Case No. D11/16

Salaries tax – certified public accountant – appellant receiving honorarium from professional institution – whether honorarium chargeable to salaries tax – whether appellant an employee of institution – sections 8(1), 9(1)(a), 14 and 68(4) and (8) of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Cissy K S Lam (chairman), Mohan Datwani and Sara Tong.

Dates of hearing: 9 December 2015 and 13 January 2016.
Date of decision: 20 June 2016.

The Appellant was a certified public accountant ('CPA'), and was invited by Institution B to act as Positions C and D. Institution B was a statutory body tasked with prescribing examinations by which prospective candidates could become qualified as CPA. Before the candidates could do the examinations, they had to go through Programme E, which comprised of 4 modules, with examinations at the end of each module and a final examination after successful completion of all 4 modules. Workshops were also run to assist Programme E candidates to complete the modules and examinations. The responsibilities of Positions C and D were to, *inter alia*, assist Programme E candidates to conduct workshops and complete the modules, as well as marking of examination scripts.

In his tax return, the Appellant did not declare his income from Institution B ('Income'), which comprised of 'honorarium' paid to the Appellant as Positions C and D. The 'honorarium' was described by Institution B as 'a token of appreciation' and was clearly inadequate remuneration given the number of hours the Appellant was expected to put in. The Assessor raised on the Appellant an Additional Salaries Tax Assessment in respect of the Income ('Additional Assessment'). The Appellant objected to the Additional Assessment, and took the view that under section 8(1) of IRO, his arrangement with Institution B was not one of office or employment of profit and the Income was not pension. The Additional Assessment was confirmed by the Commissioner, who found that the Appellant was a part-time employee of Institution B by relying on, *inter alia*, the 'control test' and 'economic reality test' propounded in the English case of Market Investigations (which was confirmed by the Privy Council). The Appellant appealed to the Board.

Held:

Legal principles

1. In order to decide whether one was an employee, it is necessary to look at all the facts and circumstances, and one must make a holistic evaluation of the facts and different assignments must be examined together as part of the bigger picture. It would be an anomaly to the extreme if the Appellant were to be considered an employee in one and a non-employee in the other. (Hall (Inspector of Taxes) v Lorimer [1994] STC 23, Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173 and Narich Pty Ltd v Commissioner of Pay Roll Tax 50 ALR 417 considered)

2. Whether a contract was one of service or one for services had to be looked at objectively. Parties could not change the nature of the contract by merely labeling it one way or another. But if within the profession there was a clear understanding of the position, that understanding should be respected. (Massey v Crown Life Insurance Co [1978] 1 WLR 676 considered)

Absence of employer-employee relationship

3. The Appellant's assignments as Positions C and D were separate contracts for services. They were not contracts for part-time employment as found by the Commissioner: (a) the Appellant's work in Positions C and D were not for the purpose of gainful employment or for a monetary gain but to enable the profession to maintain a proper educational program by which people who wanted to enter the profession could obtain the requisite qualification. To go through the 'economic reality test' by 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; (b) Institution B was not running Programme E as a commercial enterprise in order to make a financial return, but to fulfil its statutory role and responsibilities. The Appellant was respected as a professional, and engaged as a practitioner, to contribute his skills and expertise, share his work experiences, and provide comments and recommendations. It was totally inapt to adopt the 'control test', the object of which was the identification of a superior-subordinate dominant-subservient relationship; (c) the reward was inconsistent with an employer-employee relationship; (d) the parties were free to rescind at any time without any adverse consequences; (e) the Appellant was a professional and how his profession as a whole operated was an important consideration; (f) Institution B also did not regard Positions C and D as its employees or an integral part of its

organisation. (Hall (Inspector of Taxes) v Lorimer [1994] STC 23 considered)

4. In the present case, there was clearly an understanding between the parties of their respective status and the understanding was not a sham to avoid liabilities. The Commissioner took a very narrow view of the facts. Apart from extent of degree and control, one must also ask whether there were provisions inconsistent with the contact being a contract of service. The Commissioner should have gone further and examined the factors which were inconsistent with such relationship, and followed the holistic approach by evaluating all the facts as part of a big picture. This approach was more in tune with the ever changing labour market and the diverse modes of businesses and professions operated in the modern world. (Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173 considered)

5. It was clear that the Appellant was engaged as Positions C and D in his professional capacity as a CPA, and was carrying on a profession, providing professional services in his work as Positions C and D. The Income was payment received from such professional services, and was assessable to profits tax. It would be appropriate for the Board to remit the matter to IRD for re-assessment.

Appeal allowed.

Cases referred to:

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Narich Pty Ltd v Commissioner of Pay Roll Tax 50 ALR 417, PC
Lee Ting Sang v Chung Chi-Keung [1990] 1 HKLR 764, PC
Hall (Inpsector of Taxes) v Lorimer [1994] STC 23, CA
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] 1 QB 156
Massey v Crown Life Insurance Co [1978] 1 WLR 676

Appellant in person.
Lee Chui Mei and To Yee Man, for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to the Additional Salaries Tax Assessment for the year of assessment 2010/11 ('the Additional Assessment') raised on him.

The Background

2. The Appellant is a certified public accountant ('CPA').

3. At the material time, the Appellant was a lecturer with Institution A. According to the Employer's Return filed by Institution A, for the period 01-04-2010 to 31-03-2011, the total income of the Appellant was $363,460.

4. In addition, the Appellant was engaged by Institution B as a Position C and Position D for its Programme E. According to the Notification of Remuneration paid to persons other than employees ('IR56M Notification') filed by Institution B, for the period 01-04-2010 to 31-03-2011, the Appellant received remuneration in the sum of $50,400 ('the Sum').

