

9. The majority decision prevails. The appeal is allowed and the assessment is reduced by the deduction of the deficiencies arising on conversion of U.S. dollars and balances in cash and hand of \$327,750 and \$41,584.

Case No. D 19/78

Board of Review:

L. J. D'Almada Remedios, *Chairman*, W. Hume, Lau Chan-kwok & Eric K. C. Lo, *Members*.

10 January 1979.

Salaries tax—taxpayer attached to firm of stockbrokers as “runner”—firm paying commission and monthly expense allowance but having no control over taxpayer—whether taxpayer was an employee chargeable to salaries tax.

Adjustment to assessable income—assistants engaged by taxpayer—whether expenditure incurred deductible as allowable expense under s. 12(1)(a) of the Inland Revenue Ordinance.

The taxpayer, a stockbroker's “runner” was assessed for salaries tax for the year of assessment 1973/74 as an employee of a firm of stockbrokers to which he was attached. He objected to the assessment claiming that he was an independent operator with liberty to deal with other stockbrokers. He contended that as the firm had no control over his activities the relationship of master and servant did not exist in his case.

The taxpayer was paid by the firm a commission for the clients he introduced and a monthly allowance of \$1,000–\$1,500 as travelling and entertainment expenses. The Board found, *inter alia*, that whilst he was attached to the firm the taxpayer was a “runner” solely for the firm and that by his calling card he represented to his clients and the public he was part of its organization.

The taxpayer engaged two assistants to deal with his clients in the New Territories and Kowloon and claimed to deduct the expenses so incurred from his assessable income. The Revenue taking the view that the expenses were not “necessarily” incurred in the performance of the duties of his employment rejected the claim.

On appeal.

- Decision:**
1. The taxpayer was an employee and chargeable to salaries tax for year of assessment 1973/74.
 2. The expenses incurred in engaging assistants were wholly, exclusively and necessarily incurred in the production of the taxpayer's assessable income and were therefore deductible.

Appeal partly allowed. Case remitted to Commissioner for adjustment of assessment.

Lee Yai Ming of T. M. Ho & Co. for the appellant.
A. K. Gill for the Commissioner of Inland Revenue.

Cases referred to:—

1. *Morren v. Swinton*, (1965) 2 All E.R. 349.
2. *Queensland Stations Pty Ltd. v. Federal Commissioner of Taxation*, (1945) 70 C.L.R. 539.
3. *Bank voor Handel v. Slatford*, (1952) 2 All E.R. 956.
4. *Cassidy v. Ministry of Health*, (1951) 1 All E.R. 574.
5. *Ricketts v. Colquhoun*, 10 T.C. 118.

Reasons:

Part III of the Inland Revenue Ordinance relates to Salaries Tax, which is a tax on income from employment where the relationship of master and servant exists. It does not apply to a contract for services such as in the case of principal and agent or the employment of an independent contractor.

The Appellant has been assessed for Salaries Tax for the year of assessment 1973/74. At that time he was attached to a firm of stockbrokers. The Appellant's case is that he is a stockbroker's "runner" and there is no employer/employee relationship between himself and the firm; that he earns income in the form of commission which is paid to him by the firm as a result of his introducing clients to it; that he has no fixed hours of work and he is free to introduce intending clients to other members of the Stock Exchange and that he is not subservient to control by the firm.

His tax representative, therefore, argues that as the Appellant's method of earning a livelihood does not consist of obtaining a post and staying in it but consists of being a freelance operator who may deal with other members of the Stock Exchange he is not an employee; that his arrangement with the firm of stockbrokers is a contract for services because it is essential for the relationship of master and servant to exist that the former should have a right of control over the manner in which the latter shall act and as the firm did not have such right their dealings with each other are on a principal to principal basis and not that of employer/employee.

If the right of "control" is to be treated as a decisive test on whether a relationship of master and servant exists and the facts of this case are limited to the extent and in the manner set out above, we recognize the force of the Appellant's contention.

