under the taxpayer's contract with the Firm, he was liable for any loss suffered by the Firm arising from client transactions introduced by the taxpayer regardless of any fault on his part. This is fundamentally inconsistent with the relationship of employment. This is particularly so given the absence in the agreement between the taxpayer and the Firm of any restrictive covenant placed upon the taxpayer in relation to future dealings with the clients introduced by him to the Firm (D65/93, IRBRD, vol 9, 38 distinguished).

Per curiam. A different conclusion could have been reached if the nature of the taxpayer's liability to the Firm was either (a) less broad or (b) illusory

Appeal allowed.

[**Editor's note**: the Commissioner filed an appeal against this decision which was subsequently withdrawn.]

Cases referred to:

Cassidy v Ministry of Health [1951] 1 All ER 574
D19/78, IRBRD, vol 1, 323
Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631
Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374, [1991] 1 HKLR 764
Market Investigations v Minister of Social Security [1969] 2 QB 173
Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 3 All ER 817
Hall v Lorimer [1994] STC 23
D65/93, IRBRD, vol 9, 38
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] QB 497

Tsui Siu Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer has appealed against a determination of the Commissioner of Inland Revenue relating to the salaries tax assessments for the years of assessment 1991/92

and 1992/93 raised on him. The Taxpayer claims that his income should be subject to profits tax and not to salaries tax.

The facts

The following facts were not in dispute.

1. On 30 January 1992, the Taxpayer signed an agreement with a securities company ('the Firm') which stated that the Taxpayer was appointed as a Dealer Representative of the Firm. The Agreement contained the following terms of engagement:

> '[The Firm] hereby appoints [blank] as a Dealer Representative subject to the following terms and conditions:
>
> **1. DUTIES OF DEALER REPRESENTATIVE**
>
> 1.1 trade as a Dealer Representative in accordance with the Rules, Bye-Law, Regulations and Guidelines of the Stock Exchange of Hong Kong Ltd.
>
> 1.2 comply with such requirements, directions, procedures, mode and manner of trading in the securities as [the Firm] may determine from time to time to regulate the transactions of the Dealer Representative including (But not limited to) all or any of the following:
>
> 1.2.1 restriction on the trading volume of securities dealt by or through the Dealer Representative;
>
> 1.2.2 restriction and prohibition of transactions with regard to particular securities;
>
> 1.2.3 prohibition of or restriction affecting transactions with or by particular individuals, firms corporations;
>
> 1.2.4 imposition of rules for "selling out" and "buying in" of any securities bought or sold by clients dealt by or through the Dealer Representative;
>
> 1.2.5 suspension of transactions or dealings of the Dealer Representative for such time as [the Firm] shall at its absolute discretion deem fit;
>
> 1.3 refrain from speculating in securities and deal in securities for his own account purely for investment purposes only;
>
> 1.4 conduct his activities in a proper and efficient manner;

1.5 maintain and unkeep records of his daily transactions and make them available at any time to [the Firm] immediately upon demand;

1.6 warrant the true identity and particulars of all clients buying and selling through Dealer Representative and in the event that the identity of any such client is fictitious or the particulars are incorrect, the Dealer Representative shall in addition to any other remedies available to [the Firm] indemnify [the Firm] against all loss and/or damage which may be suffered by [the Firm]; and

1.7 you are required to spend sufficient time on each business day as may be determined by [the Firm] for the purpose of carrying out your duties herein throughout such working hours as may be set down by [the Firm] including but not limited to working overnight and unduly long working hours as may be required. Absence from duties is subject to prior written approval of [the Firm].

2. AUTHORITY

[A Dealer Representative has no authority to contract for the Firm or hold himself out as having any such authority.]

3. EXCLUSIVE SERVICE

3.1 you will render your services as Dealer Representative (irrespective of your designated title) exclusively to [the Firm].

3.2 you are obliged during the term as our [Firm's] Dealer Representative herein not to engage in any activity, undertaking or joint venture whether directly or indirectly of a similar nature to your duties herein connected in competition with any business of [the Firm] …

4. REMUNERATION

4.1 [the Firm] will further pay you a commission calculated on an ad valorem basis at a rate from time to time decided by [the Firm] on business introduced by you to [the Firm] and/or its affiliates and/or its clients.

5. TERMINATION OF SERVICE

[The Firm could terminate service of the Dealer Representative with one month notice without compensation or by agreement of both parties. The Dealer Representative could terminate service by giving one month written notice to the Firm.]

6. INDEMNITY

6.1 The Dealer Representative shall indemnify [the Firm] against all damages, liabilities, actions, proceeding, judgements, costs (including costs on a solicitor-and-client basis), claims, demands and any other losses of whatever nature that may be suffered or incurred by [the Firm] in connection with or arising from transactions in securities dealt by or through the Dealer Representative in the name of [the Firm] (whether or not the same may have been caused by or may relate to any fraud, deceit, neglect, misconduct, breach of contract or default on the part of the Dealer Representative or his client).

7. GUARANTEE OF CLIENT'S ACCOUNT

7.1 without prejudice to clause 6 you will be fully responsible for the collection of all amounts due by your clients and in any case be wholly and fully responsible for all amounts due to any or all of them by such clients introduced by you or your agents in relation to businesses transacted with any or all of them.

7.2 the Company reserves the right and absolute discretion to withhold payment to the Dealer Representative of any commission relating to transactions that have not been finalised and settled.

7.3 your liability under this guarantee shall be as that of a principal debtor and [the Firm] … and/or its clients may as its option hold you primarily responsible for the liabilities of the clients introduced by you or your agents in relation to businesses transacted with any or all of them.

7.4 the Dealer Representative hereby warrants to [the Firm] that all certificates and transfers delivered by its clients shall constitute good delivery pursuant to the Bye-Laws, rulings and requirements of the Exchange and undertakes to indemnify [the Firm] in the event of any breach of the said warranty.'