5. In his Tax Return – Individuals for the year of assessment 2010/11 ('the Return'), the Appellant only declared the employment income of $363,460 from Institution A, but did not report the Sum.

6. The Assessor raised on the Appellant Salaries Tax Assessment for the year of assessment 2010/11 in accordance with the Return. The Appellant did not object to the assessment.

7. Subsequently, the Assessor raised on the Appellant the Additional Assessment in respect of the Sum:

Additional Net Chargeable Income	(i.e. the Sum)	$ 50,400
Additional Tax payable thereon	(after reduction)	$ 8,568

8. By letter of 26 March 2012, the Appellant objected to the Additional Assessment. The Appellant took the view that his arrangement with Institution B was not one of office or employment of profit under section 8(1)(a) of the Inland Revenue Ordinance, Chapter 112 ('the IRO'), and the Sum was not one of pension under section 8(1)(b).

9. By letter of 10 April 2012, the Assessor proposed to revise the Additional Assessment by raising Profits Tax Assessment instead of Salaries Tax Assessment.

10. The Appellant rejected this proposal by letter of 16 April 2012, arguing that he did not carry on any trade, profession or business within the meaning of section 14 of the IRO.

11. By letter of 24 April 2012, the Assessor explained that he was led by the Appellant's use of the word 'honorarium', which meant a fee for professional services, to take the view that the Sum was subject to profits tax. In order to process the Appellant's objection, the Assessor asked for further materials for consideration.

12. The Appellant replied by letter of 30 April 2012 setting out his contentions.

13. By letter of 24 July 2012, the Assessor informed the Appellant that he maintained the view that the Sum was subject to profits tax, but as an agreement could not be reached, it was necessary for the Commissioner to determine his objection. The Assessor issued a Profits Tax Assessment in respect of the Sum, but the Appellant was entitled to raise his objection within the objection period.

14. By letter of 8 August 2012, the Appellant objected to the Profits Tax Assessment.

15. By his determination dated 22 June 2015 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Commissioner') confirmed the Additional Assessment (i.e. the assessment to salaries tax). He did not include the Profits Tax Assessment in his decision, but focused his discussions and reasoning solely on the Additional Assessment.

16. Dissatisfied with the Determination, the Appellant appeals to this Board.

Relevant Provisions of The IRO

17. Section 8(1) provides:

> '*Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-*
>
> *(a) any office or employment of profit; and*
>
> *(b) any pension.*'

18. Section 9(1)(a) provides:

> '*Income from any office or employment includes-*
>
> *(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, …*'

19. Section 14(1) provides:

> '*Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his*

assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business…'

20. Section 68(4) provide:

'*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.*'

The Facts

21. The Appellant gave evidence at the hearing. We do not doubt that he is an honest witness trying to give evidence as best he could according to his knowledge and recollection.

22. In addition, we have looked at all the documents contained in the appeal bundle submitted by the Appellant and the Commissioner.

23. On the evidence and the documents before us, we find the relevant facts as contained in paragraphs 24 to 89 hereinbelow proved.

The Sum

24. The Sum consists of the followings:

Module Name	Session	Role	Honorarium
Module X	February 2010 (1 February to 29 May 2010)	Position C	$10,000
Module Y	May 2010 (11 June to 29 August 2010)	Position C	$10,000
Module Z	December 2010 (Programme F) (October to November 2010)	Position C	$20,000
Module Z	December 2010 (Programme F) (January 2011)	Position D	$10,400
		Total:	$50,400

25. For his December 2010 assignment as Position C, the Appellant was appointed to conduct 2 sets of workshops for 2 sets of candidates (9 October to 7 November and 23 October to 21 November 2010). The honorarium was $10,000 per set,

making a total of $20,000.

Institution B and Programme E

26. Institution B is a corporation established under the Professional Accountants Ordinance, Chapter 50. Section 7 thereof set out the objects of Institution B, among which were to regulate the practice of the accountancy profession; and to conduct examinations and act in such other manner as may be necessary to ascertain whether persons are qualified to be admitted to the register, i.e. admitted as a CPA. By section 24(1), a person shall be qualified to be registered as a CPA if, *inter alia*, as a student registered with Institution B, he has passed the prescribed examinations. It is to this end that Programme E is devised.

27. Programme E comprises of four modules, with examination at the end of each module and a final examination after the successful completion of all four modules. Workshops are run to assist Programme E candidates to complete the modules and the examinations.

28. The programme was revised in September 2010. The Appellant called this Programme F. A new workshop format was introduced.

Invitations to become Position C

29. To operate these workshops, Institution B invites members to apply to become Position C. Separate invitations are issued for each workshop session. It is a general invitation open to all who are qualified and interested to take part. There is no obligation to accept or even reply to these invitations.

30. Samples of such invitation leaflets and applications forms are included in the appeal bundle. One sample was appended to the Determination. The Appellant did not keep copy of the applications forms he submitted.

31. Those who apply may or may not be given an assignment as much depends on student enrolment and their time preference, etc. This was made clear in Institution B's email to the Appellant of 14 December 2009, preceding the confirmation of his February 2010 assignment. The Appellant was asked to complete an online Information Sheet to enable Institution B to assign him his preferred time and module session. Institution B could not ascertain how many Position C would be required until the student enrolment process was finalised in mid-January. An email confirmation would be sent to the Appellant, but if the Appellant did not hear further from Institution B by end of January, the Appellant could presume that an assignment could not be made.

