Case No. D13/06

Salaries tax – section 9A of the Inland Revenue Ordinance ('IRO') – burden of proof for section 9A(3) and 9A(4) – purpose of section 9A(3) and 9A(4) – intended relationship of the parties – the issue and test under section 9A(3)(b)(ii) – requirement in section 9A(3)(b)(i) – whether or not the question under section 9A(3)(c) is any kind of control – meaning of the remuneration under section 9A(3)(d) – two elements in section 9A(3)(d) – issue under section 9A(3)(e) – meaning of the word 'right' employed in section 9A(3)(e) – the application of the criteria under section 9A(3) – fundamental question under section 9A(4)

Panel: Anthony Chan Kin Keung SC (chairman), Charles Nicholas Brooke and Julia Frances Charlton.

Dates of hearing: 17, 18 and 26 January 2006.
Date of decision: 27 April 2006.

The taxpayer is a pioneer of nuclear medicine in Hong Kong. Dr H was the chief of the Nuclear Medicine Division of the Department of Radiology and Radiotherapy of a Hong Kong private hospital. SA was a private company with Dr H and his wife as the only shareholders and directors. W was a shelf company acquired by the taxpayer. By a contract C between SA and W, W agreed to procure the taxpayer to work at the Department for five years. By a contract D between SA and the Hospital, SA agreed to assign Dr H and the taxpayer to work at the Department for a five year period which mirrored that of Contract C.

It was the contention of the Inland Revenue that by virtue of section 9A the remuneration derived by W for the provision of the taxpayer's services to the hospital should be treated as the taxpayer's income chargeable to salaries tax. The taxpayer accepted that section 9A(1) applies to this case. The dispute is whether the taxpayer can invoke sub-sections (3) and/or (4) so as to take his case outside section 9A(1). Each of the sub-paragraphs of section 9A(3) has to be satisfied before the taxpayer can rely upon it. Further the taxpayer accepts that the burden of proof for both section 9A(3) and section 9A(4) rests on her lay client.

Held:

1. The intended relationship of the parties is of relevance, but it is certainly not a decisive point. The reason being that in a case involving section 9A, it is by definition that one is not dealing with a typical employer-employee relationship. The parties concerned

probably intended not to have such a relationship. However, the determination under section 9A(3) and (4) is to ascertain the substance or the true nature of their relationship and for that purpose what was intended by the parties or what label they put on their relationship cannot be decisive.

2. Under section 9A(3)(b)(ii), the issue is whether the taxpayer carried out the same or similar services during the term of Contract D. The issue is not whether the taxpayer carried out the same or similar services during the Assessment Years. The Board agrees that what one is concerned with is the nature of the relationship between the alleged employer and alleged employee under the agreement, and not the nature of the relationship during a particular year of assessment.

3. This is not to say that where a person's duties can be compartmentalized into a number of tasks, he needs to perform each and every one of such tasks for other persons before section 9A(3)(b) is satisfied. The test is whether the tasks are material or incidental to the duties performed by the alleged employee for the alleged employer. Section 9A(3)(b) cannot be satisfied by the performance of incidental tasks for other people.

4. The Board is of the view that the requirement in section 9A(3)(b)(i) is that the alleged employee is at liberty to work for other persons. Working for other people in breach of contract with the alleged employer will not satisfy the sub-section, because that provides no distinction between an employee and a non-employee.

5. The number of occasions where the alleged employee has provided same or similar services cannot, per se, be critical, because it may be a case of simply not getting the business.

6. The Board finds that the taxpayer's work for another hospital was an one off event over a long period of time and that the taxpayer did not seek approval from the hospital suggest that it was more likely than not that the taxpayer was not acting in accordance with Contract D. As a result, section 9A(3)(b) cannot be satisfied by having worked for another hospital.

7. The Board accepts that the question under section 9A(3)(c) is not any kind of control. The Board finds that there are a number of indicia of control and supervision by the Hospital as employer. In the premises, section 9A(3)(c) cannot be satisfied.

8. The proper interpretation of remuneration under section 9A(3)(d) must be remuneration received pursuant to the contract in question and it would not be right to confine the consideration to any particular assessment year. Further, the point that one is concerned with the nature of the relationship between the alleged employer and

the alleged employee under the agreement, and not the nature of the relationship during a particular year of assessment, must apply equally to this sub-section.