2. The Firm filed employer's returns for the years ended 31 March 1992 and 1993 in respect of the Taxpayer which disclosed the following particulars:

	1991/92	**1992/93**
Capacity in which employed	Account Executive	[blank]
Period of employment	1.9.1991 to 31.3.1992	1.4.1992 to 31.7.1992
Income—Commission	$49,783	$51,473

3. In his salaries tax returns for the years of assessment 1991/92 and 1992/93, the Taxpayer declared that he had no employment income and that his income should be assessed to profits tax in the business name of Company A.

4. The assessor considered that the Taxpayer's income from the Firm should be charged to salaries tax and thus raised assessments on the Taxpayer for the years of assessment 1991/92 and 1992/93 on the basis of the income disclosed at fact 2.

5. The Taxpayer objected against the assessments on the ground that his income received from the Firm should be charged to profits tax instead of salaries tax.

6. In correspondence with the assessor, the Firm supplied the following information in relation to the Taxpayer's engagement:

(a) The Taxpayer was required to attend work during the market opening period and there was a fixed place of work in the office of the Firm for him.

(b) The Taxpayer was answerable to the Firm's directors and he was required to observe the Firm's regulations.

(c) The Firm provided all the necessary equipment and facilities such as a monitor screen, a telephone and the necessary backroom operation backup for the Taxpayer to perform his duties.

(d) The Taxpayer might have incurred outgoings and expenses in the performance of his duties. However, these expenses were not reimbursed.

(e) The Taxpayer was entitled to fringe benefits such as medical benefit, annual leave and afternoon meal supplement.

(f) The Taxpayer's leave or absence from duty had to be approved by the directors of the Firm.

(g) Employment could be terminated when there was any violation of the Firm's rules and regulations, when performance was unsatisfactory or when there was a breach of the contractual agreement. It could also be terminated by mutual agreement.

(h) The Firm had the right to transfer the client accounts served by the Taxpayer to other staff of the Firm.

(i) The Taxpayer was liable for any bad debts incurred in connection with the transactions dealt by him on his clients' behalf.

(j) The Taxpayer had the authority to handle clients' accounts with respect to execution of orders and delivery of contract notes and cheques to his clients. The clients were treated as individual customers in the books of the Firm.

(k) The payment of remuneration was made to Company A at the Taxpayer's request.

(l) The Taxpayer held the title as Financial Consultant of the Firm, as shown on his name card.

7. At all relevant times, the Taxpayer was registered with the Securities & Futures Commission as a Dealer's Representative of the Firm. The Securities and Futures Commission (Fees) Rules 1990 and the Securities and Futures Commission (Annual Returns) Rules 1990 required every registered person to pay an annual fee and to make an annual return to the Commission. Annual returns were submitted, and annual fees paid, by the Taxpayer to the Commission.

8. On 23 February 1996 the Commissioner refused to allow the Taxpayer's objection to the assessments described at fact 4.

9. On 22 March 1996 the Taxpayer appealed to the Board of Review against the Commissioner's refusal to allow his objection. The Taxpayer claimed that he was not an employee of the Firm and that his income should be subject to profits tax and not to salaries tax.

10. On 9 January 1991 the Taxpayer applied under the Business Registration Ordinance for registration of a business in the name of Company A. The nature of the business was described in the application as 'Financial Consultant – Shares and Properties Dealing'. The date of commencement of business was stated as 8 January 1991. The business address stated in the application was the same as the Taxpayer's residential address, that is, a flat in A Court, District B.

The evidence of the Taxpayer

During the course of the Board hearing the Taxpayer gave sworn oral evidence. We are bound to state at the outset that in certain respects the Taxpayer's evidence, specifically in relation to the accounts of Company A (dealt with below under the heading 'Cross-examination of the Taxpayer'), was less than satisfactory. In our view these matters have tainted the Taxpayer's evidence. The result has been that where there was any ambiguity or doubt arising from the Taxpayer's evidence, we have not been inclined to accept it as fact. Proceeding on this basis, and after examining the documents produced to the Board by both parties, we find the following additional facts.

11. In March 1991, the Taxpayer applied for registration as a Dealer's Representative under the Securities (Dealers, Investment Advisers, Partnerships and

Representatives) Rules.[1] In the application, which was received by the Securities & Futures Commission on 22 March 1991, the following particulars were disclosed (questions are printed in bold type and answers in normal type):

> **Give the following details of the dealer by whom you are to be employed:**
>
> **Name of employer** The Firm
> **Capacity employed** Dealer's Representative
>
> **Give the following particulars of your work experience in the past 5 years:**
>
> **Name of employer** The Firm
> **Capacity in which employed** Dealer's Representative
>
> **Have you carried on any business … during the past 5 years?** Not applicable

12. On 15 July 1991, the Taxpayer applied to the Stock Exchange of Hong Kong for registration as a Sales Representative.[2] In the application the following particulars were disclosed (questions are printed in bold type and answers in normal type):

> **Particulars of Applicant:**
> **Business Name** The Firm
> **Date of Registration (as Dealer's Representative)** 24 June 1991
>
> **Please state all employment held (including self-employed) during the three years immediately prior to the date of this application:**
>
> **Name of Employer** The Firm
>
> **Have you ever been employed (including self-employed) in the securities industry?** No

The last page of this application form contained the following pre-printed statement:

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1 Enacted under the Securities Ordinance (Cap 333). The necessity to register is mandated by section 50. Section 62 makes it an offence punishable with a maximum of 5 years' imprisonment for a person to make a false or misleading representation for the purposes of obtaining registration as a Dealer's Representative.

2 Under rule 330 of the Rules of the Stock Exchange a member is required to register all its Dealer's Representatives with the Exchange either as Authorised Clerks or as Sales Representatives.

> We intend to employ [the Taxpayer] as our Sales Representative and we shall be liable for all bargains made on our behalf of [the Taxpayer]. We undertake to notify you immediately of any change of employment of [the Taxpayer]. Signed [the Firm]

The application was approved by the Stock Exchange on 30 August 1991. The Taxpayer ceased to be a Sales Representative of the Firm with effect from 16 July 1992 and his name was removed by the Stock Exchange from the Register of Sales Representatives on that date.