The Assignments

32. The assignments were separate assignments. There were no written contracts as such, but there were emails confirming the respective assignments:

Assignment	Date of Email from Institution B to Appellant
February 2010	22 January 2010
May 2010	18 May 2010
December 2010 Position C	18 September 2010
December 2010 Position D	17 December 2010

33. In the emails confirming his assignment as Position C, the obligation to comply with the Guidelines (see below) and to commit to adequate preparation and attendance of all the workshops was spelt out. The need to attend pre-workshop meeting or briefing session was emphasised. The Appellant was reminded to seek endorsement from his employer for the appointment.

The Documents (Position C)

34. For the purpose of the February 2010 and May 2010 assignments, the Appellant was given:

(1) Guidelines for Position C ('Guidelines'), October 2009 version,

(2) Position C Guidance Note ('GN'), respectively February 2010 and May 2010 versions, and

(3) Candidate Learning Pack ('CLP'), respectively February 2010 and May 2010 versions.

35. For the purpose of the December 2010 Position C assignments, in addition to (1) the Guidelines Enhanced QF version, (2) the GN, December 2010 version, and (3) the Learning Pack (formerly the CLP), December 2010 version, the Appellant was also supplied with (4) the Position C Manual ('Manual').

The GN, CLP & Manual

36. The GN embodied the teaching materials while the CLP (or simply 'Learning Pack' under Programme F) embodied the learning materials for the candidates. They were prepared for the specific Programme E sessions. The Manual was a general instruction manual on how to conduct module workshops and was applicable to all Programmes F sessions.

37. The GN February 2010 and May 2010 versions included a 'suggested workshop timetable', a 'workshop coverage table', discussion notes to the Workshop Preparation Questions, plus Additional Questions for discussion in each workshop with suggested solutions. The GN Programme F version contained suggested solutions to the

pre-workshop exercises and workshop handouts, which contained additional case studies information and questions.

38. The GN was a confidential document. In the emails confirming his assignment as Position C, the confidential nature of the GN was emphasised. The Appellant was required to sign a Confidentiality Undertaking in respect of the GN. The Appellant must return the GN to Institution B after the last workshop.

The Guidelines (October 2009 version)

39. The Guidelines was a comprehensive handbook running over 30 pages plus 11 Appendices. It was divided into four sections, namely (A) About the Programme E Modules, (B) Workshops, (C) Administration and (D) Position C.

40. Section A gave an overview of the Programme E Modules, the resources available to the candidates, the roles and responsibilities of the candidates, the knowledge level requirements set out in the CLP for each module and the special topics nominated for each module, the purpose of the Workshop Preparation Questions included in the CLP and the Additional Questions made available to the Position C in the GN.

41. Section B explained the structure, objectives and conduct of the workshops, what the candidates were expected to do before, during and after the workshops, how the workshops were to be conducted in general and how each workshop was to be conducted in particular. 20% of the total module marks was based on a candidate's presentation and general and team participation during the workshops. Assessment criteria of these three areas were particularised.

42. Section C together with some of the appendices dealt with administrative matters, such as the keeping of Workshop Attendance Record, Module Work Records, Summary of Preliminary Workshop Marks and Report Detail Sheet.

43. Section D described the appointment of the Position C, the attitude, skills and knowledge expected of the Position C and their roles and responsibilities, the use of Relief Position C in emergency situations, and the provision of Position G(s) to advise on technical and generic matters and Scheme H for quality assurance. Checklist for Creating a Facilitator Team to enable co-operation between co-Position C was appended. A comprehensive 'Tips for Facilitation of Programme E Workshops' was appended.

The Guidelines (Programme F)

44. The Guidelines Enhanced QF version was an equally comprehensive document. It was divided into three sections, namely (A) About the Programme E Modules, (B) Workshops Materials and Administration and (C) Position C.

45. Section A presented the Programme F Modules – the new workshop format introduced in September 2010, the pass criteria of the module examination, the

resources available to the candidates, the knowledge level required of the candidates, the topics to be covered by each workshop, the 'generic competencies' aimed for, the development indicators the candidates should fulfil, the objectives of the workshops and the role and responsibilities of the candidates.

46. Section B explained the preparation the Position C should make, the purpose of the GN and the Manual, the pre-workshop case studies and exercises the candidates were required to complete, the use of the workshop handouts made available to the Position C and the Programme E Online Marking Scheme. An Online Marking Sheet was provided. Position C were required to grade the workshop performance of each candidate in accordance with the requirements of the performance indicators. The appendices and various administrative matters were set forth.

47. Section C on Position C was in all material respects same as Section D of the December 2009 version.

The Workshops

48. Under the old Programme E, for each module, there were four workshops. The first and the fourth workshops were of 3½ hours and the second and third workshops were 3 hours each. Candidates were divided into groups of around 20. Two Position C were allocated to each group.

49. Under Programme F, there were still 4 modules, but with some variations in subject matter. Instead of four workshops of 3 or 3½ hours each, there were two full-day (8 hours) workshops over a span of 14 weeks. Each workshop were led by two Position C running a class size of no more than 25 candidates.

50. Workshops were held in different locations subject to availability of venues. The time and venue of the workshops were fixed by Institution B.

51. Institution B provided equipment such as laptop computers, projectors, stationery, etc. for the running of the workshops.

Position C

52. The responsibilities of Position C as set forth in the Guidelines (old and enhanced versions) were mainly to:

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

(2) Help candidates to 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 those areas in which candidates have not demonstrated an adequate level of understanding and to give guidance to remedy deficiencies; and

(5) To attend to conduct all workshops in the module.

53. Position C should not dominate or 'teach' during a workshop. They should use questions to encourage candidates to participate and become involved in the workshops. An informative 'Questioning Techniques' was appended to the Guidelines, Programme E and Programme F versions. However, Position C could use their own approach to explain the subject and they could provide their own supplementary teaching materials or handouts if considered necessary.