9. The Board finds that the two elements to section 9A(3)(d) – periodical payment and whether the payment was on a basis common for employment contracts. Both elements are satisfied. In the premises, section 9A(3)(d) had not been satisfied.

10. The issue under section 9A(3)(e) is whether the alleged employer is entitled to terminate the services of the alleged employee in a manner (or for a reason) which one normally expects an employer can do.

11. The word 'right' is employed in section 9A(3)(e). In a consideration of section 9A(3)(e), one is necessarily dealing with a relationship that is governed by an agreement (hence the terms of section 9A(1)). A right under an agreement can be expressly provided for or can be implied or arise by operation of law. There is nothing in the language of the sub-section to suggest that the work 'right' should be given a restrictive meaning. Whilst the existence of a right is necessary element, the real point of section 9A(3)(e) is the manner in or the reason for which the right of termination can be exercised, because that provides the distinction between an employer-employee relationship and one which is not. If the legislature had intended that the distinguishing feature was the existence of an express provision, that could and would have been made clearly by different working. In the premise, there is no reason to interpret section 9A(3)(e) narrowly.

12. The Board is of the view that the hospital did have the right to terminate the services of the taxpayer which could be exercised in a manner (or for a reason) that one would expect an employed doctor would be dealt with by the hospital. In the premises, section 9A(3)(e) is not satisfied.

13. It cannot be intended that the application of any of the criteria under section 9A(3) would individually produce the correct result in the determination of the true nature of the relationship in question. That is the reason for the prescription of six criteria. Further, even where a taxpayer cannot satisfy all the six criteria, he can still fall back upon section 9A(4) to get out of section 9A(1).

14. The Board finds that at all material times, the taxpayer had only one full time job. It is difficult to envisage that he would normally introduce himself as someone other than the officer or employee of the hospital. Section 9A(3)(f) is not satisfied.

15. The fundamental question under 9A(4) is: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' (Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 followed).

16. The Board is drawn to the conclusion that the relationship in question was, in substance, one of employment. In the premises section 9A(4) is not satisfied (Abdalla v Viewdaze Party Ltd 53 ATR 30 and Hall v Lorimer [1994] 1 WLR 209 considered).

Appeal dismissed.

Cases referred to:

Abdalla v Viewdaze Party Ltd 53 ATR 30
Lee Ting Sang v Chung Chi-keung [1990] 2 AC 374
Hall v Lorimer [1994] 1 WLR 209

Yvonne Cheng Counsel instructed by Michael Szeto of Messrs Deacons, Solicitors, for the taxpayer.
Paul Leung Counsel instructed by Dick Ho Government Counsel of Department of Justice for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Taxpayer in respect of additional salaries tax assessments for the years 1998/99, 1999/2000 and 2000/01 ('the Assessment Years'). Such Assessments were confirmed by a Determination of the Deputy Commissioner of Inland Revenue dated 30 June 2005 ('the Determination').

2. Miss Cheng, who appears for the Taxpayer, has helpfully informed this Board at the beginning of this appeal that the Taxpayer agrees with the facts stated in paragraphs 1(1) to 1(19) of the Determination with one exception, which will be dealt with below. By reason of the agreement, this Board accepts the facts stated in the said paragraphs (as distinct from, e.g., explanations given by the Taxpayer' s Representative) and finds them as such for purposes of this appeal.

Factual Background

3. It would be helpful to start with a brief introduction of the facts to enable the issues of this appeal to be identified. Thereafter, the evidence will be examined in more depth with the issues in mind. Save where otherwise indicated, the facts stated in the Decision are the facts found by this Board.

4. The Taxpayer is a pioneer of nuclear medicine in Hong Kong. From 1980 to 1983, the Taxpayer was in private practice as a doctor. From about 1983 to 1989, he helped in the establishment of nuclear medicine services in a number of Hong Kong government hospitals. Sometime in 1989, the Taxpayer began to work in Country A as an Associate Professor at the Department of Radiology of the University B. Subsequently, he became the Chief of Nuclear Medicine Division and a Clinical Professor of Radiology at University B.

5. Dr H was a student of the Taxpayer back in about 1988. In around 1994, Dr H became the Chief of the Nuclear Medicine Division of the Department of Radiology and Radiotherapy ('the Department') of a Hong Kong private hospital ('the Hospital'). In the later half of 1998, the Hospital wanted to expand its Nuclear Medicine Division with the purchase of a Cyclotron and a Positron Emission Tomography ('PET') scanner. Those were the latest medical technology. Dr H then approached the Taxpayer and persuaded him to come back from the Country A to work at the Department.