13. On 18 June 1992, the Taxpayer filed an annual return to the Securities & Futures Commission under the Securities and Futures Commission (Annual Returns) Rules 1990[3] for the period May 1991 to April 1992. In that return the Taxpayer disclosed the following particulars (questions are printed in bold type and answers in normal type):

Business Name The Firm

14. From 1 September 1991 until he ceased to be a Sales Representative of the Firm on 16 July 1992, the Taxpayer did not receive remuneration from any securities company or stock broker apart from the Firm.

15. When the Taxpayer commenced working for the Firm, initially he was not asked to sign any agreement for his engagement as Dealer's Representative of the Firm. At that time, the Taxpayer was the Firm's only Dealer's Representative and, because the Firm was trying to develop its business, it encouraged the Taxpayer by offering him an attractive rate of commission and dispensing with the need for a guarantor. In late November/early December 1991, he was, however, given a draft of the agreement set out at fact 1. At that time, the Taxpayer was not willing to sign the draft agreement because he had made no such commitment to the director of the Firm, Mr C, who had recruited him. Mr C replied that the Firm had decided that the Taxpayer must sign and that he would be dismissed by the Firm if he did not sign.

16. The majority of the clauses in the draft agreement were the same as those set out at fact 1. However, clauses 3, 4 and 5 of that draft indicated that the Taxpayer was an employee of the Firm by referring respectively to 'employment' (rather than a more neutral term such as 'service'), to 'a monthly salary of $1 payable monthly in arrears on the last day of each month' and to termination and resignation of 'your employment'. Around late November/early December 1991, the Taxpayer marked up his copy of the draft agreement by making various notations thereon. Some of those notations were questions or queries; other, such as the deletion of all references to 'employment' and 'monthly salary', were of a more substantive nature. He then had at least two formal meetings with directors of the Firm during which the terms of his engagement with the Firm were discussed. In the result, the Taxpayer's suggested changes to clauses 3, 4 and 5 of the draft were accepted by the

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[3] Enacted under the Securities and Futures Commission Ordinance (Cap 24).

Firm and were incorporated in the final agreement set out in fact 1. The Taxpayer then signed the agreement. This was the only agreement signed by the Taxpayer with the Firm.

17. One additional notation made on the agreement by the Taxpayer was an extra sub-clause appended to draft clause 1 showing '1.8 Vacation leave 14 days'. Apart from stating that he never intended to sign the draft agreement and that his notations were made to delay any eventual signing, the Taxpayer gave no clear explanation of why he made this particular notation.

18. The Firm initially designated the Taxpayer as 'Financial Consultant' of the Firm. It later revised the Taxpayer's title to 'Manager - - Investment Portfolio'. The Firm provided the Taxpayer with name cards to this effect. At all relevant times, the Firm also referred to the Taxpayer as an 'Account Executive' (see, for example, fact 2).

19. The Firm provided a telephone line for the Taxpayer in its offices at its own cost. The Taxpayer was required to use his designated telephone line. If the Taxpayer required a further line, he would be responsible for the installation cost but the Firm would be responsible for the monthly charges.

20. The Taxpayer made several assertions that the information provided by the Firm to the assessor was either incorrect or misleading. Specifically, the Taxpayer stated:

(a) He was not entitled to annual leave (contrast fact 6(e)). This entitlement was not specified in the agreement set out at fact 1. He was not shaken on this matter in cross-examination. Although we accept the Taxpayer's formal contention on this issue, this seems of little importance given our findings at fact 20(e) below and the fact that the Taxpayer was remunerated solely by way of commission.

(b) He was not entitled to any medical benefit (contrast fact 6(e)). Although this entitlement was also not specified in the agreement set out at fact 1, another document produced by the Taxpayer (minutes of a meeting between the Taxpayer and directors of the Firm in December 1991 refers) specifically states that the Firm agreed to provide the Taxpayer with medical benefits up to an amount of $150 per consultation, subject to a maximum of 12 medical consultations per year. We do not accept the Taxpayer's contention on this issue.

(c) The Taxpayer agreed that it was common market practice for broking firms to provide equipment and facilities such as a monitor screen, a telephone and the necessary backroom operation backup (fact 6(c) refers). The Taxpayer agreed that these were the basic items he needed to perform his work. However, the Taxpayer explained that the Firm did not provide him with any secretarial assistance (he had to fax all information to clients, as well as deliver share scrip and cheque payments to them) and that the monitor was placed in a general area so that it was also available for viewing by clients. The Taxpayer also stated

that, in earning his commission income, he had to pay an annual registration fee as Dealer's Representative. He also reimbursed the Firm $150 for the cost of Christmas cards sent to clients. In addition to the equipment and facilities provided by the Firm, for the purpose of maintaining contact with clients he also purchased his own mobile phone and pager, the capital and recurrent costs for which were not reimbursed by the Firm. We accept these explanations and statements.

(d) The Taxpayer disputed that the Firm had the right to transfer the client accounts served by the Taxpayer to other staff of the Firm (contrast fact 6(h)). In subsequent correspondence with the assessor, the Firm clarified this point by noting such a transfer was only possible upon request, or upon agreement by the Taxpayer and the client, or upon cessation of the Taxpayer's appointment with the Firm. The Firm also admitted that when the Taxpayer left the Firm 'he is permitted to take away the clientele, provided they wish to be served by him'. We accept these clarifications.

(e) The Taxpayer considered that the Firm's statements that he was required to attend work during the market opening period and that there was a fixed place of work in the office of the Firm for him (fact 6(a) refers) were misleading. He explained that the office premises of the Firm were less than 200 square feet and that Account Executives were required to sit with ordinary clients to view the monitor. Although he agreed that the Firm supplied him with a desk, his space was not fixed and the office premises could be particularly crowded during peak trading hours. Occasionally, Account Executives had no space to sit and needed to move, with permission, to the director's office.