54. A Position G (or Position J under the Programme F) was available to advise on technical and generic matters. Additional comments from the Position G or the Examinations Board of Institution B might be provided.

55. As part of the quality assurance process, Institution B had in place a Scheme H. A Workshop Observer visited a workshop group at least once to evaluate the performance of Position C.

56. There were appraisal forms by which candidates and Position C could respectively give feedback about the running of the workshops to Institution B.

Trainings

57. The old Programme E provided a 2-part Training (3 hours plus 1 day) for new Position C and Briefing Session (3 hours) and Refresher Course on Skills Development (4 hours) for the trained Position C.

58. Under Programme F, more intensive trainings were provided – a 2-part (4 hours each) training for the new Position C and a 1-part (4 hours) training for the experienced Position C. In addition, an 8-hour workshop specific training was provided to all Position C, new and experienced alike. There was also an optional briefing session which Position C were encouraged to attend.

59. According to the Appellant, one must complete the initial training before one became eligible to be invited to become a Position C. This is not borne out by the Guidelines or the invitation leaflets, but there was less training hours for the trained Position C.

Relief Position C

60. In emergency situations rendering a Position C unable to attend his workshop, he should in the first instance inform his Co-Position C and the Relief Position

C on duty to stand in as his substitute. He should then inform Institution B about the situation and the circumstances leading to the use of the Relief Position C. Position C were not expected to use the service of the Relief Position C save in emergency situations.

Preparation and student support

61. According to the sample invitation leaflets, a Position C was expected to spend about 39 hours in 'preparation and student support' under the old Programme E and around 32 hours under Programme F.

Candidate Counselling

62. Position C had a responsibility to counsel those candidates who failed to attend the workshops or who underperformed, and to keep a record of such counselling. The Appellant 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.

Honorarium for Position C

63. The Appellant 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, under which the honorarium was stated to be for the workshops conducted – $10,000 for 4 workshops under the old Programme E and $5,000 for each workshop under Programme F. Position C were required to complete and return their evaluation documentation and workshop material to Institution B before the honorarium was sent to them.

64. On top of the workshop hours, a Position C had to attend training and pre-workshop briefing – 3 + 4 hours for the trained Position C under the old Programme E and 4 + 8 hours under Programme F. In addition, there were the hours spent on preparation and student support – 39 hours under the old Programme E and around 32 hours under Programme F. So altogether, a trained Position C spent around 60 hours or more on Programme E, old and enhanced version.

65. Considering the number of hours Position C were expected to put in, the honorarium was clearly not an adequate remuneration. In each email confirming the assignment, it was stated that the honorarium was paid 'as a token of appreciation'. In Institution B's letter of 14 December 2012, Institution B acknowledged that the amount 'was never intended to reflect the time and effort contributed by [Position C], as many of them are seasoned professionals who have worked as Certified Public Accountants for many years. In most cases, [Position C] 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 [Programme E] over 10 years ago, they continue to be willing to undertake the role of [Position C].'

66. In the sample invitation leaflets, members were invited to become Position C to 'play a role in grooming budding accountants!', to be able to 'meet and network with fellow professionals and keep their technical skills and knowledge up-to-date and get paid for meeting their structured CPD requirements'.

Continuing Professional Development ('CPD') hours

67. Time spent as a Position C on the workshops and the preparation could be considered as verifiable CPD hours. The count was based on the number of hours actually spent on preparatory work and as a facilitator. On the other hand, time spent in the trainings, it would seem, was not included.

Mandatory Provident Fund ('MPF') deduction – May 2010 assignment

68. In the email confirming the May 2010 assignment, it stated that since the appointment was more than 60 calendar days, the Appellant was entitled to enrol in the MPF Scheme of Institution B, and $500 employee contribution would be deducted from the honorarium, giving a net sum of $9,500.

69. Upon enquiries from the Assessor, Institution B replied in its letter of 27 November 2015, *inter alia*, that the Appellant 'participated in the scheme as employee.' He made no contribution during the period from 1 April 2010 to 31 March 2011. A breakdown shows that the mandatory contributions were made by Institution B at $125 per month for the months of June, July, August and September, making a total contribution of $500. An 'Employee Application Form' signed by the Appellant was attached.

70. At the briefing session, Institution B explained that it did not want to risk violating the MPF rules and asked the applicants to sign the requisite applications forms. The Appellant agreed to the arrangement and signed the form without giving any thought to its fiscal implication.

Group Personal Accident Policy

71. The Guidelines stipulated that accidental insurance coverage against accidental death or permanent disability during the normal course of their duty was provided to all Position C. Coverage commenced as a Position C left his place of residence or place of employment to go directly to the appointed workshop venue; and ceased when Position C arrived at his place of residence or place of employment directly from the appointed workshop venue after the end of the workshop.

72. The copies of 'Group Personal Accident Policy' obtained from Institution B show the policy covered a wide range of persons including 'Facilitators &/or Instructors &/or Employees &/or Council Members &/or Ex Council Members &/or Nominees &/or representatives of the Policyholder …'

73. The coverage clearly was not confined to employees or to employees' compensation. We fail to see any relevance it has to our present considerations.

2010 December Position D Session

74. Like Position C, Position D receive separate invitations for each examination marking session. It is a general invitation. There is no obligation to accept or reply to the invitation. Those who apply may or may not be given an assignment depending on student enrolment and number of available Position D.