6. The contractual arrangement between the Hospital, Dr H and the Taxpayer may be seen to be somewhat unusual. The contractual arrangement was established via two companies, SA and W. SA was a private company incorporated in Hong Kong on 28 July 1994. At all material times, Dr H and his wife were the only shareholders and directors of SA. W was a shelf company (incorporated in Hong Kong) acquired by the Taxpayer and it was activated on the 1 December 1998. On that day, two gentlemen, who were the Taxpayer's brothers-in-law, became shareholders and directors of W. They did so as the Taxpayer's nominees. It is undisputed that the Taxpayer was at all material times the only beneficial owner and in control of W.

7. By a contract dated 27 October 1998 (it appears to have been signed on 2 December 1998) between SA and W ('Contract C'), W agreed to procure the Taxpayer to work at the Department for five years from 1 December 1998 to 30 November 2003. Under Contract C, W was entitled to a monthly remuneration of not less than HK$220,000 and bonuses if certain gross receipt targets were met. By a contract dated 10 November 1998 between SA and the Hospital ('Contract D'), SA agreed to assign Dr H and the Taxpayer to work at the Department for a five year period which mirrored that of Contract C. Under Contract D, SA was entitled to a remuneration of HK$440,000 per month and bonuses when certain gross receipt targets were met.

8. By an employment contract dated 1 December 1998 ('Contract E'), the Taxpayer was employed by W to provide managerial and consultative services for a term of 10 years commencing on 1 December 1998. Under Contract E, W would pay the Taxpayer an annual salary of not less than HK$456,000 plus various allowances and benefits.

The Issues

9. This appeal concerns section 9A of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance'). Section 9A was added to the Ordinance in 1995 and is apparently designed to tackle the use of service companies by, inter alia, professionals for purposes of reducing their tax

liabilities. Mr Leung, who appears for the Inland Revenue ('IR'), contends that by virtue of section 9A the remuneration derived by W for the provision of the Taxpayer' s services to the Hospital should be treated as the Taxpayer' s income chargeable to salaries tax.

10. The relevant part of section 9A provides as follows:

> '*(1) Where a person ("relevant person") … 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 … 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) an associate or associates of the relevant individual; 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 …*
>
> *(3) Paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where …*
>
> *(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.'

11. The contentions of the IR for purposes of section 9A(1) are that the 'relevant person' here was the Hospital, the relevant agreement was Contract D, the 'relevant individual' was the Taxpayer and the remuneration for the Taxpayer's services was paid or credited to SA, which was a corporation controlled by Dr H being the Taxpayer's associate ('associate' is defined under section 9A(8) and the IR relies particularly on sub-paragraph (f) of the definition).

12. Ms Cheng has fairly (and in the view of this Board rightly) accepted that, prima facie, section 9A(1) applies to this case. Therefore, the dispute before this Board is whether the Taxpayer can successfully invoke sub-sections (3) and/or (4) so as to take his case outside section 9A(1). In respect of section 9A(3), there is no issue on section 9A(3)(a) – whether Contract D provided for various kinds of leave, allowances, pension entitlements, accommodation, etc. In other words, it is not disputed that (3)(a) has been satisfied. However, it is common ground that each of the sub-paragraphs of section 9A(3) has to be satisfied before the Taxpayer can rely upon

it. Further, Ms Cheng accepts that the burden of proof for both section 9A(3) and section 9A(4) rests on her lay client.

The Relevance of W

13. Before this Board deals with the evidence in more depth, it is logical to determine an issue raised by Ms Cheng – that the relationship between W and the Taxpayer is irrelevant for the resolution of the dispute in question. Ms Cheng submits that even if W were the alter ego of the Taxpayer, it would not assist this Board in deciding whether the Taxpayer was or was not an employee of the Hospital. Further, it is said that the IR, having abandoned any argument based on section 61 of the Ordinance (which allows certain artificial or fictitious transactions to be disregarded), it is not open to it to suggest, e.g., that what involved W was artificial or fictitious or that W was a tax-saving device. Ms Cheng says that the Taxpayer would have wished to advance additional evidence to show, e.g., that W was established for genuine business purposes to answer any 'aspersions' over the genuineness of W.

