Case No. D108/01

Salaries tax – income under agreements – whether income derived from an employment of profit – sections 8, 9A and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Michael Robert Daniel Bunting and Colin Cohen.

Date of hearing: 22 September 2001.
Date of decision: 26 November 2001.

The appellant was an actor and he and his mother were the only directors and shareholders of a private company ('ServiceCo'). ServiceCo made agreements with a television broadcasting company ('the Person') in 1995 and 1997 respectively. Under the agreements, remuneration for services carried out under the agreements by the appellant was paid to ServiceCo.

Clause 3 of the agreements governed the nature of the appellant's service and required the personal services of the appellant to act, to perform and to play any roles in any television programmes or television serial drama programmes as and when designated by the Person. The appellant had not at any material time carried out any television or television drama programme for any person other than the Person.

Under clause 10 (ii) and (iii) of the agreements, the appellant was bound to follow the directions of the Person's production executives and the materials to be incorporated by the appellant in programmes should be subject to the Person's prior approval.

Under clause 7 of the agreements, the Person had the right to terminate the agreements if ServiceCo was unable or refused to procure the appellant's service for whatever reasons to perform any assignments given by the Person for three occasions or more (in aggregate or consecutively).

The assessor raised on the appellant a number of salaries tax assessments which included all income paid to ServiceCo by the Person. The appellant objected against the inclusion of such income but the Commissioner was of the view that section 9A of the IRO was applicable and made his determination accordingly.

Held:

1. Television programmes or television serial drama programmes are 'the services carried out under the agreement' for the purposes of subsection (1) and thus the relevant 'services' for the purposes of section 9A. Filming of television commercial under the agreements was not 'the same or similar service'.

2. Under clause 10 (ii) and (iii), the controls or supervisions of the performance by the appellant are controls or supervisions commonly exercised by an employer in relation to the performance of his employee's duties.

3. Under clause 7, the Person did have the right to cause any of those services to cease to be carried out for a reason commonly provided for in relation to the dismissal of an employee under a contract of employment. The right of the Person under clause 7 seems more extensive than the rights of an employer under section 9(1) of the Employment Ordinance (Chapter 57) ('EO') which provides that an employer may terminate a contract of employment without notice or payment in lieu if an employee, in relation to his employment, wilfully disobeys a lawful and reasonable order or is habitually neglectful of his duties.

4. It is clear from the agreements that what the Person contracted for were the exclusive personal services of the appellant. The appellant was subject to strict control by the Person under the agreements. The appellant reported to work on days and times and at places as instructed by the Person.

5. The only 'role' of ServiceCo under the agreements was to procure the personal services of the appellant. The interposition of ServiceCo between the Person and the appellant seems quite artificial. The appellant has not begun to discharge the burden of proving that the carrying out of the services was not in substance the holding by him of an employment of profit with the Person.

Appeal dismissed.

Cases referred to:

Lee Ting-sang v Chung Chi-keung [1990] 1 HKLR 764
Hall v Lorimer [1994] STC 23
D103/96, IRBRD, vol 12, 49

Chan Wai Mi for the Commissioner of Inland Revenue.

Yau Kim Hung of Messrs Willis Cheng & Co, Certified Public Accountants, for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 10 May 2001 whereby:

(a) Salaries tax assessment for the year of assessment 1996/97 under charge number 9-2119821-97-A, dated 11 June 1998, showing assessable income of $1,036,000 with tax payable thereon of $155,400 was confirmed.

(b) Additional salaries tax assessment for the year of assessment 1997/98 under charge number 9-3824391-98-1, dated 8 June 2000, showing additional assessable income of $2,344,000 with additional tax payable thereon of $322,002 was confirmed.

(c) Salaries tax assessment for the year of assessment 1998/99 under charge number 9-1235024-99-0, dated 15 October 1999, showing net chargeable income of $1,022,000 with tax payable thereon of $163,240 was reduced to net chargeable income of $807,500 with tax payable thereon of $126,775.

The background facts

2. At all material times, the Appellant was an actor and he and his mother were the only directors and shareholders of a private company ('ServiceCo') incorporated in Hong Kong on 24 March 1994. The Appellant held 9,999 shares and his mother held the remaining one share.

3. By an agreement dated 20 September 1995, ServiceCo made a written agreement with a television broadcasting company ('the Person') ('the 1995 Agreement').

4. By a deed dated 20 September 1995 ('the 1995 Deed'), the Appellant gave the Person guarantees and indemnities.

5. By letter dated 9 September 1996, Messrs Ivan Tse & Company (' the First Representatives') applied on behalf of ServiceCo and the Appellant for an advance ruling by the Respondent under section 9A(4) of the IRO that the Appellant did not in substance hold an office or employment of profit with the Person in so far as the remuneration derived from the Person under the 1995 Agreement was concerned.