75. By email of 9 December 2010, the Appellant was invited to indicate his interest in serving as Position D for Module Z examination December 2010 session. The marking fee per script per section (50 marks) was $80. Each Position D was expected to mark about 130 scripts of one section of the paper, i.e. either Case or Essay/Short Questions.

76. Particulars of the work schedule was given as follows:

Date	Action
Tuesday, 28 December 2010	Examination takes place
Tuesday, 4 January 2011	Section B (Essay/Short Questions) Position D's Meeting
Wednesday, 5 January 2011	Section A (Case) Position D's Meeting (Examination Panellists will brief Position D on expected marking standard, and lead the marking of sample scripts to arrive at a mutually agreed scheme for live marking at home. Therefore, all Position D MUST attend the Position D's Meeting of either Section A or Section B, subject to which Section he/she will be assigned to mark. The meeting will start at 7:00 pm, in Institution B's meeting rooms…)
5 - 6 January 2011	Dispatch of scripts to Position D who will not be able to pick the scripts after the Position D's Meetings
Tuesday, 18 January 2011	Last day for collection of marked scripts of Section B
Wednesday, 19 January 2011	Last day for collection of marked scripts of Section A

77. So the marking of the examination scripts must follow the standard and

marking scheme formulated in concert at the Position D's Meeting. The time schedule to complete the marking and to return the marked scripts was 2 weeks. It was determined by Institution B.

78. By email of 17 December 2010, the Appellant was appointed a Position D of Module C Essay/Short Questions (i.e. Section B). The Appellant was required to attend the Position D's Meeting on 4 January, and to abide by the Confidentiality Undertaking in respect of the examination script booklets.

79. After the Position D's Meeting, by email of 5 January 2011, the Appellant was sent the revised marking scheme, the marking grid for recording marks and a questionnaire by which, *inter alia*, the Appellant was to report problems with the script booklets. The Appellant was urged to complete the marking within time.

80. The marking was a take-home exercise. Position D were not provided with any equipment by Institution B.

81. Position D could not delegate the marking to any person. If for any reason Position D could not carry out the marking, he should notify Institution B immediately.

Honorarium for Examination Marking

82. The honorarium for marking the Programme E module examination was $80 per script. For the final examination, the honorarium was $150 and $50 for the Case section and Essay/Short Question section respectively.

83. According to Institution B, the honorarium payable to Position C and Position D were approved by Institution B's Qualification and Examination Board, based on a benchmarking exercise to market rate for course facilitation conducted at the inception of Programme E in 1999. It has remained the same since.

Institution B's position with regard to Position C & Position D

84. In a letter of 19 September 2012, Institution B made clear that the Appellant was not a full time or part time employee of Institution B. In a letter dated 14 December 2012 in reply to enquiries from the Assessor, Institution B reiterated its position.

85. The Position C and Position D are not part of its staff or organisation framework. Institution B's rules and regulations for its staff do not apply to Position C or Position D. Institution B does not hold them out as its staff, nor can the Position C and Position D hold themselves out as staff of Institution B. Institution B cannot assign them to perform duties outside the scope of their appointment. There is no promotion prospect and they do not have any subordinates who are staff members of Institution B. The relationship is not a continuous one, but exists only to procure a result, namely completion of the workshops and the marking of the examination scripts respectively.

86. Position C and Position D are free to work for other organisations without notifying Institution B, so long as there is no conflict of interests. Indeed, Institution B recognises that most Position C and Position D have full time employment elsewhere and they apply to be a Position C and Position D as a contribution to the profession.

87. There is no obligation to work or for Institution B to provide work. Position C can notify Institution B if they are unable to conduct a particular workshop assigned to them. Likewise for the Position D. They are urged to notify Institution B as early as possible so that a Relief Position C could be arranged or for alternative marking arrangement to be made. They do not, however, incur any liability for late cancellation. They can, at any time, decide that they no longer want to be on the list of Position C or Position D.

Endorsement from Institution A

88. In the emails confirming the assignments, the Appellant was reminded to seek endorsement from his employer. This the Appellant did. In recommending approval of the application, the Appellant's superior wrote: '[Institution B] [Programme E] Facilitation will enhance the knowledge about updated syllabus, and this is a part of CPD activities of Accounting People'.

89. The Appellant was required to pay Institution A a levy of 15% of the Sum. It was described as a levy for gross earnings 'received from outside practice'. The term 'employment' was not used.

The Commissioner's Reasons for his Decision

90. The Commissioner cited the test propounded by Cooke J in Market Investigations and approved by the Privy Council in Lee Ting Sang (see paragraph 105 below). He adverted to the 'control test', the 'integration test' and the 'economic reality test' and came to the conclusion that the Appellant was a part-time employee of Institution B. He stated his reasons as follows:

> 'In coming to this conclusion, I have had regard to the following facts:
>
> (a) [Institution B] engaged the Taxpayer as a contractual [Position C] and [Position D] [Fact (9)(a)]. He was required to provide personal services to [Institution B]. It was only [Institution B] which could have control over where and when the workshops were conducted. [Institution B] determined the scheduled timetable to complete the marking of examination scripts [Facts (9)(b) and (c)]. The Taxpayer was also required to follow [Institution B]'s guidelines on the structure of the workshop and topics covered [Fact (9)(d)]. He had to complete training sessions and briefing sessions [Fact (8)(a)(i)]. [Institution B] provided handouts containing cases, questions and suggested solutions for

the workshops. The examination scripts should be marked in accordance with the marking scheme provided by [Institution B] [Fact (9)(f)]. If the Taxpayer was subsequently not available to perform the work, he had to contact [Institution B] and a relief [Position C] or reserve [Position D] would be called upon by [Institution B] to replace him [Fact (9)(g)]. As such, the Taxpayer was clearly under the control of [Institution B].

