HCIA 2/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO 2 OF 2016

BETWEEN

COMMISSIONER OF INLAND REVENUE Applicant

and

PANG FAI Respondent

Before: Hon Chow J in Court
Date of Hearing: 20 September 2017
Date of Decision: 3 November 2017

J U D G M E N T

INTRODUCTION

1. The issue for determination in this appeal is whether the Board of Review was wrong in law to find that four sums of money, totalling HK$50,400, received by Mr Pang from the Hong Kong Institute of Certified Public Accountants described as "honorarium" should be regarded as his assessable profits chargeable with profits tax, as opposed to assessable income chargeable with salaries tax.

BACKGROUND FACTS

2. The facts of this case are fully set out in the written decision of the Board of Review ("the Board") dated 20 June 2016 ("the Decision"). For the purpose of the present appeal, the following basic facts, taken from the Decision, should suffice.

(i) The Institute's Qualification Programme

3. The Hong Kong Institute of Certified Public Accountants ("the Institute") is a corporation established under the *Professional Accountants Ordinance*, Cap 50. Section 7 thereof sets out the objects of the Institute, including the regulation of the

practice of the accountancy profession, conducting examinations and acting in such other manner as may be necessary to ascertain whether persons are qualified to be admitted to the register of certified public accountants. By section 24 of the Ordinance, a person shall be qualified to be registered as a certified public account if, amongst other things, he is a student registered as such with the Institute and has passed such examinations in accountancy and other subjects as may be prescribed by the Council of the Institute.

4. For this purpose, the Institute has devised a Qualification Programme comprising four modules, with examination at the end of each module and a final examination after the successful completion of all four modules. The Qualification Programme was revised in September 2010. In this judgment, the pre-September 2010 Qualification Programme shall be referred to as the "Old QP", and the revised programme shall be referred to as the "Enhanced QP".

5. Workshops are run to assist the students to complete the modules and the examinations. To operate these workshops, the Institute invites members to apply to become Workshop Facilitators or Examination Markers. Separate invitations are issued for each workshop or examination marking session. It is a general invitation open to all who are qualified and interested to take part. There is no obligation to accept or reply to the invitations. Those who apply may or may not be given any assignments as much depends on student enrolment, the number of available Workshop Facilitators or Examination Markers, and their time preference, etc.

(ii) Mr Pang was engaged by the Institute to act as Workshop Facilitator and Examination Marker

6. Mr Pang was at all material times a certified public accountant and a member of the Institute. He was engaged by the Institute to act as Workshop Facilitator and Examination Marker for the Qualification Programme in 2010 and 2011. According to the Notification of Remuneration Paid to Persons other than Employees (Form IR56M) filed by the Institute, for the period from 1 April 2010 to 31 March 2011, Mr Pang received remuneration in the total sum of HK$50,400 ("the Sum"), which related to the following assignments offered by the Institute and taken up by Mr Pang:-

Module Name	**Session**	**Role**	**Honorarium**
Module C (Auditing & Information Management)	February 2010 (1 February to 29 May 2010)	Workshop Facilitator	HK$10,000
Module B (Financial Management)	May 2010 (11 June to 29 August 2010)	Workshop Facilitator	HK$10,000
Module C (Business Assurance)	December 2010 (Enhanced QP) (October to November 2010) – 2 sets of workshops for 2 sets of candidates	Workshop Facilitator	HK$20,000

Module Name	**Session**	**Role**	**Honorarium**
Module C (Business Assurance)	December 2010 (Enhanced QP) (January 2011)	Examination Marker	HK$10,400
		Total:	HK$50,400

(iii) Workshop Facilitator

7. Each assignment was a separate engagement. No written contract was entered into between the Institute and the Workshop Facilitator, but each assignment would be confirmed by an email. The Workshop Facilitator was required to comply with the relevant guidelines issued by the Institute and to commit to adequate preparation and attendance of all the workshops. The need to attend pre-workshop meeting or briefing session was emphasised.

8. In relation to his assignments as Workshop Facilitator, Mr Pang received the following from the Institute:-

(1) Guidelines for Workshop Facilitators;

(2) Workshop Facilitator Guidance Note (which was a confidential document which must be returned to the Institute after the last workshop);

(3) Candidate Learning Pack; and

(4) Workshop Facilitator Manual (for the December 2010 assignments only but not for the earlier ones).

9. These documents provided, inter alia, detailed notes and guidelines relating to the preparation, contents and conduct of the workshops and other administrative matters which Mr Pang was expected or required to observe and follow.

10. For each module, there would be four workshops each lasting between 3 to 3½ hours for the old QP, and two full-day (8 hours) workshops for the Enhanced QP. Each workshop would be led by two Workshop Facilitators running a class size of about 20 to 25 candidates. The time and venue of the workshops were fixed by the Institute, which also provided equipment such as laptop computers, projectors, stationery, etc, for the running of the workshops.

11. The responsibilities of Workshop Facilitators as set forth in the Guidelines for Workshop Facilitators (for both the Old and Enhanced QP) were mainly to:-

(1) guide candidates in applying theories on practical situations;

(2) help candidates develop their generic skills;

(3) assist candidates to raise their knowledge levels from those assumed at entry to those required for successful completion of the module;

(4) identify areas in which candidates failed to demonstrate an adequate level of understanding and give guidance to remedy deficiencies; and

(5) conduct workshops.