6. By a ruling dated 13 January 1997, the Commissioner informed the First Representatives that the services in question came within the scope of section 9A(1) and the income so derived should be subject to salaries tax.

7. By an agreement dated 11 April 1997, ServiceCo made another written agreement with the Person (' the 1997 Agreement').

8. By a deed dated 11 April 1997 (' the 1997 Deed'), the Appellant gave the Person guarantees and indemnities.

9. The assessor raised on the Appellant a number of salaries tax assessments for the years of assessment 1996/97, 1997/98 and 1998/99 which included all income paid to ServiceCo by the Person.

10. The Appellant objected against the inclusion of such income.

11. The Commissioner was of the view that section 9A was applicable and made his determination accordingly.

12. By letter dated 8 June 2001, Messrs Willis Cheng & Co gave notice of appeal on behalf of the Appellant, contending that the contract between the Person and ServiceCo was contract for services and that the income from the Person should be assessed under profits tax instead of salaries tax.

The appeal hearing

13. The appeal was originally scheduled to be heard on 3 August 2001.

14. By letter dated 24 July 2001, Messrs Willis Cheng & Co applied for an adjournment ' to September 2001 or later' on the ground that the Appellant ' left Hong Kong since middle of June and will return to Hong Kong until the end of August' .

15. The appeal was rescheduled to be heard on 22 September 2001.

16. However, the Appellant was absent at the hearing of the appeal on 22 September 2001.

17. Mr Yau Kim-hung of Messrs Willis Cheng & Co conducted the appeal on behalf of the Appellant. The Respondent was represented by Miss Chan Wai-mi.

18. Neither party called any witness.

19. Mr Yau Kim-hung did not cite any authority. Miss Chan Wai-mi cited:

(a) section 9A of the IRO;

(b) Lee Ting-sang v Chung Chi-keung [1990] 1 HKLR 764;

(c) Hall v Lorimer [1994] STC 23; and

(d) D103/96, IRBRD, vol 12, 49.

Our decision

20. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant.

21. Section 8 provides that salaries tax shall, subject to the provisions of the IRO, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the source of any office or employment of profit.

22. Section 9A, so far as relevant, provides:

‘ *(1) Where a person ("relevant person") carrying on (or deemed under this Ordinance to be carrying on) a trade, profession or business, or prescribed activity, has entered into an agreement, whether before, on or after the appointed day, under which any remuneration for any services carried out under the agreement on or after that day by an individual ("relevant individual") for the relevant person or any other person is paid or credited on or after that day to –*

(a) a corporation controlled by –

(i) the relevant individual;

(ii) ... or

(iii) the relevant individual together with an associate or associates of the relevant individual;

...

then, subject to subsections (3) and (4), for the purposes of this Ordinance –

(i) the relevant individual shall be treated as having an employment of profit with the relevant person –

(A) commencing on –

(I) in the case of the trade, profession or business, the day the relevant individual commenced to carry out any of those services or the appointed day, whichever is the later;

(II) ...

(B) until the agreement terminates without the relevant individual continuing to carry out any of those services as an employee of the relevant person;

(ii) the relevant individual shall be treated as an employee of the relevant person, and the relevant person shall be treated as the employer of the relevant individual, whilst the relevant individual is treated, under paragraph (i), as having an employment of profit with the relevant person; and

(iii) any such remuneration shall be treated as being –

(A) income derived by the relevant individual from an employment of profit with the relevant person; and

(B) received by and accrued to the relevant individual at the time that it is paid or credited to the corporation or trustee concerned referred to in paragraph (a), (b) or (c),

and the other provisions of this Ordinance (including section 52) shall be construed accordingly.

(2) ...

(3) Paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where –

(a) neither the agreement referred to in that subsection nor any related undertaking (and whether or not the agreement refers to that undertaking) provides for any remuneration for any of those services

to include or to be the provision of annual leave, passage allowance, sick leave, pension entitlements, medical payments or accommodation, or any similar benefit, or any benefit (including money) in lieu thereof;

(b) if the agreement referred to in that subsection or any related undertaking (and whether or not the agreement refers to that undertaking) requires any of the services referred to in that subsection to be carried out personally by the relevant individual, the relevant individual carries out the same or similar services –

(i) for persons other than any person for whom those first-mentioned services are carried out under that agreement; and

(ii) during the term of that agreement or undertaking, as the case may be;

(c) the performance by the relevant individual of any of those services is not subject to any control or supervision –

(i) which may be commonly exercised by an employer in relation to the performance of his employee' s duties; and

(ii) by any person (including the relevant person) other than the corporation or trustee concerned referred to in subsection (1)(a), (b) or (c);

(d) the remuneration referred to in that subsection is not paid or credited periodically and calculated on a basis commonly used in relation to the payment or crediting and calculation of remuneration under a contract of employment;

(e) the relevant person does not have the right to cause any of those services to cease to be carried out in a manner, or for a reason, commonly provided for in relation to the dismissal of an employee under a contract of employment; and

(f) the relevant individual is not held out to the public to be an officer or employee of the relevant person.