(b) The Taxpayer did not have to bear any financial risk in conducting the workshops or marking the examination scripts. He was not required to provide his own equipment for the running of the workshops [Fact (9)(1)] or contribute any monetary capital [Fact (9)(m)]. He was paid an honorarium at predetermined rates approved by [Institution B]'s Qualification and Examinations Board [Fact (9)(o)].

(c) Notwithstanding there were some conditions of the Taxpayer's employment suggesting that he did not form part and parcel of the organization, most of them were not inconsistent with a contract of service. A person might carry out more than one employment in the same period of time. The permission to work for other organization without prior approval by [Institution B] [Fact (9)(e)], the absence of entitlement to fringe benefits, subordinates and promotion opportunity [Fact (9)(i)] as well as the lack of continuity of the appointment as a [Position C] and [Position D] [Fact (9)(j)] are common characteristics of part-time employment. Although the Taxpayer was not subject to any staff performance appraisals, [Institution B] had an observer scheme to monitor the quality of workshops and assess the performance of [Position C] [Facts (8)(a)(ii) and (9)(k)].'

The Grounds of Appeal

91. In response to the 'control test', the Appellant argued in his 'Statement of Grounds of Appeal' as follows:

'Control Test

2. However, the type of "control" as cited by the Department as in Reason 4(a) is, in my opinion, too general and therefore not sufficient to form the basis in concluding there existed a contract of employment between [Institution B] and myself.

3. Indeed, even a lawyer or a CPA representing a client before court or on some other occasion should be subject to some sort of instructions, or control, from her client.

4. More importantly, [Institution B] shall not give me any instructions to follow throughout the so-called period of employment.

5. I was not to read out scripts as given by [Institution B], or to show notes or answers on white board for candidates to copy.

6. I was there, based on my experience as a CPA, to help facilitating the candidates' learning, assessing their performance and giving them advice, if necessary.

7. From time to time, we facilitators also proactively gave advice to [Institution B] so as to improve the quality of its workshops and/or marking of exam scripts.

8. It has never been the case that we facilitators just received orders from [Institution B] for execution, whether directly related to workshop facilitation, and/or marking of exam scripts, or not.

9. In short conclusion, the so-called control test is in this case at best not conclusive.'

92. In response to the 'economic reality test', the Appellant argued:

'Economic Reality Test

16. To sum up, each batch of workshops had roughly a total contact time of 13 or 14 hours but might take up to four months to finish.

17. Also, they were more or less on a rolling basis so that a new contract might start negotiating even before the preceding contract ended.

18. As such, it could not be a typical arrangement of a part-time employment contract as proclaimed by the Inland Revenue Department, if it is an employment at all.

19. Part-time employment is usually less formal and may have only one overall contract to govern the continuity of the employment until further notice.

20. On the other hand, if the four letters of assignment could be construed as four separate employment contracts, since their inception, [Institution B] did not handle the essential administrative duties for me in relation to my employment as

their [Position C], on their capacity as an employer.

21. As shown in Appendix 8 (the second paragraph), after confirming the assignment as a [Position C], [Institution B] explicitly "reminded me to seek endorsement from my employer (which, in this case, was [Institution A]) that I was going to serve as a [Position C]..." and I was also told that I could "contact [Institution B] should I need any assistance".

22. Consequently, I needed to apply to [Institution A] for Outside Practice / Outside Work, in my own name, instead of in [Institution B]'s name, the alleged employer of mine by the Inland Revenue Department.

23. In addition, it is not true that I did not have to bear any financial risk in conducting workshops or marking the exam scripts (Reason 4(b)).

24. My employer, namely [Institution A], has in fact imposed a 15% levy for the gross earnings of the total $50,400 I received from outside practice from [Institution B], amounting to $7,560.

25. After all, while there is no official definition in the Inland Revenue Ordinance about what employment is, whether my relationship with [Institution B] in relation to the workshop facilitation and/or marking of exam scripts could be construed as an employment should be a matter of fact, to be understood and accepted by the majority of sensible people in the public.

26. Please note that, at least since the first time the above-mentioned honorariums I received was reported to the Inland Revenue Department on 23 May 2011, for the year of assessment 2010/11, [Institution B] has used the form "Notification of Remuneration paid to Persons other than Employees".

27. [Institution B] has at least continued this practice for me for the years of assessment 2011/12 and 2012/13 on 30 May 2012 and 24 May 2013 respectively.

28. From what I understand, there is another form for employers to report remunerations of its employees to the Inland Revenue Department (Form: IR 56B).

29. There are also other obligations that an employer needs to fulfil to the Inland Revenue Department under the Inland Revenue Ordinance, such as notification of termination of service of

employees (Form: IR56F).

30. I have never received copies of the above-mentioned forms as required by the Inland Revenue Ordinance.

31. This practice continued even after the Inland Revenue Department has issued me the additional salaries tax assessment on 22 March 2012.

32. I therefore assume that the Inland Revenue Department has accepted the practice by [Institution B] to not regard my situation as one of employment for the purpose of the Inland Revenue Ordinance.

33. As [Institution B] is [concealed by the Board of Review] in Hong Kong and the Inland Revenue Department the main government body to administer the Inland Revenue Ordinance, I have no doubt to believe the majority of sensible people in the public would also accept that my situation with [Institution B] should not be construed as one of employment for the purpose of the Inland Revenue Ordinance.'

The Appellant's arguments in submission

93. In his submission at the hearing, the Appellant highlighted several points in addition to his grounds of appeal.

94. The invitation to act as a Position C or Position D was not made to the public, but only to qualified persons within the profession.