12. Workshop Facilitators were supposed not to dominate or 'teach' during a workshop, but should use questions to encourage candidates to participate and become involved in the workshops. An informative "Questioning Techniques" was appended to the Guidelines for Workshop Facilitators. However, Workshop Facilitators could use their own approach to explain the subject and they could provide their own supplementary teaching materials or handouts if considered necessary.

13. A Master Workshop Facilitator (or Assistant Director under the Enhanced QP) was available to advise on technical and generic matters. Additional comments from the Master Workshop Facilitator or the Examination Board of the Institute might be provided.

14. As part of the quality assurance process, the Institute had in place a Workshop Observer Panel Scheme. A Workshop Observer visited a workshop group at least once to evaluate the performance of the Workshop Facilitators. There were appraisal forms by which candidates and Workshop Facilitators could respectively give feedback about the running of the workshops to the Institute.

15. The Old QP provided a 2-part training session (3 hours plus 1 day) for new Workshop Facilitators, and briefing session (3 hours) and refresher course on skills development (4 hours) for the trained Workshop Facilitators. Under the Enhanced QP, more intensive trainings were provided:a 2-part (4 hours each) training session for the new Workshop Facilitators and a 1-part (4 hours) training session for the experienced Workshop Facilitators. In addition, an 8-hour workshop specific training session was provided to all Workshop Facilitators, new and experienced alike. There was also an optional briefing session which Workshop Facilitators were encouraged to attend.

16. In emergency situations rendering a Workshop Facilitator unable to attend his workshop, he should in the first instance inform his Co-Workshop Facilitator and the Relief Workshop Facilitator on duty to stand in as his substitute. He should also inform the Institute about the situation and the circumstances leading to the use of the Relief Workshop Facilitator. Workshop Facilitators were not expected to use the service of the Relief Workshop Facilitator save in emergency situations.

17. According to the sample invitation leaflets, a Workshop Facilitator was expected to spend about 39 hours in "preparation and student support" under the Old QP, and around 32 hours under the Enhanced QP.

18. Workshop Facilitators had a responsibility to counsel those candidates who failed to attend the workshops or who underperformed, and keep a record of such counselling. According to Mr Pang, he would telephone those candidates after the workshops to find out the reasons for their non-attendance or their lack of performance and try to help them.

19. Mr Pang stated that the honorarium was paid for the conduct of the workshops only and he would not be paid if, for example, he fell ill and could not complete the workshops. This was consistent with the Guidelines for Workshop Facilitators, under which the honorarium was stated to be for the workshops conducted: $10,000 for 4 workshops under the Old QP and $5,000 for each workshop under the Enhanced QP. Workshop Facilitators were required to complete and return their evaluation documentation and workshop material to the Institute before the honorarium would be paid to them.

(iv) Examination Marker

20. In December 2010, Mr Pang was appointed a Marker of a section (namely, Essay/Short Questions) of a paper for Module C. Prior to the despatch of the examination scripts to him, Mr Pang was required to attend a Markers' Meeting during which the Examination Panellists would brief the Examination Markers on the expected marking standard, and lead the marking of sample scripts to arrive at a mutually agreed marking scheme. The marking of the examination scripts must follow the standard and marking scheme formulated in concert at the Markers' Meeting. The timeframe for completing the marking and returning the marked scripts was 2 weeks. It was determined by the Institute. Mr Pang was urged to complete the marking within time.

21. After the Markers' Meeting, Mr Pang was sent the revised marking scheme, the marking grid for recording marks and a questionnaire by which, inter alia, Mr Pang was to report problems with the script booklets. The marking was a take-home exercise. The Examination Markers were not provided with any equipment by the Institute. The Examination Markers could not delegate the marking to any person. If for any reason an Examination Marker could not carry out the marking, he should notify the Institute.

22. The honorarium for marking a QP module examination paper was $80 per script per section (50 marks). Each Marker was expected to mark about 130 scripts of one section of a paper, ie, either Case or Essay/Short Questions. For the final examination, the honorarium was $150 and $50 for the Case section and Essay/Short Questions section respectively.

(v) Other matters

23. In the Decision, the Board also made the following findings which are relevant to the issues raised by the Commissioner in this appeal:-

(1) Taking into account the time that a Workshop Facilitator had to spend on attending training and pre-workshop briefing and preparation and student support, in addition to the time spent on the actual conduct of the workshops, the honorarium paid to the Workshop Facilitators was clearly not an adequate remuneration. In each email confirming an assignment, it was stated that the honorarium was paid "as a token of appreciation". In the Institute's letter dated 14 December 2012, the Institute acknowledged that the amount "was never intended to reflect the time and effort contributed by the Workshop Facilitators, as many of them are seasoned professionals who have worked as Certified Public Accountants for many years. In most cases, Workshop Facilitators are driven by a genuine interest to help groom the next generation of budding accountants. As such, despite the time and effort required to prepare and conduct the workshops, and the relatively small amount of honorarium, which has remained the same since the inception of the QP over 10 years ago, they continue to be willing to undertake the role of Workshop Facilitator."