14. With respect, this Board disagrees with the above submissions. As will be seen below, it is the duty of this Board to examine all the relevant evidence in order to come to a true finding of fact on the relationship between the Taxpayer and the Hospital. The existence and purpose of W are part of the factual matrix before this Board. They may explain and/or provide a context to the other facts. It would be taking a blinkered approach to ignore W.

15. Moreover, this Board sees no unfairness in the conduct of the IR. Mr Leung has made it quite plain in the cross-examination of the Taxpayer that the IR contends that W was his alter ego. Evidence has in fact been adduced by the Taxpayer before this Board on why W was acquired and its business.

16. At this juncture, this Board wishes to point out that the Decision on this appeal must be reached by applying the relevant law. It is of no concern to this Board whether the Taxpayer has benefited, in terms of his tax exposure, from the deployment of W. If that is permitted under the law, the Taxpayer is entitled to benefit accordingly.

Evidence

17. The Taxpayer is the only witness who gave evidence. In general, this Board finds him to be a credible witness. However, there are a few areas where his evidence is found to be unconvincing. Those matters will be specifically dealt with below.

How Contract C came to be made

18. The Taxpayer was contacted by Dr H in around July 1998. Dr H told him about the intended expansion at the Hospital, that he would not be able to cope with the additional workload and asked the Taxpayer to come back to Hong Kong to help him as an equal partner. There were

some negotiations between the Taxpayer and Dr H concerning his remuneration package. The Taxpayer was concerned that what he was going to get should be comparable to the package offered to certain government directorate grade employees. The negotiations did not take long. There were only a few phone calls and e-mails between the Taxpayer and Dr H before Contract C was signed.

19. The Taxpayer, perhaps understandably, is vague on the details of his negotiations with Dr H which took place more than seven years ago. Despite the discussion about a partnership, according to the Taxpayer, 'the contract ended up as a sub-contractor, not partners'. In his evidence, he described himself as a 'contracted radiologist', being a 'sub-contractor' of Dr H. Given the existence of Contract C, details of the prior negotiations are not critical.

20. However, there are two important points. Firstly, this Board accepts and finds that the Taxpayer did not have any direct contact with the Hospital prior to entering into Contract C and that he was not aware of the precise details of the contractual arrangement between the Hospital and Dr H (or SA) until years later (He was assuming that there was a contract between the Hospital and Dr H.). The Taxpayer' s evidence that he did not think it right to go behind Dr H to make a direct contact with the Hospital appears to be perfectly reasonable. Further, it is a fact that Dr H did not, contrary to the Taxpayer' s belief, share the bonuses with him on an equal footing and that is compelling proof that the Taxpayer was not aware of the precise details of Dr H' s contractual arrangement with the Hospital.

21. Secondly, at the time when the Taxpayer was considering Dr H' s offer, his family, with five young children, was living happily in Country A. He had a very stable job which was very prestigious. He described it as one which was 'as good as one could get in my career'. In the premises, this Board infers that the issue of job security must have been a very important consideration for him in deciding whether to come back to Hong Kong with his family.

22. This inference is consistent with the Taxpayer' s evidence that he did have concern about contracting with SA which he knew nothing about. He said that 'for a little bit of assurance' he asked Dr H to use the letterhead of the Hospital for Contract C.

Terms of Contract C and D

23. Contract C was drafted by Dr H. It appears to this Board that Contract C was probably copied by Dr H from one of his (or SA' s) contracts with the Hospital, because the terms of Contract C are very similar to those at R1/289-91 (a contract between SA and the Hospital dated 16 February 1998).

24. The preamble of Contract C referred to a letter of intent and a preliminary agreement. The Taxpayer is unable to remember anything about them. In addition to what has been mentioned in paragraph 7 above, the material terms of Contract C are:

(a) W would procure the Taxpayer to work in the Hospital exclusively on a time schedule to be agreed by SA and W;

(b) W warranted the provision of other qualified radiologist subject to prior approval by SA and the Hospital, particularly in the event of the Taxpayer' s absence;

(c) W was to provide radiologist services to the Department. Such services included the giving of lectures to student nurses and the training of student technicians of the Hospital following the time schedule fixed by both parties;