95. The work was on an ad hoc assignment-by-assignment basis.

96. Institution B's control was confined to the running of the workshops and the marking of the examinations. Institution B exercised no control over him during his preparation for the workshops. He did the preparation in his own time, using his own resources. He was not provided with any facility by Institution B.

97. Likewise with candidate counselling.

98. He was paid for conducting the workshops, but was not paid for the extra hours he spent in training and in preparation and student support.

99. Even in the conduct of the workshops and in the marking of the exam scripts, the Appellant was not supposed to mechanically follow the Guidelines and marking scheme. He had to exercise personal skill and judgements. He shared his work experiences and perspectives with the candidates. He gave feedback and recommendations

to Institution B, and he was welcome to point to any flaws and errors. To make good the point, he produced email exchange he had with Institution B in October 2010, in which he made certain comments on the guidance notes on Handout 5; and email exchange in January 2011 in which he referred Institution B to certain deficiency in the candidates' answers which seemed to have arisen out of flaws in the handouts and the Learning Pack.

100. He compared his position with a tax representative or lawyer who must act according to the client's instructions, or an actor or master of ceremony who must follow the script, but they do not per se become an employee of their clients. Much depends on the nature of the work.

101. The Appellant pointed out that Institution B's use of the IR56M Notification was a clear statement that Institution B did not regard the Appellant as its employee. According to the Appellant, Institution B continued to use the same form of return, namely Notification of Remuneration paid to persons other than employees, in the subsequent years.

Authorities

102. We have been referred to the following authorities:

- Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173, Cooke J
- Narich Pty Ltd v Commissioner of Pay Roll Tax 50 ALR 417, PC
- Lee Ting Sang v Chung Chi-Keung [1990] 1 HKLR 764, PC
- Hall (Inpsector of Taxes) v Lorimer [1994] STC 23, CA

103. MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1967] 1 QB 156, held that:

> '*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*'

104. In Market Investigations, Cooke J began by referring to MacKenna J's condition (i) and agreed that that was the first condition which must be fulfilled. He next referred to condition (ii), the so-called 'control test', and recognised it was no longer a decisive test. He referred to the example of a master of a ship, who might be employed under a contract of service, and yet the owners had no power to tell him how to navigate

his ship. '… when one is dealing with a professional man, or man of some particular skill and experience, there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test. . … 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.'

105. After referring to a number of other case, Cooke J propounded the following test [184G-185B]:

> '*… 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 that 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 application of the general test may be easier in a case where the person who engages himself to perform to services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.*'

106. This test, known as the so-called 'economic reality test', was cited with approval by the Privy Council in Lee Ting Sang [766G-767B].

107. These authorities are, of course, binding on us, but for reasons to be explained below, we do not find either the 'control test' or 'economic reality test' useful in the circumstances of the present case. Rather, we find the following dictum by Nolan LJ in Hall v Lorimer (pages 28 to 29) most instructive:

> '*… 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. I agree with the views expressed by Mummery J in the present case (at 612) where he says:*

> *"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 detail may also vary in importance from one situation to another. The process involves painting a picture in each individual case. …" '*

Our Decision

108. At the outset of the hearing, this Board warned the Appellant that we found his proposition that the Sum was not subject to any kind of fiscal assessment, whether salaries tax or profits tax, quite astonishing. The Appellant indicated that if that was the view taken by the Board, then he would argue that it was subject to profits tax.

109. We accept that the unique features of this case have made it difficult to fit it into a binary division. Nonetheless, 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 services, i.e. 'profits from trade, profession or business' within the meaning of section 14(1).

110. The Sum comprised of honorarium paid to the Appellant as Position C in 3 modules and as Position D in one module. There was not one contract, but a series of contracts. The 3 assignments where the Appellant was appointed as Position C can certainly be looked at together given that the terms of the assignments were comparable in all material respects. The Appellant argued that his assignment as Position D 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. It would be an anomaly to the extreme if the Appellant were to be considered an employee in one and a non-employee in the other.

111. In order to decide whether one is an employee or not, it is necessary to look at all the facts and circumstances. At first blush, the facts of the present case seem to have a lot of similarities with those in Market Investigations and Narich.

112. In Market Investigations, the employer company was engaged in the field of market research. They maintained a large panel of part-time interviewers. The question was whether there existed a contract of service or a series of contract for services between the company and the part-time interviewer. Cooke J proceeded to ask himself two questions: First, whether the extent and degree of control was consistent with there being a contract of service; and second, whether, when the contract was looked at as a whole, its nature and provisions were consistent or inconsistent with its being a contract of service, bearing in mind the general test he had adumbrated (i.e. the 'economy reality test'). He found that the company exercised extensive control over the interviewers through the company's 'Interviewer's Guide', which contained detailed instructions on how the interviews should be conducted, whom to interview, what to say to informants, how to handle the questionnaire, etc. The company could not dictate when the interviewer should do her work, had no right to prohibit her from doing similar work for other organisations and could not give direct instructions while she was working in the field. But such limitations were not inconsistent with the existence of a contract of service. Having answered the first question in the positive, he went on to examine the second question and found nothing inconsistent with there being a contract of service. He found that the interviewer was not in business on her own account, but was employed by the company.