(2) The Institute enrolled Mr Pang in its MPF scheme, and made a total contribution of $500 ($125 per month) into the scheme as "employer" for the months of June, July, August and September 2010. At the briefing session, the Institute explained that it did not want to risk violating the MPF rules and asked the applicants to sign the requite application forms. Mr Pang agreed to the arrangement and signed the form without giving any thought to its fiscal implication.

(3) The Institute provided accidental insurance coverage against accidental death or permanent disability during the normal course of a Workshop Facilitator's course of duty. Coverage commenced as a Workshop Facilitator left his place of residence or place of employment to go to the appointed workshop venue, and ceased when the Worker Facilitator arrived at his place of residence or place of employment directly from the appointed workshop venue after the end of the workshop. The coverage was not confined to employees or employees' compensation.

(4) In its letters dated 19 September 2012 to the IRD, the Institute stated that Mr Pang was not a full-time or part-time employee of

the Institute. The same position was reiterated in the Institute's letter to the IRD dated 14 December 2012.

THE COMMISSIONER'S DECISION

24. For the year of assessment 2010/11, Mr Pang worked as a lecturer with the HKU School of Professional and Continuing Education ("HKU SPACE"). According to the Employer's Return filed by HKU SPACE for that year of assessment, the total income of Mr Pang was HK$363,460. As earlier mentioned, Mr Pang also worked as Workshop Facilitator and Examination Marker for the Institute in 2010 and 2011 and was paid the Sum of HK$50,400 by the Institute for his services.

25. In his Tax Return – Individuals for the year of assessment 2010/11, Mr Pang only declared the employment income of HK$363,460 from HKU SPACE. The assessor originally assessed Mr Pang's liability to pay salaries tax in accordance with that return. Subsequently, the assessor issued to Mr Pang an Additional Salaries Tax Assessment dated 22 March 2012 in respect of the Sum, as follows:

Additional Net Chargeable Income:	$50,400
Additional Salaries Tax payable:	$8,568

26. Mr Pang objected to the Additional Salaries Tax Assessment, on the ground that his arrangement with the Institute was not one of office or employment of profit under section 8(1)(a) of the *Inland Revenue Ordinance*, Cap 112 ("the Ordinance"), and the Sum was not income arising in or derived from any "pension" under section 8(1)(b) of the Ordinance.

27. The assessor then proposed to revise the Additional Salaries Tax Assessment by raising a profits tax assessment on the Sum and excluding it from Mr Pang's assessable income for the purpose of salaries tax assessment. That proposal, however, was also objected to by Mr Pang on the ground that he did not carry on any trade, profession or business within the meaning of section 14 of the Ordinance.

28. In the absence of agreement between the assessor and Mr Pang, the matter was eventually decided, on 22 June 2015, by the Deputy Commissioner of Inland Revenue, who confirmed that the Sum should be regarded as forming part of Mr Pang's assessable income chargeable with salaries tax.

THE BOARD OF REVIEW'S DECISION

29. On 8 July 2015, Mr Pang lodged a notice of appeal against the determination of the Deputy Commissioner to the Board.

30. By the Decision dated 20 June 2016, the Board allowed Mr Pang's appeal, holding that Mr Pang was carrying on a profession in respect of his acceptance of assignments by the Institute as Workshop Facilitator and Examination Marker for its

Qualification Programme, and the Sum arose in or was derived from such profession. The Board further found that the Sum should be regarded as Mr Pang's assessable profits chargeable with profits tax under section 14 of the Ordinance, and not as his assessable income chargeable with salaries tax under section 8 of the Ordinance.

31. In relation to the central question of whether Mr Pang was an employee of the Institute, the Board reminded themselves of (inter alia) the well-known decisions of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1967] 1 QB 156 and of Cooke J in *Market Investigations v Minister of Social Security* [1969] 2 QB 173, and then referred to the decision of Nolan LJ in *Hall (Inspector of Taxes) v Lorimer* [1994] 1 WLR 209 which the Board considered to be most instructive.

32. The Board went on to find that Mr Pang was not an employee of the Institute. In order to do full justice to the careful reasoning of the Board which led to that conclusion, I shall recite in full the following passages contained in the Decision:-

> "109 We accept that the unique features of this case have made it difficult to fit it into a binary division. Nevertheless, the Sum was clearly earnings received through work and the ultimate question is really whether the work was in the nature of a contract of service, i.e. 'income from office or employment of profit' within the meaning of section 8(1) of the IRO, or a contract for service, i.e. 'profits from trade, profession or business' within the meaning of section 14(1).
>
> 110 The Sum comprised honorarium paid to the Appellant as Workshop Facilitator in 3 modules and as Examination Marker in one module. There was not one contract, but a series of contracts. The 3 assignments where the Appellant was appointed as Workshop Facilitator can certainly be looked at together given that the terms of assignments were comparable in all material respects. The Appellant argued that his assignment as Examination Marker should be looked at separately because the nature of the work was different. In our view, all the assignments should be looked at together. Following what we would call the 'big picture' approach in Hall v Lorimer, one must make an holistic evaluation of the facts and the different assignments must be examined together as part of the bigger picture…
>
> 114 In the present case, the scope and objectives of the workshops and the manners in which the workshops were to be conducted were likewise set out in the [Guidelines for Workshop Facilitators, the Work Facilitator Guidance Note, and the Candidate Learning Pack] in great details and the marking of the

examination papers must follow the standard and marking scheme mutually agreed at the Markers' Meeting. Even if he was not bound hand and feet, the Appellant had to work within a straightjacket, at least insofar as the conduct of the workshops and the marking exercise were concerned.