However, over the last 60 years or more the law on this topic has developed and changed in line with changes in social relationship between parties. "Control", although a factor to be taken into account, is no longer a conclusive test nor can it be regarded as of

universal application. In the case of a professional man or a man with some particular skill and experience, the inadequacy of the test of "control" is apparent since in some such cases there can be no question of the employer telling the professional man or the man with some particular skill and experience how to do work, and absence of control and direction is, therefore, hardly useful as a test: **Morren v. Swinton**¹. The same can be said of a stockbroker's runner where the nature of his work requires little, if any, superintendence or control. On the other hand, there may be cases when one who engages another to do work may reserve to himself full control over how the work is to be done but, nevertheless, the contract is not a contract of service: see, for example, **Queensland Stations Pty. Ltd. v. Federal Comr. of Taxation**².

Today, the test of being a servant does not rest on submission to orders: per Denning L.J. in **Bank voor Handel v. Slatford**³. There is, in short, no single decisive test. The best one can do is to look at all the circumstances and examine all the possible factors that may have a bearing on the relationship between the parties concerned and apply the criterion in **Cassidy v. Ministry of Health**⁴, namely: "Was the contract a contract of service within the meaning which an ordinary person would give to the words?"

Having heard the evidence of the Appellant and of his witness, a partner of the firm, we find that the Appellant joined the firm in October 1972 and was attached to that firm as a runner. Evidence was given that the firm paid him sums ranging between \$1,000 and \$1,500 per month as an allowance for travelling and entertainment expenses. Although the Appellant stated that he was at liberty to introduce business to other stockbrokers, he was or remained a runner solely for the firm. Although he had no fixed hours of work, he attended the office of the firm daily where he would wait for clients to telephone him and then pass the business on to the firm and get his commission. His calling card (printed in English and Chinese) showed that he was attached to or associated with the firm and listed the telephone numbers of its office and desk in the Trading Hall. His card was printed with the knowledge and authorization of the firm and the firm agreed that such a calling card would signify that the Appellant is part of its organization.

¹ (1965) 2 All E.R. 349 at 351.

² (1945) 70 C.L.R. 539 at 552.

³ (1952) 2 All E.R. 956 at 971.

⁴ (1951) 1 All E.R. 574.

For the four years of assessment 1973/74 to 1976/77, the firm submitted an Employer's Return showing the Appellant to be an employee of the firm. The Returns show entries in separate items for salary, commission and allowances. No satisfactory explanation was given as to why there were separate figures for salary and allowances or to account for those sums in the Returns which do not appear consistent with the evidence of a fixed allowance of \$1,000 to \$1,500 a month. If the firm did not consider the Appellant to be an employee, one would not expect it to file a Return showing the Appellant to be its employee. But we will not hold that against the Appellant as it may well be that a layman may not appreciate the distinction between a contract of services and a contract for services. For the year of assessment in dispute, the Employer's Return showed a figure for salary in the sum of \$20,400 and a figure for allowances in the sum of \$3,604. As recently as the 13 November 1978 a fresh Return for the same year of assessment was submitted to show total allowances in the sum of \$24,004 with a blank figure against salary. Although asked for, no explanation was forthcoming as to what the figure \$3,604 in the original Return represented or why in the original Return the sum of \$20,400 was put against salary and not allowances.

The Returns were completed by the accountant of the firm, who obtained the information from the account books of the firm. If so, it would appear that the books of the firm must have shown separate entries for salary and allowances. Likewise, no explanation in this respect was forthcoming.

Another feature of this case is the Appellant's evidence that he terminated his services with the firm in July 1976. He then joined another firm of stockbrokers and had new cards printed and did not thereafter introduce any further customers to his former firm.

Having regard to all the facts, the overall picture that emerges is that the Appellant was, at all material times, part of the set-up of the firm from whom he derived income by way of commission. He was a runner for the firm. He was attached to and attended daily at its office. By his calling card he necessarily represented to his customers and to the public that he was part and parcel of its organization. A person can be an employee although he is remunerated by commission only. Payment to the Appellant of a fixed monthly allowance appears to us consistent with an expectation that the Appellant would not be directing his business elsewhere and with the assumption that the firm did not regard the Appellant as a freelance operator unconnected with it. The way in which the accounts of the firm were kept also lead to such a view. In addition,