113. In Narich, the employer company was franchisees of the 'Weight Watchers' programme designed to help people lose weight. 'Weight Watcher' classes were conducted by lecturers in accordance with the programme and the nature and scope of a lecturer's work, and the precise manner in which she was required to carry them out, was closely controlled and directed through the medium of the 'Weight Watchers Lecturers' Handbook', which was hired to the lecturer and which was a confidential document and must be returned after the termination of the lecturer's contract. The contract between Narich and the lecturer entitled Narich to terminate the lecturer's engagement if she failed to carry out her duties and obligations in a proper manner. Clause 3 of the contract stipulated that 'The lecturer is not an employee of the Company but is an independent contractor and shall perform her duties free from the direction and control of the Company and she will attend without payment one Saturday Meeting of Lecturers per month at which she will, inter alia, be weighed.' The Privy Counsel considered that the effect of the contract as a whole contradicted that clause and effect could not be given to that clause according to its term. 'The plain situation in law is that a lecturer is tied hand and foot by the contract with regard to the manner in which she performs her work under it. In these circumstances it is not possible to hold that she is, in relation to Narich, an independent contractor. On the contrary, the only possible conclusion is that she is an employee.' So the control test had won the day.

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, the GNs and the CLPs in great details and the marking of the examination papers must follow the standard and marking scheme mutually agreed at the Position D's 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 Position C and Position D 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 Institution B.

116. Equally, Institution B was not running Programme E as a commercial enterprise in order to make a financial return. It ran the programme to fulfil its statutory role and responsibilities. Programme E was the gateway to becoming a CPA. Institution B was the guardian of this gateway. Programme E had to be maintained at a high standard. How Programme E 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 Institution B. Institution B supplied the teaching materials and learning materials and the various guidelines and manual to 'control' the standard of Programme E. 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 Position D's 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 underlining 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 Institution B 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 Position C could not complete the workshops. The

honorarium was clearly inadequate. Indeed the very choice of the word recognised 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 Institution B as early as possible, but he was not penalised for the failure. Equally, Institution B 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. We find rapports with the following words of Rowlatt J in Davies v Braithwaite (quoted in Hall v Lorimer at page 31), a case concerning the income of an actress:

> *'… and in the case of an actor's or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining one engagement, then another, and a whole series of them - then each of those engagements cannot be considered employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments. … She makes a contract with a producer for the next thing that she is going to do, and then another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film. I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career.'*

121. This is true for many professions. Instead of looking at each engagement in isolation, it is a lot more helpful to examine the modus operandi of the profession and the person's career as a whole. A barrister may accept engagements to sit as a member of a tribunal or give a lecture at the university or give *pro bono* advice for a charity. These are incidents in the conduct of a barrister's professional career. He remains very much his own boss in each of these engagements.

122. In the same way, it is necessary to look how these engagements as Position C and Position D operate within the CPA profession as a whole. In this regard, it is important to note that Institution B did not regard the Position C and Position D 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 (see paragraphs 4 and 81 above).

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 the MPF, as we know, are most complex. On the safe side, Institution B 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 Institution B was confused with the MPF requirements. But Institution B 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.

125. Dennings LJ in Massey v Crown Life Insurance Co [1978] 1 WLR 676 held: '*The Law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it … On the other hand, if the relationship is ambiguous and is capable of being one or the other [ie either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them.*' This passage was cited with approved by the Privy Council in Narich [page 421].

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.

127. We agree with the Appellant that the Commissioner took a very narrow view of the facts. The main thrust of the Commissioner's decision was the 'control test' and the fact that the Appellant did not bear any financial risk in conducting the workshops or marking the examination scripts. As explained, these tests are inapt in the present case.

128. Cooke J reminded us in Market Investigations, '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.' He asked himself two questions, not one. Apart from the extent and degree of control, he also asked whether there were provisions inconsistent with the contract being a contract of service. The Commissioner should have gone further and examined the factors which were inconsistent with an employer-employee relationship. He should have followed the holistic approach of Nolan LJ in Hall v Lorimer and evaluated all the facts as part of a big picture. This approach is more in tune with the ever changing labour market and the diverse modes businesses and professions operate in the modern world. It produces a more

equitable result.

129. Stepping back and taking a macro view, this is what we see: Institution B 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 Programme E. Programme E 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 'Position C' 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 Institution B treat Position C or Position D 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 Institution B 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 Position C and Position D, the Appellant did not make himself an employee of Institution B.

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 Position C and Position D were separate contracts for services. They were not contracts for part-time employment as found by the Commissioner.

132. Lastly, the Appellant once took the view that the Sum was not subject to any fiscal assessment. He argued that he was not carrying on any trade, profession or business within section 14(1) of the IRO. While we agree that he was not engaged in any trading or business activities, it is clear that it was in his professional capacity as a CPA that the Appellant was engaged as a Position C and a Position D. He was clearly carrying on a profession and was providing professional services in his work as a Position C and a Position D. Indeed the very definition of 'honorarium' is 'a payment given for professional services that are rendered nominally without charge' (see Online Oxford Dictionaries). The Sum was payment received from such professional services. We find that the Sum is assessable to profits tax.

133. The Appellant indicated that should we come to the conclusion that section 14(1) is applicable, he would seek to deduct certain expenses from the Sum. In the circumstances, we think it is only appropriate that we remit the matter to the Revenue for

re-assessment.

Conclusion

134. In summary, for the reasons stated above, we find that each assignment was a contract for services. Section 8 of the IRO was not applicable. The appeal is allowed.

135. The Appellant was carrying on a profession insofar as concerns his acceptance of the assignments as Position C and Position D and the Sum arose in or was derived from such profession. Section 14 of the IRO is applicable.

136. Under section 68(8)(a) of the IRO, we remit the case to the Commissioner with our opinion that the Sum is assessable under section 14 of the IRO. Under section 68(8)(b) of the IRO, we give leave to the Commissioner to apply for such directions (if any) as the Board may give concerning the revision required in order to give effect to such opinion.