115 Having looked at these authorities, one is very tempted to say that the present falls well within them and come to the same conclusion. But to do that, in our view, would be to ignore some very unique features which put the present case in its own category. Unlike the employees in Market Investigations and Narich, the Workshop Facilitators and Examination Markers did not do the work for the purpose of gainful employment. It is not the case of someone working (employed or in business) for a monetary gain. Rather, it is the case of a professional man devoting his time and effort to the profession in return for an 'honorarium', knowing that it is an inadequate remuneration, but with the object of enabling the profession to maintain a proper educational programme by which people who want to enter the profession can obtain the requisite qualification. The Appellant did not set out to make any profit in the real sense. To go through the so-called 'economic reality test', asking how the Appellant would profit from sound management of his business and what degree of financial risk he took, would be a completely unsuitable and ineffectual exercise. The Appellant has certainly failed this test, but that does not per se make him an employee of the HKICPA.

116 Equally, the HKCIPA was not running the QP as a commercial enterprise in order to make a financial return. It ran the programme to fulfil its statutory role and responsibilities. The QP was the gateway to becoming a CPA. The institute was the guardian of this gateway. The QP had to be maintained at a high standard. How the QP should be structured, how the workshops were to be conducted, how the candidates should be assessed and how examinations should be marked, all these had to be closely monitored by the HKICPA. The Institute supplied the teaching materials and learning materials and the various guidelines and manual to 'control' the standard of the QP. It was a completely different category of 'control' from the kind one is speaking of in an employer-employer relationship. In such a relationship, the employer exercises control over the employee to ensure that the employee's performance profits the employer. There was not such a relationship here. The Appellant was respected as an equal among equals, a professional among his peers. He was engaged in his capacity

as a practitioner, to contribute his professional skill and expertise, to share his work experiences, to provide comments and recommendations. He was left to his own devices in his preparation and in candidate counselling. No supervision was given, as no supervision was needed. He attended Markers' Meeting not to receive orders or instructions, but to help formulate 'a mutually agreed scheme for live marking at home'.

117 For these same reasons, we think it is totally inapt to adopt here the 'control test', the object underling which is the identification of a superior-subordinate dominant-subservient relationship. It asks if one is so under the control or commands or limitations of the other that the former is the servant/employee and the other the master/employer. This is far removed from the relationship between the Appellant and the HKICPA in the present case.

118 Nor was the reward consistent with an employer-employee relationship. The honorarium covered an estimated 60 hours or more of work, though no payment would be made if for any reason the Workshop Facilitator could not complete the workshops. The honorarium was clearly inadequate. Indeed the very choice of the word recognized the deficiency. A professional may be prepared to provide pro bono services or work for a nominal sum in return for CPD hours and networking, but unlikely for an employee.

119 Another important indicator that the relationship was not one of employer-employee is the fact that the parties were free to rescind at any time without any adverse consequences. The Appellant would not incur any liability even if he could not attend the workshops or if he could not complete the marking in time. He was urged in such instances to notify the HKICPA as early as possible, but he was not penalised for the failure. Equally, the HKCIPA made it clear in the pre-assignment emails that the Appellant might not be given any assignment as much depended on the student enrolment and time preferences, etc.

120 Further, the Appellant is a professional and how his profession as a whole operates is an important consideration…

122 In the same way, it is necessary to look at how these engagements as Workshop Facilitators and Examination Markers operate with the CPA profession as a whole. In this regard, it is important to note that the HKICPA did not regard the Workshop Facilitators and Examination Markers as its employees or an integral part of its organisation. This was made clear in its

letters of 19 September 2012 and 14 December 2012 and the use of the IR56M Notification …

123 True, for the May 2010 assignment, contribution to the MPF was made. This was not done for the February 2010 assignment, even though it also lasted more than 60 days. The provisions relating to MPF, as we know, are most complex. On the safe side, the Institute chose to register the Appellant to the scheme for the May 2010 assignment. They did not do it for the earlier assignment. The anomaly shows confusion. It shows that the Institute was confused with the MPF requirements. But the Institute was not confused about its relationship with the Appellant. The Appellant was not its employee and the IR56M Notification made that clear.

124 We have reminded ourselves that whether a contract is one of service or one for services has to be looked at objectively. Parties cannot change the nature of the contract by merely labelling it one way or another. But if within the profession there is a clear understanding of the position, that understanding should be respected. Just as in the legal profession, we have a good idea of who are the employed and who are the self-employed…

126 Here, there was no express proviso in the email correspondence specifying the relationship between the parties. But there was clearly an understanding between the parties of their respective status and the understanding was not a sham to avoid liabilities. In our view, due weight should be given to it…

129 Stepping back and taking a macro view, this is what we see: the HKICPA is a professional body. They are tasked with prescribing examinations by which prospective candidates can become qualified as a CPA. Before a candidate can do the examinations, they have to go through the QP. The QP and the examinations are comparable to a degree program in universities or other vocational trainings. Standard has to be kept high. The workshops have to be well structured. They have to be of fixed length with a fixed timetable, the materials have to be excellent and model questions and solutions have to be set in advance. Standard has to be the same across the board and marking has to be uniform.