The Taxpayer also explained that he was not required to attend the office regularly and that his work of getting clients to effect buy and sell orders could be carried on outside the office by telephone. In this event, the Firm confirmed orders by return phone call. Alternatively, orders were confirmed by the Firm at its office premises if the Taxpayer was then present. When the market was not active or when his clients were not involved in the market, the Taxpayer would, on occasions, return to the Firm's office premises. More frequently however, given these conditions, it was necessary for the Taxpayer to leave the office premises to meet more regularly with clients and provide them with market information, in order to induce them to enter into further transactions. When the Taxpayer did not return to the Firm's office premises during the day, he would not normally notify the Firm (contrast fact 6(f)). He would, however, normally inform a director of the Firm on those occasions when he was absent from the office premises for the whole day.

The Taxpayer's evidence and explanations concerning these various matters were not seriously challenged in cross-examination and we have decided to accept that, although some degree of control was exercised by the Firm in relation to matters such as abiding by office rules and regulations (see, for

example, clause 1 of fact 1), as a substantive matter he was not required to attend the office at fixed times and that he was not required to seek approval for absences from the Firm's office premises.

21. Operating costs, such as stationery, were borne by the Taxpayer. However, the Firm provided to the Taxpayer the following equipment and services free of charge: a computer, Reuters service, telephone and computer printouts.

22. If a client margin was exceeded by the amount of any loss made on an investment, and the client failed to make up any shortfall, the Taxpayer would have to bear the loss. Although this did not happen to the Taxpayer personally, it did happen to some of his colleagues. The Taxpayer did, however, admit that if he followed the rules of the Stock Exchange as well as the internal procedures set by the Firm, it would be unlikely that he would be forced to pay any indemnity to the Firm (clause 6 of fact 1 refers), *provided* that the market remained steady. If the market became volatile, client exposure could increase significantly and, in this event, he could have become liable to the Firm under the indemnity.

23. The Taxpayer was restricted in his access to the back room office of the Firm in the same way as any ordinary client. Restricted access was due to security reasons since share scrip and cheques were occasionally lost.

24. The Taxpayer was not treated by the Firm as its ordinary staff. He was not entitled to join the Chinese New Year dinner party nor any staff functions such as picnic and launch trips. Unlike ordinary staff the Taxpayer had no fixed monthly pay date.

25. The Taxpayer had no authority to sign any agreements, receipts or any other documents on behalf of the Firm (compare clause 2 of fact 1).

26. The Firm had discretion to withhold payment to the Taxpayer of any commission relating to any transaction that had not been settled, for example, as a result of a client default (compare clause 7.2 of fact 1).

27. In accordance with clause 4 of the agreement set out at fact 1, the Taxpayer was paid by the Firm 45% of the brokerage fee referable to the client business introduced by the Taxpayer to the Firm. On occasion, after January 1992, the payment voucher signed by the Firm showed the payee to be 'Company A—[The Taxpayer]'. There is insufficient evidence before us to state whether any of the cheques made out by the Firm as payment for commission due to the Taxpayer were made out in the name of Company A or in the name of the Taxpayer.

28. All bought and sold notes in relation to client business introduced by the Taxpayer to the Firm were issued by the Firm. The clients settled any balance of moneys due by them directly with the Firm. No invoice was ever sent to those clients by the Taxpayer or by Company A. The Taxpayer gave name cards to the clients showing his

affiliation with the Firm (fact 18 refers). There is no evidence before us that he disclosed to the clients any information relating to Company A.

29. The Taxpayer received, at different times, copies of the employer's returns referred to at fact 2. He complained to the Firm's accounting department that he considered that such a return was inappropriate. He did not receive any reply from the Firm in relation to this complaint. Neither did he take any follow up action on this matter.

Cross-examination of the Taxpayer

During the course of the hearing, the Taxpayer was subject to detailed cross-examination by the Commissioner's representative, Ms Tsui Siu-fong. The Taxpayer's responses to many of Ms Tsui's questions have been incorporated in our findings of fact set out above. There is, however, one specific item arising out of the cross-examination which we particularly wish to highlight.

The accounts produced by the Taxpayer in the name of Company A

In support of his argument that he was carrying on business on his own account the Taxpayer produced books of account in the name of Company A. We find these accounts, at best, to be of marginal value and, to the extent to which they supported the Taxpayer's case, we have not relied upon them.

To take but one example. The Taxpayer claims to have employed both his mother-in-law and his sister in conducting his business. He claims that he employed them to deliver cheques and share scrip to clients in order to effect settlement. Our findings on this matter are as follows. During the relevant period his mother-in-law was not particularly young (she was in her early to mid-sixties); how the relatives were in a position to perform these tasks was never clearly described; the Taxpayer was unable to explain how the remuneration paid to his two relatives was calculated; the remuneration was paid in cash and no receipts were given; and in no realistic way were the alleged payments shown to be incurred in the production of the Taxpayer's commission income. In short, the Taxpayer's explanations relating to employing his relatives lacked all credibility. In our view it was no coincidence that the alleged salaries paid by the Taxpayer were pitched at amounts that never significantly exceeded the tax free, or minimum tax, thresholds for individuals during the relevant years of assessment. In contrast to his other evidence, the Taxpayer's evidence in this regard was halting and hesitant; his demeanour during cross-examination showed some discomfort.

We stress, however, that this is but one example. Ms Tsui cross-examined the Taxpayer on other book entries. In no case were the Taxpayer's explanations satisfactory. In all the circumstances, we have no hesitation in finding that no reliance whatsoever should be placed upon the accounts produced for Company A. We find the Taxpayer's evidence in this regard to be totally unsatisfactory and have no hesitation in rejecting it.

Preliminary matters before the Board

The Taxpayer requested us to consider two preliminary matters. He first noted that the agreement set out at fact 1 contained various irregularities and mistakes including the omission of his name as Dealer Representative and the juxtaposition of the signatures on the agreement (the Taxpayer signed where the Firm should have signed and vice versa). None of these mistakes or irregularities affected the validity of the agreement. Indeed, the Taxpayer's evidence, and much of his argument, relied upon the efficacy of the agreement. We therefore accept the agreement as evidence of the formal bargain struck between the parties; and we reject the Taxpayer's invitation to disregard its terms.