(d) The Taxpayer and the other radiologist might accept any other honorary appointment or title relating to the medical practice or profession, provided that prior written approval was obtained from the Medical Superintendent ('the MS') of the Hospital;

(e) The MS would supervise the administrative and staff matters of the Divisions (defined as the Nuclear Medicine and PET Divisions) assisted by the Chief Radiographer;

(f) The radiologist assigned by W would attend the Hospital for duty from 9:00 am to 5:00 pm on Monday to Friday and from 9:00 am to 1:00 pm on Saturday. As regards after office hours, weekends and public holidays, W should arrange during 50% of such time for a qualified radiologist to be available to respond to emergency cases;

(g) The Hospital should maintain the Divisions in a reasonable standard as far as equipment and supporting staff were concerned.

25. Contract D appears to have been signed earlier than Contract C (on 10 November 1998). The terms of these contracts are very similar. The important difference being the obligation by SA to 'assign Dr [H] and [the Taxpayer] to work in the Hospital exclusively and on a full time basis'. Contract C may be seen as a kind of back-to-back contract with Contract D in that SA was sub-contracting half of the service obligations to the Hospital to W under Contract C.

26. It is clear to this Board that despite the reference in Contract C to the provision of 'other qualified radiologist', it was an essential obligation of W to provide the exclusive service of the Taxpayer for the benefit of the Hospital. This is consistent with the Taxpayer' s evidence that he was recruited by Dr H due to his reputation in the profession. The same can be said about Contract D. It cannot seriously be argued that under either contract, it was not essential to provide the personal service of the Taxpayer to the Hospital. It is difficult to contemplate that the Hospital would have agreed to pay such a handsome remuneration for someone whose name it did not even

know. The provision for substitution was to cater for the occasions where, e.g., the Taxpayer was ill or had to go on leave. In the premises, Ms Cheng' s submission on a 'right to provide substitute' cannot be accepted.

The intended relationship

27. This Board accepts that, as reflected by Contract C and D, the Hospital and the Taxpayer did not intend to have an employer-employee relationship. This is consistent with a letter dated 3 July 2002 from the Hospital addressed 'To Whom It May Concern' stating that the Taxpayer was not its employee.

28. The Taxpayer has given evidence to the effect that he was adverse to the idea of coming back to Hong Kong to work as an employee. He was certainly very concerned about prestige and receiving the appropriate financial reward, but this Board is not convinced that, in truth, given a prestigious position with an attractive remuneration package the Taxpayer would have declined the offer simply because he would be an employee. Indeed, when questioned by this Board, that point was accepted by the Taxpayer.

29. The intended relationship of the parties is of relevance, but it is certainly not a decisive point. The reason being that in a case involving section 9A, it is by definition that one is not dealing with a typical employer-employee relationship. The parties concerned probably intended not to have such a relationship. However, the determination under section 9A(3) and (4) is to ascertain the substance or the true nature of their relationship and for that purpose what was intended by the parties or what label they put on their relationship cannot be decisive. This view is supported by the authority set out in paragraph 106 below.

The use of W

30. The Taxpayer' s evidence is that he had previously formed a limited company in Hong Kong for his medical practice. W was acquired to enable him to practise his profession and conduct other aspects of medical business with limited liability. However, he accepted that he could not limit his professional negligence liability with the use of W.

31. Whilst this Board is prepared to accept that in acquiring W the Taxpayer might have had in mind the prospects of using it for medical business in the future, this could not be the main reason for having W. There is no evidence that the Taxpayer had any substantive business opportunity or plan at the time. Indeed, what evidence there is concerning W' s medical business indicates that W had not engaged in any substantial business venture. That is reflected by the fact that W had no staff (apart from the Taxpayer who held the title of its manager, but was engaged full time at the Hospital) until 1 September 2000 when the Taxpayer' s wife joined it as a 'part-time Financial Analyst' (she became a full time Financial Manager on 1 August 2002). According to W' s Financial Statements for the year ended 31 December 2000, only HK$6,000 was paid to the Taxpayer' s wife as salary [R1/348 and paragraph 1(14)(g) of the Determination]. Further, this

Board is not persuaded by the evidence of business activities set out in paragraph 50 of the Taxpayer's first witness statement ('1st W/S') (adopted as part of his evidence) [A/18-21], especially after this was scrutinised under cross-examination. It is accepted that the Taxpayer had an eye on using W as a vehicle to do business, but that was no more than one of the reasons for its existence.