the fact that the Appellant has not challenged a Salaries Tax assessment for the years preceding and subsequent to 1973/74, even although in those years he stood in the same relationship to the firm, suggests at least a lack of conviction on his part that he was truly a freelance operator. Finally, the Appellant's evidence that he terminated his services with the firm and joined another firm of stockbrokers is in harmony with the inference that he was connected with the former firm as an integral part of it as opposed to being a self-employed freelance operator. The termination of services with one firm and the joining of another firm do not appear to us to be appropriate concepts in the case of a self-employed freelance operator. We have, therefore, come to the conclusion, on the facts, that he was an employee of the firm and is chargeable to Salaries Tax.

The only issue left to be decided is whether the sum of \$29,536.83 is deductible as an allowable expense. The Commissioner dismissed the Appellant's claim for expenses in the following terms:

"I note that the Taxpayer has made a claim for expenses. It has been held that expenditure 'necessarily' incurred in the performance of the duties of the employment 'must be expenses which a holder of an office is necessarily obliged to incur'—that is to say, obliged by the very fact that he holds the office and has to perform its duties (per Viscount Cave in *Ricketts v. Colquhoun*, 10 T.C. 118). In the present case, whilst it may have been very convenient for the Taxpayer to have assistants to assist him in his work I am not satisfied that it was necessary that they should do so. The claim therefore fails."

The *Ricketts* case⁵, however, arose out of statutory provisions in the U.K. that are distinguishable in material respects from the provisions of the Inland Revenue Ordinance. Under section 12(1)(a) of the Ordinance, what the Taxpayer has to show is not, as in the U.K., that the holder of the office was necessarily obliged to incur the expense in *the performance of the duties of his office* but that it was incurred wholly, exclusively and necessarily in *the production of his assessable income*, which is quite a different matter.

In the frenetic period of the Stock Market boom, the Appellant engaged two assistants to deal with and attend to his clients in the New Territories and Kowloon without whose help he would not have been able to earn the income which is now the subject of tax. We are satisfied on the evidence, from receipts produced and explanations given, that the expense totalling \$29,536.83 was wholly, exclusively and necessarily incurred in the production of his assessable income and is deductible as an allowable expense.

⁵ 10 T.C. 118.

This case is, therefore, remitted to the Commissioner to adjust the assessment accordingly.

Case No. D 1/79

Board of Review:

S. V. Gittins, *Chairman*, E. J. S. Tsu, Professor P. G. Willoughby & K. W. Young, *Members*.

13 July 1979.

Profits tax—credit union—liability to tax—application of the mutuality principle—taxpayer a club.

The Deputy Commissioner of Inland Revenue by his Determination confirmed assessments for profits tax for the years of assessment 1971/72, 1972/73, 1973/74, 1974/75 and 1975/76, made against the taxpayer, a credit union. The assessments consisted of the surpluses of income over expenditure for each of the said years. The taxpayer appealed against the Determination. The appellant contended, as its first ground of appeal, that it was a mutual concern and that its surpluses were not assessable income for the purposes of Profits Tax and, as its second, that it came within section 24 of the Inland Revenue Ordinance.

On appeal the Board held that the mutuality principle did not apply to the appellant. The first ground of appeal therefore failed. As to the second ground, the Board took the view that, on the facts of the case, the appellant came within the definition of "club" as defined in the Oxford English Dictionary, meaning, *inter alia*, an association formed to combine the operations of persons interested in the promotion or prosecution of some object and, therefore, the appellant carried on a club or similar institution within section 24(1) of the Ordinance.

Decision: Appeal allowed on second ground of appeal. Assessments appealed against annulled.

B. H. Tisdall for the appellant.

A. K. Gill for the Commissioner of Inland Revenue.

Case referred to:—

1. Sydney Water Board Employees' Credit Union Ltd. v. Federal Commissioner of Taxation, (1973) 4 A.T.R. 157.

Reasons:

1. The Taxpayer has appealed to the Board of Review against the Determination of the Deputy Commissioner of Inland Revenue confirming assessments for profits Tax for the years of assessment 1971/72, 1972/73, 1973/74, 1974/75 and 1975/76.