130 In order to run the workshops and to mark the corresponding examination papers, they need the help of the qualified members. One cannot expect senior and successful members to be engaged

> on a permanent basis. They can only be invited to help on an ad hoc basis. They are free to accept the invitations, or they can ignore them. They cannot be paid adequately. The very word 'honorarium' is a recognition that the pay is not a proper salary or fee. The choice of the title 'Workshop Facilitator' is also a recognition that the person is there to help – to facilitate – the conduct of the workshop, but he is not an employee or part of the organisation. At no time did HKICPA treat the Workshop Facilitators or the Examination Markers as an employee or an integral part of the organisation. They remain very much the professional men and women that they are, and are there merely to help the junior end, or to adopt the words used by the HKICPA in their invitation leaflets – 'to play a role in grooming budding accountants'. As the Appellant put it, it was rather like a 'community service'. In accepting the invitations to act as Workshop Facilitators and Examination Markers, the Appellant did not make himself an employee of HKICPA.
>
> 131 Having carefully examined all the facts and taking a macro holistic view, we have come to the conclusion that the Appellant's assignments as Workshop Facilitators and Examination Markers were separate contracts for services. They were not contacts for part-time employment as found by the Commissioner."

THE PRESENT APPEAL

33. The Commissioner was not satisfied with the Board's decision that Mr Pang was not an employee of the Institute in relation to his aforesaid assignments as Work Facilitator and Examination Marker. By a summons dated 20 July 2016 as amended on 26 August 2016, the Commissioner sought leave to appeal against the Decision of the Board. Leave to appeal was granted by this court on 6 February 2017.

34. In the Commissioner's Amended Statement lodged pursuant to Section 69(3)(a)(ii) of the Ordinance, the Commissioner advances a total of 10 Grounds of Appeal:-

(1) Grounds 1 to 3 relate to the Board's approach in determining the question of whether Mr Pang was an employee of the Institute;

(2) Grounds 4 to 9 relate to the Board's treatment of the evidence on a number of matters; and

(3) Ground 10 is a "catch-all" ground, the contention being that the Board's conclusion that Mr Pang was not an employee of the

> Institute was perverse in that it was contrary to the true and only reasonable conclusion.

GROUNDS 1 TO 3

35. It is clear from the skeleton submissions of Mr Paul H M Leung for the Commissioner dated 6 September 2017 as well as from his oral submissions to the Court at the hearing on 20 September 2017 that the principal point raised by the Commissioner in the present appeal relates to the Board's approach in determining the question of whether Mr Pang was an employee of the Institute in relation to his work as Workshop Facilitator and Examination Marker.

36. Section 69(1) of the Ordinance provides that where the Board has made a decision on an appeal under section 68, the appellant or the Commissioner may appeal to the Court of First Instance against the Board's decision on a ground involving only a question of law.

37. It is well established that the question of whether or not a person performed certain work in his capacity as an employee or independent contractor is regarded by an appellate court as a "question of fact" to be determined by the trial court. Accordingly, a finding that an employer-employee relationship did or did not exist can only be interfered with on appeal if it can be shown that the trial court misdirected itself in law or came to a conclusion which no tribunal properly directing itself on the relevant facts could reasonably have reached (see *Lee Ting Sang v Chung Chi-keung* [1990] 1 HKLR 764, at 772 H *per* Lord Griffiths; *Poon Chau Nam v Yim Siu Cheung* (2007) 10 HKCFAR 156, at paragraph 22 *per* Ribeiro PJ).

38. As stated by Bokhary PJ in *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, at paragraph 37 (with whom the other members of the Court of Final Appeal agreed):-

> "In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions. These propositions complement each other, although the understandable tendency is for those attacking the fact-finding tribunal's conclusion to stress the third one while those defending that conclusion stress the first two."

39. In relation to the legal test for determining whether a person is an employee, the law has now be authoritatively stated by the Court of Final Appeal in *Poon Chau Nam*, *ante*, at paragraph 18 *per* Ribeiro PJ (with whom the other members of that court agreed), as follows:-

> "The modern approach to the question whether one person is another's employee is therefore to examine all the features of their relationship against the background of the indicia developed in the abovementioned case-law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked. It involves a nuanced and not a mechanical approach, as Mummery J emphasised in *Hall v Lorimer*[1] (in a passage approved by the English Court of Appeal[2]):
>
> > 'In order to decide whether a person carries on 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.'"

40. In the present appeal, the Commissioner complains that:-

(1) the Board erred in law in brushing aside the "economic reality" test altogether and ruling it as a "completely unsuitable and ineffectual exercise" (Ground 1);

(2) the Board erred in law in brushing aside the "control test" as well and ruling it as "totally inapt" to adopt that test in the appeal before the Board (Ground 2); and

(3) the Board ought to have examined all the features of the relationship between the Institute and Mr Pang against the background of established *indicia* suggestive of employment or some other types of relationship (such as the performance of

---

1 [1992] 1 WLR 939 at 944.