32. During the three years ended 31 March 1999, 31 March 2000 and 31 March 2001, W received over HK$6.5m from SA which was derived from the Hospital for the services rendered by the Taxpayer. In his tax returns for the Assessment Years, the Taxpayer declared respective employment income of HK$414,680, HK$519,600 and HK$456,000 from W.

33. At all material times, the Taxpayer had full control of W's bank account. From the material put together by the IR [R1/29-51], it can be seen that from January 1999 (the first monthly income under Contract C was received in January 1999) until November 2000, regular withdrawals in large amount were made from W's bank account, totalling over HK$4.5m. Most of these withdrawals went to the Taxpayer and were booked as loans to him in W's account. Some of them went to a securities company and were also booked as loans to the Taxpayer. When asked whether he needed such loans, the Taxpayer answered in the affirmative and said that the high cost of living in Hong Kong was the reason for the loans, which implies that the Taxpayer could not afford to live on the salary he was getting from W. In the two Financial Statements of W covering respectively the periods from 17 October 1997 to 31 December 1999 and for the year ended 31 December 2000 ('the Financial Statements') [R1/317-28 and 335-48], the loans to the Taxpayer were described as 'unsecured, interest free and without a fixed term of repayment'. That arrangement had not changed when the Taxpayer gave evidence before this Board.

34. The Financial Statements also set out the 'Administrative and general expenses' of W for the periods in question. Examined in conjunction with the information provided by the Taxpayer's Representative set out in paragraph 1(14) of the Determination, it can be seen that such expenses covered, inter alia, the travelling expenses for the family reunion of the Taxpayer and his family, amenities expenditure of the Taxpayer's residence and all kinds of education expenses for the Taxpayer's children.

35. It is quite clear to this Board that, certainly from the commencement of its operation until the end of 2000, all the income of W was derived from the Taxpayer's services. It had no substantive business of its own and much of its expenditure was incurred for the benefit of the Taxpayer (and his family). This Board has no reason to doubt that the Taxpayer was entitled to various allowances insofar as his arrangement with W was concerned so that the expenditure was properly incurred. However, coupled with the admission that what the Taxpayer was receiving from W was insufficient for his living, these facts demonstrate overwhelmingly that, at the very least, one of the main reasons for the use of W was tax planning.

36. When asked bluntly by this Board, the Taxpayer said that he did not use W as part of tax planning for Hong Kong. In response to a further question by Mr Leung, the Taxpayer admitted that he used W for tax planning in respect of his Country A tax liability. The Taxpayer was at all material times a Country A citizen and his evidence is that he was subject to Country A tax liability when working in Hong Kong.

37. This Board believes that even if W was only used for tax planning in respect of the Taxpayer' s Country A tax liability, he must have been alive to the fact that the use of W would have an impact on his Hong Kong tax liability. It is quite plain that such an impact was a favourable one considering the whole picture. For that reason, it is somewhat disingenuous for the Taxpayer to try to impress this Board that although he was taking out loans from W, profits tax had been paid by W at a rate higher than salaries tax in respect of the money. Further, the Taxpayer' s evidence that he only took a small amount of pay from W and left retained earnings of a greater amount in the company so that W' s accounts would be more impressive to potential business investors cannot be taken seriously. This Board agrees with Mr Leung that anyone who understood financial statements would see that W' s retained earnings were represented not by fixed assets or income generating assets, but almost exclusively by interest free loans to the Taxpayer. The accounts therefore could not have impressed an informed investor.

The Taxpayer and the Hospital

38. On the evidence, Dr H and the Taxpayer were the only radiologists working at the Nuclear Medicine Division and the PET Division ('the Divisions') of the Hospital until 1 September 2003. Dr H was the Director of the Divisions. Initially, the Taxpayer had the title of Deputy Director of the Divisions. However, he later found it 'demeaning' to have a lower rank and on his own initiative he caused his title to be changed to that of a Consultant. The use of a title associated with the Hospital was subject to the approval of the Hospital. The Taxpayer has a name card which carries the Hospital' s motif, states his position as a Consultant of the Department of Nuclear Medicine and PET and the contact details at the Hospital [B1/39]. He had an old name card which carried the title of Deputy Director, but the other details were the same as the current one.