The Taxpayer then requested us to disregard the evidence of the Firm in its responses to the assessor's enquiries (fact 6 refers), for the reason that the principal director of the Firm, Mr C, had been publicly censured by the Stock Exchange for short selling. For various reasons, we do not agree with the Taxpayer's contention that Mr C's censure taints the statements made by the Firm upon which the Commissioner's determination was, at least in part, based. First, to a great extent, the information provided by the Firm to the assessor corroborates the statements made by the Taxpayer. Second, the censure in no way leads us to infer that the Firm had a propensity to give false or misleading information in relation to the Taxpayer. Third, a response made following formal requests for information by the Inland Revenue Department is a serious matter which can attract significant penalties for any misleading or incorrect information given without reasonable excuse. Accordingly, contrary to the Taxpayer's submission, where differences exist, our general inclination has been to accept the statements made by the Firm rather than the evidence of the Taxpayer. However we have, as indicated above, accepted various clarifications made by the Taxpayer to those statements.

The Commissioner's Representative, Ms Tsui, also argued a preliminary matter. She referred us to the definitions of 'dealer' and 'dealer's representative' in section 2 of the Securities Ordinance and then referred us to section 50 of that ordinance to show that a Dealer's Representative is engaged just to perform the functions of the Dealer and is required to be registered as the representative of a registered Dealer and to serve that Dealer only. Ms Tsui then argued that a Dealer's Representative cannot personally execute clients' orders and that he must be attached to a Dealer's business. We agree with this submission. But it goes too far to then conclude, as Ms Tsui would have it, that a Dealer's Representative cannot carry on business on his own account. In other words, we agree that a Dealer's Representative cannot trade securities for clients directly (he must do so through the Dealer); but we do not agree that a Dealer's Representative cannot therefore perform services for the Dealer only as an employee and not as an independent contractor.

The above conclusion is supported by the definition of 'dealer's representative' in section 2 of the Securities Ordinance. By its terms the definition distinguishes between a person in 'employment' and a person 'acting for or by arrangement with, a dealer'. In the context of the definition, this latter phrase presupposes a relationship other than employment. We conclude, therefore, that whether the Taxpayer is an employee or an independent contractor of the Firm cannot simply be answered by reference to the provisions of the Securities Ordinance.

In similar vein, Ms Tsui referred us to rules 330-341 of the Rules of the Hong Kong Stock Exchange relating to Sales Representatives (see also fact 12). Throughout those rules, words such as 'employ', 'employment', 'employed' and 'employer' are used. For example, rule 334 states:

> 'No Member shall employ an unregistered … Sales Representative, and, if the name of [a] Sales Representative is expunged from the Register of … Sales Representatives, he must be dismissed from employment as such. Every employment of [a] Sales Representative by a Member shall be upon this understanding and any written agreement shall contain a clause to this effect.'

Ms Tsui did not go quite so far as to suggest that the rules preclude someone in the Taxpayer's position from being, as a matter of law, anything but an employee of a Dealer. But she did submit that the rules suggest an employer/employee relationship between a Dealer and a Dealer's Representative. She contended that, as a Dealer's Representative, the Taxpayer was bound by these rules (see rule 333) and that 'most likely' he is thereby an employee. We can see the attraction of this submission. However, in view of our conclusion above relating to the Securities Ordinance, the provisions of which do not preclude the relationship of the Taxpayer and the Firm being one for services (independent contractor) rather than one of service (employment), we also consider that we cannot conclude this appeal simply by reference to the Rules of the Stock Exchange. We have therefore concluded that, ultimately, the question for our decision is one of fact based upon the totality of facts (of which the content and import of the rules is one) to which we must apply the correct principles of law set down by courts whose decisions are binding upon us.

The Taxpayer's contentions

During the Board hearing, the main thrust of the Taxpayer's argument was essentially that the risks taken by, and rewards available to, him indicate that he was carrying on business on his own account. Accordingly, he should be liable to profits tax rather than salaries tax. Specifically, the Taxpayer relied upon:

(1) The risk and reward of unstable income. He was simply paid on a commission basis with no guaranteed income. Therefore, his opportunity of earning commission depended significantly upon the way he managed his work. Furthermore, the Taxpayer retained his own client base if he moved from one broking firm to another.

(2) The indemnity and guarantee given by him to the Firm. The Taxpayer was responsible for all liabilities for default in payments by his clients to the Firm (clauses 6 and 7 of fact 1 refer). In this regard, the Taxpayer noted that under clause 7.2 the Firm had a discretion to withhold payment of commission to him and that, if his contract were one of employment, this clause would infringe the Employment Ordinance.

(3) The operation risk. Any dispute on share quotations due to poor communication between the Taxpayer and the floor trader or between the Taxpayer and a client would need to be resolved by the Taxpayer. The Taxpayer would be liable to compensate the Firm for any loss suffered by it. Conversely he could lose any unsatisfied client.

(4) Default risk. If any client could not pay for shares purchased or failed to deliver share scrip sold, the Taxpayer would be liable to indemnify the Firm. Conversely, if the Firm became insolvent, the Taxpayer would be responsible for any loss suffered by his clients.

The Taxpayer also argued that, unlike the employees of the Firm, he did not receive any statutory and typical contractual employee benefits such as a stipulated pay date, sick leave, overtime payment, double pay, bonus, provident fund and severance and long service payments.

Finally, the Taxpayer argued that the documents referred to at facts 11, 12 and 13 in which, inter alia, he described the Firm as his 'employer' and denied that he carried on any business on his own account, contained mistakes. He claimed that he did not understand the significance of all the questions in the documents, that the documents were detailed and, in view of work pressure, he did not pay sufficient attention to the nature of the answers that he gave. The Taxpayer then argued that, according to the Rules of the Stock Exchange, registration as a Dealer's Representative can only be made in an individual's name and not in a firm name (fact 11 refers; see also rule 336). He also intimated, in relation to his first annual return (fact 13 refers), that if he included details of Company A this would elicit many (apparently unwelcome) follow up questions from the Stock Exchange.