2 [1994] 1 WLR 209 at 216 (CA).

> services as a person in business on his own account) by considering many aspects of the taxpayer's work activity, with a view to deciding whether, as a matter of overall impression of the whole, the relationship was one of employment.

41. On behalf of the Commissioner, Mr Leung argues that the "economic reality test" and the "control test" remain "*highly, if not the most, important indicia*" for determining whether an employment relationship exists. In support of his contention, Mr Leung refers the court to a decision of the Court of Appeal in *Sae-Lee Srikanya v Chung Yat Ming* [2009] 3 HKLRD 152, in particular the following statement by Cheung JA at paragraph 6 of his judgment:-

> "In the absence of an express employment contract, the question of whether an employment relationship existed has to be determined by reference to the surrounding circumstances. In *Poon Chau Nam v. Yim Siu Cheung* [2007] HKLRD 951, the Court of Final Appeal held that in determining whether a person is an 'employee' (i.e. a person working under a contract of service) or an 'independent contractor' (i.e. a person working under a contract for service), the court should refer to the fundamental test laid down in *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 175 (at 184 to 185)."

42. Mr Leung also refers the court to the decision Poon J (as he then was) in *Leung Kam Wah v Fung Yuk Ching*, HCLA 43/2006 (23 April 2008), at paragraph 5, where the *indicia* of control and other facets of the economic reality test were mentioned.

43. The above judgments must be read having regard to the particular factual circumstances pertaining to those cases. *Poon Chau Nam* concerned a claim under the *Employee's Compensation Ordinance* (Cap 282) brought by an experienced air-conditioning worker who was engaged "on a casual as required basis" by the defendant and suffered personal injury whilst working on a job for the defendant, *Sae-Lee Srikanya* likewise concerned a claim under the *Employee's Compensation Ordinance* brought by a master scaffolder who was engaged by a scaffolding sub-contractor to work on a project involving the replacement of aluminium window frames for five buildings and died as a result of a fall from height, while *Leung Kam Wah* concerned a claim brought by a driver against the person who engaged him as a Mainland and Hong Kong cross-border lorry driver for various sums under the *Employment Ordinance* (Cap 57). Assessing the true relationship of the parties in these familiar factual situations by reference to the well-established *indicia* embodied within the "control test" and "economic reality test" would plainly be appropriate and can be carried out without much difficulty.

44. It is not, however, the law that those *indicia* must be regarded as being applicable and of importance in all cases or circumstances. In the English Court of Appeal's judgment in *Hall*, in the sentence immediately before the passage quoted by Ribeiro PJ in *Poon Chau Nam* (recited in paragraph 41 above), Nolan LJ stated the following –

> "Mr. Goldsmith invited us to adopt the same approach as that of Lord Griffiths in applying the test or indicia set out by Cooke J. to the facts of the present case. That is an invitation which I view with some reserve. In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another."

That was said in the context of a freelance vision mixer who did work for a number of production companies under short-term contracts in studios owned or hired by the production companies using their equipment, who did not have any financial interest in the making of a film or programme and was not required to hire any staff to assist him, who set his own charges for a working day and was registered for VAT, and who took bookings by telephone and did his paperwork from an office in his home.

45. It may also be noted that, in the specific facts and circumstances of the case in *Poon Chau Nam*, Ribeiro PJ held that the "control test" was of "little relevance" (see paragraph 53 of the judgment in that case).

46. Although I accept that the *indicia* embodied in the "control test" and "economic reality test" are likely to be relevant in many cases, it is, in my view, incorrect to elevate it into a general statement applicable to all cases that the economic reality test and the control test remain "*highly, if not the most, important indicia*" for determining whether a person stands in an employee-employer relationship vis-à-vis another person who has engaged the former to perform some work or services. Whether those *indicia* are relevant, and the degree of their relevance, in any given case must depend on the circumstances of that case. No useful purpose would be served by generalising the situation.

47. In the present case, I do not consider the Board to have "brushed aside" the control test or economic reality test as contended by the Commissioner. While is it true that the Board took the view that it was "inapt" to adopt the control test (paragraph 117 of the Decision), and it would be a "completely unsuitable and ineffectual exercise" to go through the economic reality test (paragraph 115 of the Decision), these conclusions were reached after a careful analysis of the facts of the present case. In particular:-

(1) The Board considered that it would not be suitable to apply the control test because the object underlining that test was, traditionally, the identification of a superior-subordinate, dominant-subservient, relationship, which was far removed from the relationship between Mr Pang and the Institute (paragraph 117 of the Decision). In this regard, the Board did not lose sight of the fact that there was a high degree of control (in the words of the Board, a "straightjacket") insofar as the conduct of the workshops and the marking exercise were concerned (paragraph 114 of the Decision). However, the Board

considered that to be a "completely different category of control" from the kind that one spoke of in an employer-employee relationship, and recognised that Mr Pang would be left to his own devices in his preparation for the workshops and in candidate counselling (paragraph 116 of the Decision). I pause to observe that there would necessarily also be a wide scope for the exercise of individual skills and methods in the conduct of a workshop, and that the marking scheme was in fact not imposed or provided by the Institute, but was set and agreed to by the Examination Markers themselves.