(4) Paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where the relevant individual establishes to the satisfaction of the Commissioner that at all relevant times the carrying out of the services referred to in that subsection was not in substance the holding by him of an office or employment of profit with the relevant person.

...

(8) In this section ... "associate", in relation to the relevant individual, means ... a relative of the relevant individual [and] "relative" means the spouse, parent, child, brother or sister of the person concerned'.

Treatment under section 9A(1)

23. The Person carried on the business of television broadcast. The Person has entered into the 1995 Agreement and the 1997 Agreement (collectively referred to as 'the agreements'), under which agreements remuneration for services carried out under the agreements by the Appellant for the Person was paid to ServiceCo, a corporation controlled by the Appellant together with her mother, a relative and an associate. Section 9A(1) applies and subject to subsections (3) and (4), for the purposes of the IRO:

(a) the Appellant shall be treated as having an employment of profit with the Person;

(b) the Appellant shall be treated as an employee of the Person;

(c) the Person shall be treated as the employer of the Appellant;

(d) any such remuneration shall be treated as being income derived by the Appellant from an employment of profit with the Person; and

(e) any such remuneration shall be treated as being received by and accrued to the Appellant at the time that it was paid or credited to ServiceCo.

Exclusion under section 9A(3)

24. Where **all** the paragraphs in subsection (3) are satisfied, subsection (1) shall not apply. Subsection (3) does not assist the Appellant because one or more of the paragraphs is/are not satisfied.

25. Clause 3 of the agreements governed the nature of the Appellant's service and required the personal services of the Appellant to act, to perform and to play any roles in any television programmes or television serial drama programmes (as the case may be) as and when

designated by the Person for a minimum of four or seven series (as the case may be) of 20 one-hour episodes per series drama television programme. Television programmes or television serial drama programmes are 'the services carried out under the agreement' for the purposes of subsection (1) and thus the relevant 'services' for the purposes of section 9A. The agreements required such services to be carried out personally by the Appellant. The Appellant has not at any material time carried out any television or television drama programme for any person other than the Person. Filming of television commercial, whether under the 6 November 1997 agreement or the 10 December 1997 agreement was not 'the same or similar service' and paragraph (b) is not satisfied.

26. Under clause 10 (ii) and (iii) of the agreements, the Appellant was bound to follow the directions of the Person's production executives and the materials to be incorporated by the Appellant in programmes should be subject to the Person's prior approval. Such controls or supervisions of the performance by the Appellant are controls or supervisions commonly exercised by an employer in relation to the performance of his employee's duties and paragraph (c) is not satisfied.

27. Under clause 7 of the agreements, the Person had the right to terminate the agreements if ServiceCo was unable or refused to procure the Appellant's service for whatever reasons to perform any assignments given by the Person for three occasions or more (in aggregate or consecutively). Thus the Person did have the right to cause any of those services to cease to be carried out for a reason commonly provided for in relation to the dismissal of an employee under a contract of employment and paragraph (e) is not satisfied. The right of the Person under clause 7 seems more extensive than the rights of an employer under section 9(1) of the EO which provides that an employer may terminate a contract of employment without notice or payment in lieu if an employee, in relation to his employment, wilfully disobeys a lawful and reasonable order or is habitually neglectful of his duties.

Exclusion under section 9A(4)

28. It is clear from the agreements and the 1995 Deed and the 1997 Deed that what the Person contracted for were the exclusive personal services of the Appellant. The only 'role' of ServiceCo under the agreements was to procure the personal services of the Appellant. There is no evidence that ServiceCo had ever had any officer or any officer apart from the Appellant. The interposition of ServiceCo between the Person and the Appellant seems quite artificial.

29. The Appellant was subject to strict control by the Person under the 1995 Deed, the 1997 Deed and the agreements, see clauses 7, 9, 10(ii), 10(iii), 10(vi), 10(vii), 10(xi), 10(xii), 10(xiii), 10(xiv) and (xv) of the agreements. The Person's log reports showed that the producers reported to the management any matters caused by the Appellant which affected the work schedule.

30. The Appellant reported to work on days and times and at places as instructed by the Person. Neither ServiceCo nor the Appellant was required to incur any expense for any equipment or helper. The Appellant followed the directions of the Person's production executives. The Appellant left at the end of a session and waited for the Person's payment at the end of a series, at the agreed contractual rate. Neither ServiceCo nor the Appellant assumed any financial risk. Neither ServiceCo nor the Appellant would profit from sound management of their work.

31. The Appellant has not begun to discharge the burden of proving that the carrying out of the services was not in substance the holding by him of an employment of profit with the Person and subsection (4) does not assist him.

Disposition

32. The Appellant has not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as confirmed or reduced by the Commissioner.