The Commissioner's contentions

Apart from her reliance upon the provisions of the Securities Ordinance and the Rules of the Stock Exchange, Ms Tsui presented a detailed, finely argued, submission based upon three tests used by the courts to distinguish between an employee and an independent contractor: the control test, the integration test and the economic reality test. We deal with these arguments below when we consider the application of the various tests to the facts of this appeal.

Ms Tsui also relied generally upon the documents described at facts 11, 12 and 13 wherein the Taxpayer declared the Firm as his 'employer' and did not disclose that he carried on business on his own account; and wherein the Firm made a declaration stating that it intended 'to employ' the Taxpayer. Ms Tsui stated that these were all contemporaneous documents which indicated the existence of an employer/employee relationship between the Firm and the Taxpayer and showed that the Taxpayer was not carrying on business on his own account but that he was merely carrying on business on the Firm's account.

In relation to the draft agreement prepared by the Firm for the Taxpayer's signature (facts 15 and 16 refer), Ms Tsui argued that it does no assist the Taxpayer because it suggests the Firm's original intention was to regard the Taxpayer as an employee, that the amendments to that agreement (essentially replacing the references to 'employment' with 'service': fact 16 refers) were neutral and that, in any event, the Taxpayer's aim in this exercise was to delete the employment clauses purely for tax purposes. Ms Tsui bolstered this argument by reference to the fact that the Firm submitted employer's returns for the Taxpayer (fact 2 refers) and that this is prima facie evidence of the Firm recognising the true legal relationship throughout the term of the Taxpayer's engagement with the Firm.

In conclusion, Ms Tsui submitted that no matter what test was used to determine the issue, the Taxpayer was engaged as an employee of the Firm during the relevant period. In short, there is, she argued, little evidence to show that the Taxpayer was an independent contractor who had ventured into business on his own account with all its attendant risks. Rather, she argued that the facts before us have all the appearance of an employee who, for tax purposes, has sought to show himself as carrying on a business.

The relevant law

Income from employment is liable to salaries tax; profits from a trade, profession or business are liable to profits tax (Inland Revenue Ordinance, sections 8 and 14).

An employment exists where there is a contract of service as opposed to a contract for services (Cassidy v Ministry of Health [1951] 1 All ER 574 and D19/78, IRBRD, vol 1, 323). In Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631 the Court of Appeal decided that no single test determined whether a contract was one of service or for services, that ultimately this is a question of fact and that it is necessary to balance all relevant factors in deciding the overall classification of an individual (see also Halsbury's Laws of England 'Contract of Employment' volumn 16, 4th edition, at pages 8 and 9). Generally, however, courts in Hong Kong have adopted the so-called 'work on own account' test to determine whether a worker was an employee or an independent contractor. This was approved by the Privy Council in Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764 per Lord Griffiths:

> *'Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J at pages 184 and 185 in Market Investigations v Minister of Social Security [1969] 2 QB 173:*
>
> *"The fundamental test to be applied is this:*
>
> *Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"*
>
> *If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No", then the contract is a contract of service. No*

exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task".'

The way in which the parties themselves treat the contract and the way in which they describe and operate it is not decisive and may, if amounting to mere labeling, be wholly disregarded. What must be considered is the correct categorisation of the relationship objectively (Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 3 All ER 817).

A number of useful general statements of principle also emerge from the English Court of Appeal decision in Hall v Lorimer [1994] STC 23. This case accepted that the test to be generally applied in determining whether an employment exists is that laid down in Market Investigations v Minister of Social Security [1969] 2 QB 173 quoted above. The court then went on to state:

'In order to decide whether a person carries on a business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative, appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case.' ([1994] STC 23 per Nolan LJ at 29).

Reasons for decision

The relevance and extent of control. We appreciate that in distinguishing between a contract of service and a contract for services control is no longer regarded as the sole determining factor, although it will nearly always have to be considered (see Market Investigations v Minister of Social Security [1969] 2 QB 173 per Cooke J at 184).

In this regard, we do not accept the Commissioner's argument that the restrictions placed by the Firm upon the Taxpayer in relation to matters such as working schedule and leave requirements, the non-competition clause (that is, the Taxpayer was not allowed to concurrently work for other securities firms and, if he wished to do so, he had to seek approval from the Firm) as well as the requirement placed upon the Taxpayer generally to observe the Firm's rules and regulations (see clauses 1.1 to 1.7, and 1.2 in particular, of fact 1) show a level of control by the Firm which is unequivocally consistent with the existence of an employment relationship. Our analysis of this issue follows.

Notwithstanding the terms of the agreement (fact 1) and the very general statements made by the Firm to the assessor, including the statement that the Taxpayer was answerable to the directors of the Firm and bound by its rules and regulations (fact 6(b)), we have accepted that the Taxpayer's working hours and absence from the Firm's office premises were not strictly regulated (fact 20(e)). Moreover, the general tenor of the Taxpayer's evidence was that he had a high degree of autonomy in liaising and dealing with his clients. Despite extensive cross-examination of the Taxpayer, there was nothing in his evidence that indicated that the Firm ***actually*** imposed control over the manner in which he carried out his work. The controls that were placed upon the Taxpayer, in his capacity as a Dealer Representative of the Firm, seem to have emanated externally. Specifically, the Taxpayer was required to act in accordance with the Rules of the Stock Exchange. It was within this framework that the relationship between the Taxpayer and the Firm was forged.

In the result, the inference of control present in this case is insufficient in degree or extent to justify the conclusion that the Taxpayer must be an employee of the Firm. In any event, even assuming a high degree of control to be present in this case, we must go on to consider whether there are any other factors inconsistent with the existence of a contract of service.[4]

Integration. This is a test to see whether a person is employed by another as part of a business and whether that person's work is done as an integral part of that other's business. Conversely, it is said that under a contract for services, the person's work, although done for the business, is not integrated into it but is only accessory to it.