(2) The Board also considered that it would not be suitable to apply the economic reality test in the present case, for the simple reason that neither the Institute nor Mr Pang was driven by any profit making motive in running the Qualification Programme or acting as Workshop Facilitator/Examination Marker. The Board thus considered that it would be completely unsuitable and ineffectual to ask how Mr Pang could profit from sound management of his business and what degree of financial risk he took (paragraphs 115 and 116 of the Decision).

48. In my view, the approach adopted by the Board, namely, examining all the facts and taking a macro holistic view of the whole case (paragraph 131 of the Decision) is consistent with the overall evaluative-impressionistic approach of "standing back from the picture which has been printed", "viewing it from a distance" and "making an informed, considered, qualitative appreciation of the whole" for determining the question of whether the relationship is one of employment as suggested by Mummery J in *Hall* and endorsed by Ribeiro PJ in *Poon Chau Nam*.

49. In so far as the Board's conclusion that Mr Pang was not an employee of the Institute in relation to his assignments as Workshop Facilitator and Examination Marker is concerned, the proper question for this court is whether the Board misdirected itself in law or came to a conclusion which no tribunal properly directing itself on the relevant facts could reasonably have reached, not whether this court would have come to the same conclusion had it been tasked with the question of deciding whether Mr Pang was an employee of the Institute. It is not for this court to re-examine the primary facts as found by the Board to reach a fresh conclusion on the status of Mr Pang, which would be to trespass upon the proper province of the fact finding jurisdiction of the Board. Neither is it for this court to conduct a detailed review the evaluative process undertaken by the Board which led to its conclusion that Mr Pang was not an employee of the Institute. The Board made detailed findings of fact, and demonstrably carried out a careful evaluation of those facts to reach a final conclusion on the true relationship between Mr Pang and the Institute (see paragraph 32 above). I do not consider that the Board misdirected itself in law, or reached a conclusion that no tribunal properly directing itself on the relevant facts could reasonably have reached. I would observe that the question of whether Mr Pang was an employee or independent contractor of the Institute is a fine one,

and reasonable minds may come to different conclusions. Whatever may be my own view on this issue, this is not a case which I consider it would be justifiable for me to interfere in the Board's conclusion that Mr Pang was not an employee of the Institute.

50. For the above reasons, Grounds 1 to 3 are rejected.

GROUNDS 4 TO 10

51. I can deal with the remaining grounds more briefly, which are subsidiary grounds raised by the Commissioner in this appeal.

52. Ground 4 challenges the Board's finding at paragraph 116 of the Decision that "No supervision was given, as no supervision was needed", arguing that the Board overlooked a piece of documentary evidence, namely, the Guidelines for Workshop Facilitators (in particular page 28 thereof under the heading "Workshop Observer Visit" and Appendix J thereto titled "Workshop Observer Panel Scheme Evaluation Form") which, it is said, established (i) the Institute's intention to closely supervise and control the work of Mr Pang, and (ii) the mechanism through which the Institute executed that intention.

53. The Board was plainly aware of the Workshop Observer Panel Scheme which was part of the Institute's quality assurance process (paragraph 55 of the Decision). The sentence in paragraph 116 of the Decision quoted by the Commissioner in Ground 4 must be read in its proper context: "He was left to his own devices in his preparation and in candidate counselling. No supervision was given, as no supervision was needed". The supervision, or rather lack of supervision, referred to in that sentence related to "preparation" and "candidate counselling". It is not suggested that the Workshop Observer Panel Scheme was relevant to those aspects of Mr Pang's work as Workshop Facilitator.

54. Ground 5 challenges the Board's conclusion that Mr Pang was not working as Workshop Facilitator or Examination Marker for the purpose of "gainful employment" or for "monetary gain". Essentially, the Commissioner's argument is that the Sum (HK$50,400) amounted to 1.68 times of Mr Pang's monthly salary as HKU SPACE lecturer which, it is said, "[i]n its proper contest, was a significant sum, especially considering that the engagement was chiefly during weekends" (see paragraph 36 of the Commissioner's Amended Statement).

55. The Board gave detailed reasons why the honorarium paid by the Institute to Workshop Facilitators was clearly not an adequate consideration (paragraph 65 of the Decision). When the Board stated in paragraph 115 of the Decision that:-

> "… the Workshop Facilitators and Examination Markers did not do the work for the purpose of gainful employment. It is not the case of someone working (employed or in business) for a monetary gain. Rather, it is the case of a professional man devoting his time and effort

> to the profession in return for an 'honorarium', knowing that it is not inadequate remuneration, but with the object of enabling the profession to maintain a proper educational programme by which people who want to enter the profession can obtain the requisite qualification",

it was making a general statement and not referring to the personal circumstances of Mr Pang. In this regard, it seems to me to be clear that whether an employment relationship existed between the Institute and a Workshop Facilitator/Examination Marker should not depend on the personal circumstances of the individual concerned.