39. It should be pointed out that the Taxpayer' s evidence is that a doctor in private practice, not being an employee of the Hospital, might be authorised by the Hospital to have a title associated with the Hospital (he gave the example of the Director of the Breast Cancer Centre) and use the Hospital' s motif on his name card. This Board has not been shown an example of such a card, but there is no reason to doubt such evidence. However, it appears to be highly likely that such a doctor would either have two name cards, one for his private practice and one for his Hospital position, or have the details of both his private practice and his Hospital position shown on the same card.

40. In the General Register of medical practitioners (gazetted pursuant to the Medical Registration Ordinance, Chapter 161) as at 1 January 1999, 1 January 2000 and 1 January 2005, the Taxpayer' s registered address was that of the Hospital [R1/462, 464 and 466]. At all material

times, he had no medical practice other than working at the Divisions (such medical services which he had provided outside the Divisions will be examined below).

41. The nature of the Taxpayer's work at the Hospital is set out in paragraph 21 of his 1st W/S [A1/8-9]. It is not in dispute and will not be repeated in this Decision. The services provided by Dr H to the Hospital were very similar to those of the Taxpayer. Dr H and the Taxpayer were assisted by the Hospital staff and technicians in the performance of their duties. The Taxpayer said that the speciality of his and Dr H was that of interpreting scan images. Their duties were confined to their professional field and they were not required to exercise any administrative or managerial function at the Hospital. In return for the services provided by them, the Hospital paid the monthly remuneration and bonuses to SA under Contract D.

42. Both Contract C and Contract D prescribed the working hours, which were the normal hours of operation of the Divisions. The evidence is that the Taxpayer, perhaps expectedly, had to work considerably longer hours at the Hospital. If Dr H and he wanted to change the operation hours of the Divisions, they would require the approval of the Hospital.

43. Although Contract C and Contract D contained a provision whereby another qualified radiologist had to be provided to work at the Hospital in the event of the Taxpayer's absence, there is no evidence that such a radiologist was ever provided.

44. The Taxpayer's evidence is that he had accepted a number of honorary appointments without the written approval of the Hospital despite the provision of Contract C (and Contract D) to the contrary. He said that the provision was in place to stop him for becoming a competitor and in reality approval was not required. That was how he interpreted the contract and also the 'professional practice'. This Board takes the view that the Taxpayer's interpretation of the contract cannot prevail over its clear wording. The Hospital might have tolerated what he did, but the point remains that it was in a position to impose restrictions on what honorary appointments were to be taken up by the Taxpayer.

45. In respect of the fees charged at the Divisions, the evidence, in summary, is that there were generally three kinds of fees – scan fees, professional fees and treatment fees. There were four or five types of treatment, but only one or two of them were governed by a hospital 'price list'. For those treatments with a price list, the Taxpayer normally adhered to it, but he would adjust the price in about 30% of the cases for a number of reasons – the patients' financial situation, case complication and the pricing of the Hospital's competitors. In the case of patients treated in the first class ward the Taxpayer could increase the charges. The Taxpayer explained that the price list only applied to 'third class patients' and therefore he could charge first class patients at his discretion.

46. As regards scan fees and professional fees, the price lists only applied to third class patients. In relation to the PET scan, there was a price list for first class patients. The Taxpayer did enjoy some degree of discretion over the fees charged for cases he handled. In particular, he said

that the medical profession was a benevolent one and he had on occasions waived the professional fees in favour of a patient who was in financial difficulty.

47. The picture which emerges from the evidence is that the Hospital allowed a good deal of room for the decision of Dr H and the Taxpayer when it came to fees. This is understandable because, firstly, these doctors were top professionals practising in a highly specialised field and, secondly, it must be assumed that what they charged would be in the common interest of themselves and the Hospital given the sharing in the gross receipts of the Divisions under the bonus provision of Contract D. In any case, the Taxpayer' s evidence is that he only departed from the hospital price lists in 2% of the cases and most of them involved financial difficulty on the part of the patients. There is no reason to think that the Hospital was adverse to the benevolent gesture of the Taxpayer. However, it would not be right to think that the Hospital had relinquished control over the charges at the Divisions. In particular, the Taxpayer agreed that in the event of a complaint over fees the Hospital might advise him to charge a different fee. He said that he did not believe that he had to abide by the Hospital' s view, but he was a reasonable person and would act reasonably. It appears to this Board that given that the contracts with the patients must have been made with the Hospital, the Hospital must have the right to final decision on any question of charges.