We accept the Commissioner's argument that, at all relevant times, the engagement of the Taxpayer by the Firm as its Dealer's Representative (facts 1 and 11 refer) and his registration as a Sales Representative of the Firm (fact 12 refers) indicate that the Taxpayer has, to a large degree, been integrated into the business of the Firm. We also agree that the definitions of 'dealer' and 'dealer's representative' in section 2 of the Securities Ordinance support this conclusion.

On the basis of the facts we have found, we conclude that the nature of the Taxpayer's activities as a Dealer' Representative were to a considerable extent part and parcel of the business of the Firm to whom he was attached. Such facts include: his

[4] See further, Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] QB 497.

designation and name cards of the Firm showing him as 'Financial Consultant' and later 'Manager—Portfolio Investment' (fact 18), provision of medical benefits for the Taxpayer arranged by the Firm (fact 20(b)), provision of certain equipment and facilities, such as monitor screen, designated telephone line and the necessary backroom operation (fact 20(c)) and the general tenor of the Taxpayer's oral evidence that the Account Executives met separately and together with the Firm to discuss and work out questions of mutual benefit and interest.

On the other hand, unlike ordinary employees of the Firm, the Taxpayer received no fringe benefits from the Firm apart from certain medical benefits. This distinguishes the Taxpayer from the normal cohort of employees (although we appreciate that absence of fringe benefits and regular pay is common to many employees who work on a piece rate or commission basis: see D65/93, IRBRD, vol 9, 38 at 53). We also note that the Taxpayer appears to have had a large degree of autonomy in liaising and dealing with clients and it seems to have been accepted by the Firm that, although clients were recorded on the books of the Firm, they had a personal relationship with the Taxpayer and were free to move with him if he left the Firm (fact 20(d) refers).

Notwithstanding our findings upon the extent of the Taxpayer's integration into the business of the Firm, we cannot conclude that the Taxpayer must therefore have been an employee of the Firm. The level of integration is a factor which indicates the overall classification of the Taxpayer as either an employee or as an independent contractor. But this cannot, in our view, be determinative of the dispute before us. As indicated above, the modern approach adopted in the cases shows that our task, is to balance *all* relevant factors.

The economic reality. Case law of the highest authority indicates that in distinguishing a contract of service from a contract of services the fundamental test is to ask whether:

> 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account? [If not] then the contract is a contract of service.' (see Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764)

In this regard, we appreciate the dangers of simply focusing upon the factors which have been considered in previous cases. We remind ourselves of the warning expressed in Hall v Lorimer [1994] STC 23 that application of this test must not become a mechanical exercise in just ticking a check list. In any event, an analysis of the factors referred to with approval in Lee Ting-sang v Chung Chi-keung does not give a clear answer to the present dispute: one factor supports the finding of employment (the lack of cogent evidence relating to the hiring of staff by the Taxpayer); other factors support a contrary finding (such as his overall responsibility for managing his activities, the degree to which he could profit from sound management and his exposure to financial risk); while other factors are neutral (his level of overall independence and the provision by both the Firm and the Taxpayer of equipment necessary for the Taxpayer's work).

In the result we must, as indicated by the authorities binding upon us, step back and look at the totality of the facts before us. In doing this, we have decided, although not without some hesitation, to conclude that the Taxpayer was carrying on business on his own account.

In reaching our conclusion, we have not disregarded the arguments of the Commissioner whereby Ms Tsui ably listed a series of factors which indicated that the Taxpayer was an employee of the Firm. However, as Ms Tsui appreciated, none of these factors – such as the Taxpayer signing his engagement letter in his own name without reference to Company A, the fact that he had no authority to contract for or bind the Firm, the fact that he rendered exclusive service to the Firm, that apparently the clients had no notice of the existence of Company A and that the Taxpayer did not hold himself out to the clients as carrying on business on his own account, the possibility of termination of the Taxpayer's contract for failure to comply with the Firm's rules and regulations and the fact that either party could give one month's notice to terminate the agreement – are determinative that the Taxpayer was not carrying on business on his own account. Whilst the existence or, where relevant, absence of these factors might have helped the Taxpayer's case, on the totality of facts before us they did not damn it. Indeed, many of the factors noted by Ms Tsui are commonly found in contracts for services used in various service industries.

In light of the specific matter discussed above under the heading 'Cross-examination of the Taxpayer', we have been particularly cautious against taking the Taxpayer's evidence at face value. But in the final analysis, we found that the nature of the risk borne by the Taxpayer in relation to his dealings with his clients was crucial to this appeal and has titled the balance in the Taxpayer's favour. Unlike any employment situation we can envisage, the terms of the indemnity and guarantee clauses in this case (clauses 6 and 7 of fact 1 refer) appear unique. Our analysis on this issue follows.

Where an employee commits a fraud or is grossly negligent, then that employee is liable to compensate the employer for any loss incurred by the employer arising from the employee's actions. But in the present case, liability would attach to the Taxpayer *regardless* of any fault on the part of the Taxpayer. This seems to us to be fundamentally inconsistent with the relationship of employer and employee. This is particularly so given the absence in the agreement (fact 1 refers) of any restrictive covenant placed upon the Taxpayer by the Firm in relation to future dealings with the clients whom he has introduced to the Firm (see also fact 20(d)).

In this regard, it is useful to reiterate the extent of the Taxpayer's liability in clauses 6 and 7 of fact 1:

> 6.1 The Dealer Representative shall indemnify [the Firm] against all damages, liabilities, actions, proceeding, judgements, costs (including costs on a solicitor-and-client basis), claims, demands and any other losses <u>of whatever nature</u> that may be suffered or incurred by [the Firm] in connection with or

> arising from transactions in securities dealt by or through the Dealer Representative in the name of [the Firm] (whether or not the same may have been caused by or may relate to any fraud, deceit, neglect, misconduct, breach of contract or default on the part of the Dealer Representative or his client).
>
> 7.1 without prejudice to clause 6 you will be fully responsible for the collection of all amounts due by your clients and in any case be wholly and fully responsible for all amounts due to any or all of them by such clients introduced by you or your agents in relation to businesses transacted with any or all of them. (emphasis added)

Although Ms Tsui argued vigorously that these clauses are immaterial to our decision, the threat of liability under them was not illusory. We appreciate that the Taxpayer did not in fact incur any liability to the Firm under these clauses (his evidence generally showed him to be conservative in his client dealings); but he fact remains that his colleagues did become liable (fact 22) and the Taxpayer could have been subject to the same fate regardless of any fault on his part.