56. The Commissioner also relies on the fact that (i) the amounts of the honorarium fixed by the Institute were not arbitrary or "nominal", but had been benchmarked against market rates for course facilitation; and (ii) a Workshop Facilitator also stood to gain CPD hours and credits not only for the hours spent doing the workshops but also for those spent in preparatory work for the workshops. I do not see how either matter would be inconsistent with the Board's finding that Workshop Facilitators or Examination Markers did not generally take up the assignments for the purpose of "gainful employment" or for "monetary gain" (see also paragraph 118 of the Decision).

57. Ground 6 challenges the Board's finding at paragraph 116 of the Decision that the Institute did not run the Qualification Programme as a "commercial enterprise" in order to make a "financial return", and contends that the Board erred in law in taking into consideration the "subjective" intention of the Institute when there was no evidence from the Institute to suggest that it was running the Qualification Programme to fulfil its statutory role and responsibilities to the exclusion of an intention to make a financial return or profit out of the programme. This ground is plainly unsustainable because I do not consider the Board to have relied on any "subjective" intention of the Institute in running the Qualification Programme. The Board referred to the statutory functions and powers of the Institute under the *Professional Accountants Ordinance*, and found that the Qualification Programme was devised for the purpose of enabling a person to meet the qualification requirements of a CPA under section 24(1) of that Ordinance. In the absence of any or any clear evidence to the contrary, the Board was, in my view, fully entitled to make the aforesaid finding in paragraph 116 of the Decision.

58. Ground 7 contends that the Board erred in law in focusing on the "subjective" intention of Mr Pang and/or the Institute. I have set out in detail the relevant facts found by the Board and its reasoning for reaching the conclusion that Mr Pang was not an employee of the Institute. There is, in my view, no basis for the contention that the Board relied on the "subjective" intention of either Mr Pang and/or the Institute, instead of on objective facts and circumstances, in reaching its conclusion.

59. Ground 8 complains that the Board erred in law in concluding that the Institute did not regard the Workshop Facilitators and Examination Markers, such as Mr Pang, as its employees or an integral part of its organisation, contending that the Board failed to take into account 2 pieces of contemporaneous documentary evidence, namely, (i) a covering fax from the Institute to the IRD dated 8 January 2016 and 2 insurance policies

therewith which suggested that Mr Pang and other Workshop Facilitators were covered by the Institute's policies for employees' compensation, and (ii) an earlier covering letter from the Institute to the IRD dated 27 November 20915 which suggested that Mr Pang participated as an employee in the Institute's MPF scheme.

60. The two policies referred to in (i) above were a Group Personal Accident Insurance Policy and an Office Insurance Policy:–

(1) In respect of the first policy, as pointed out by the Board, it covered a variety of persons, namely, "Facilitators &/or Instructors &/or Employees &/or Council Members &/or Ex Council Members &/or Nominees &/or representatives of the Policyholder…". Its coverage was clearly not confined to employees (paragraphs 72 and 73 of the Decision).

(2) In respect of the second policy, although Section 4 of the Schedule thereto referred to "Professional/Technical/Office Staff/Workshop Facilitator/Director/Speaker" as "Empl.", it made no reference to "Examination Marker". It is questionable whether "Speaker" could or should properly be regarded as "employee" of the Institute. In my view, this document provides some, but limited, support for the view that the Institute regarded Workshop Facilitators as its employees.

61. In respect of (ii), the Board made an express finding that Mr Pang was enrolled in the Institute's MPF scheme because the Institute did not want to risk violating the MPF rules (paragraph 70 of the Decision), this was done for the May 2010 assignment but not the February 2010 assignment, and the Institute was itself was confused with the MPF requirements (paragraph 123 of the Decision).

62. On the other hand, there was clear evidence before the Board that the Institute did not regard Mr Pang as its full-time or part-time employee, namely, (a) the Institute's letters to the IRD dated 19 September 2012 and 14 December 2012 respectively, and (b) the Form IR56M (Notification of Remuneration Paid to Persons other than Employees) dated 23 May 2011 used by the Institute to report to the IRD the payment of the Sum to Mr Pang (paragraphs 84 and 122 of the Decision). In my view, it is open to the Board to find, on the evidence before it, that the Institute did not regard Mr Pang as its full-time or part-time employee.

63. Ground 9 complains that the Board erred in law in concluding that Mr Pang and the Institute were free to rescind their arrangement at any time without any adverse consequence. There was no evidence to suggest that that Institute was under any legal obligation to provide any assignments to Mr Pang, or Mr Pang would incur any legal liabilities for withdrawing from an assignment, or face any adverse legal consequences from a failure to carry out the assignments or complete the same in time. The Board's finding at paragraph 119 of the Decision that-

> "the parties were free to rescind at any time without any adverse consequences. The Appellant would not incur any liability even if he could not attend the workshops or if he could not complete the marking in time… Equally, the HKICPA made it clear in the pre-assignment emails that the Appellant might not be given any assignments as much depended on the student enrolment and time preference, etc."

seems to me to be justifiable.

64. Ground 10 does not arise for separate consideration having regard to my views on Grounds 1 to 9.

DISPOSITION

65. For the above reasons, I dismiss the Commissioner's appeal, with costs to Mr Pang to be taxed if not agreed.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Paul H M Leung, instructed by Department of Justice, for the applicant

The respondent acting in person