Ms Tsui then referred us to a previous Board of Review decision, D65/93, IRBRD, vol 9, 38, a case involving an Account Executive who claimed he was not an employee, where it was stated at page 52:

> *'One of the Taxpayer's nine reasons … relates to his liability to indemnify [the Company]. This could arise under two circumstances:*
>
> *Under sub-paragraph 3(c) of the letter [of engagement]. The Board notes that this liability to indemnify was expressed to arise if loss or damage were to be suffered by reason of the Taxpayer failing to observe [the Company's] rules and regulations, with respect to foreign currency and bullion trading. The Board accepts the Revenue's submission that this does not create the agreement between [the Company] and the Taxpayer a contract for services as it is not an unusual feature of the type of employment accepted by the Taxpayer when he counter-signed the letter from [the Company].*
>
> *Under sub-paragraph 4(c) of the letter [of engagement]. The Board notes that this liability to indemnify was expressed to arise if a customer procured by the Taxpayer 'default[ed] in payment", namely failed to settle balances due to [the Company] on the customer's trading account. The Board does not accept that this provision in any way detracts from the Revenue's submission [set out above]. The Taxpayer was to be remunerated in part by commissions on business introduced and, obviously, a provision of this nature focuses the employee's mind on his need to introduce only those customers who would be good for their commitments, particularly if the trading was to be undertaken on unsecured margin accounts.'*

Ms Tsui contended that the facts in D65/93 are similar to those before us and that the presence of the indemnity and guarantee clauses in the agreement are not necessarily inconsistent with the Taxpayer being an employee of the Firm. In our view, the cases are not analogous. In particular clause 6 of the agreement set out at fact 1 is much broader than that considered in D65/93. Clause 6 applies whether or not the Taxpayer has deviated from the Firm's rules and regulations (contrast sub-paragraph 3(c) considered in D65/93) and states expressly that it applies regardless of any lack of care on the part of the Taxpayer (contrast sub-paragraph 4(c) considered in D65/93 which is silent on this matter). In argument, Ms Tsui responded to these concerns by referring us to the positions of a bank teller and a betting operator at the Jockey Club, both of whom would undeniably be employees. We found this analogy initially attractive, but upon reflection we would distinguish these cases because these employees would not be liable for every conceivable loss suffered by their employers regardless of fault. Like D65/93 these employees would be liable if they did not follow the strictures laid down by their employers in performing their duties. In this appeal, the Taxpayer would be liable in any event.

Although the transactions of his clients were processed through the Firm and although the clients appeared to be ignorant of Company A and the details of the nature of the Taxpayer's dealings with the Firm, the Taxpayer is not thereby rendered an employee of the Firm. In this regard, we find that although the clients are nominally recorded separately as clients of the Firm in its accounts, in reality they have a personal relationship with the Taxpayer and might be expected to move with him if he moved to another broking firm (see also fact 20(d)). We support this inference by again noting the absence of any restrictive covenant placed upon the Taxpayer by the Firm in relation to future dealings with the clients whom he has introduced to the Firm. If there were an employment relationship in this case, we would expect such a covenant to be incorporated into the agreement. Its absence, together with the very broad terms of clauses 6 and 7, indicate strongly to us that the Taxpayer was carrying on business on his own account.

It is also common ground that the remuneration (commission) received by the Taxpayer from the Firm was not a salary and that he had no minimum allowance from the Firm. In short, he profited from his own energy and initiative; the more he had, the more he was paid. The reality was that if he did not bring in clients he would not receive any remuneration. To use a cliche, but a truth nonetheless: he sank or swam depending solely upon his own ability.

We have also asked ourselves whether there was any indication from the facts before us that the Taxpayer in any way benefited from the rights conferred upon employees under the Employment Ordinance. Ms Tsui did not argue that there was. In this regard, we should add that this 'omission' was entirely explicable: for the very good reason that there was simply no evidence before us to admit such an argument. In short, and unlike the situation for employees covered by the Employment Ordinance, there was no safety net of any description, let alone an iron rice bowl, for the Taxpayer in this case.

The totality of the facts before us indicate, in our view, that the Taxpayer was an entrepreneur who had entered into a collaborative arrangement with the Firm with the

aim of mutual gain and sharing of commission income obtained from clients. It is our conclusion that the Taxpayer was in business on his own account.

In reaching our decision, we have, as indicated previously, paid particular attention to the unique features of the Taxpayer's engagement with the Firm (see clauses 6 and 7 of fact 1, considered together with the absence of any client restraint clause). We would, however, like to state that our decision could have been different if the terms of the indemnity and guarantee clauses were less broad (for example, if they only covered losses due to the Taxpayer's fraud or negligence) or were illusory (for example, if the evidence showed that there was simply no likelihood of (1) the Firm suffering losses from client defaults or (2) the clauses actually being enforced by the Firm according to their terms).

We should also add that we have not ignored Ms Tsui's submissions relating to the terms of the documents set out at facts 13 to 15 and the Employer's Returns set out at fact 2. Although these documents do support the inference of the Taxpayer having an employment, other documents (for example, the agreement itself and the Taxpayer's Business Registration) go the other way. Neither the Taxpayer nor the Firm have been consistent in the way in which they have treated and described the legal nature of the relationship between them. In these circumstances, what we have endeavoured to achieve is, on the basis of all the competing facts before us, to consider the categorisation of that relationship objectively.

For all the above reasons, we conclude that the Taxpayer's income from the Firm arose from his carrying on business on his own account. The income in dispute was thus properly subject to profits tax and not to salaries tax. We therefore order that the Taxpayer's appeal be allowed and the assessments under appeal be discharged.