48. A good deal has been said by both sides about an organisation chart of the Divisions provided to the IR by the Hospital [B1/38]. Conflicting and respectable arguments have been advanced by Ms Cheng and Mr Leung on how that document supports their cases. This Board is unable to derive any material assistance from that document itself. In particular, one must bear in mind that the Hospital did not intend to have an employer-employee relationship with the Taxpayer.

49. The Taxpayer' s evidence is that 'the Hospital does not exercise much supervision or control over me, as I am a fully licensed and experienced specialist. I would normally have to observe the guidelines of the Hospital and standards of practice like any other visiting medical practitioners, who are not employee of the Hospital' [A1/9, para.23]. Such evidence accords with common sense in that it is not expected that the Hospital would exercise close supervision or control over its highly professional, and no doubt trustworthy, staff (whatever was the precise nature of their relationship).

50. However, the above evidence demonstrates quite firmly that the Hospital was in control of the Divisions. They were under the Hospital' s management and operated by Dr H and the Taxpayer with the support of the Hospital' s staff.

51. There is evidence from the Taxpayer that there were many doctors practising privately who affiliated themselves with the Hospital so that they could make use of the facilities and support at the Hospital to treat their patients. In the consolidated bill rendered to a patient of this type of doctor, there would be a professional or consultation fee which would go to the private doctor and other fees such as medicine, room charges, etc. would go to the Hospital. A private

doctor might also man a clinic of the Hospital. The Taxpayer did not belong to this category of doctors.

52. It appears to this Board that for patients who specially went to the Hospital to consult the Taxpayer, because, e.g., of his reputation or a recommendation by their family doctor, the contract for the services must still be one made between the Hospital and the patients and the fees earned would go towards the gross receipts to be enjoyed between the Hospital and the Taxpayer (and Dr H). There is no suggestion in the evidence that the Taxpayer had an independent practice.

53. W provided some of the equipment that the Taxpayer used in his day to day work. However, these were relatively inexpensive and personal items like a stethoscope, tendon hammers and laptop computers. The Taxpayer agreed in cross-examination that, with the exception of computers, these were equipment normally acquired by doctors as their own once they qualified.

54. Further, medical books and journals were purchased by W. The Taxpayer's evidence is that he had a collection of over 200 books and journals. He said that it was very important for a specialist like him to have such material for reference. In the Financial Statements, one can see that 'Subscription' expenditure of HK$9,588 and HK$26,264 had been incurred [R1/348]. The Taxpayer started to build up his reference library since he graduated some 35 years ago. He probably had more nuclear medical books in his collection than the book shop. Less than 1% of his collection had been purchased since W commenced business.

55. The Taxpayer made the point that if he were an employee of the Hospital he probably would have asked the Hospital to buy the reference material. This Board can see some merits in the point. However, bearing in mind the larger picture, it is not surprising that the Taxpayer or W was paying for the reference material, because (i) neither the Taxpayer nor the Hospital intended to have an employer-employee relationship; (ii) the Taxpayer was at all material times continuing with his academic research (with the blessing of the Hospital) and (iii) the Taxpayer wanted to keep updating his precious library and he wanted to continue to own it.

56. As the workload of the Divisions continued to increase, on 1 September 2003 (outside the Assessment Years), a Dr F was, according to the Taxpayer, brought in as a second sub-contractor by SA. Every month, Dr F would receive a base monthly remuneration of HK$140,000. That sum of HK$140,000 was contributed by the Hospital, SA and W in the respective amounts of HK$100,000, HK$10,000 and HK$30,000. The Taxpayer said that he had to contribute more than Dr H, because Dr H said that he worked faster than him. In addition to the monthly remuneration, Dr F would get a share of the bonuses based on reaching certain gross receipts targets of the Divisions. As a result of these arrangements, a new contract was entered into between SA and W for a five year period from 1 September 2003 to 31 August 2008. In that contract, W's monthly remuneration was reduced by HK$30,000 to HK$190,000 and its bonus entitlement was adjusted to allow for its contribution to payment of bonus to Dr F (SA had the same obligation over such bonus).

57. Dr F was one of the candidates interviewed by Dr H and the Taxpayer. He was their preferred choice. After Dr H made a recommendation to the Hospital, Dr F was hired. A contract was entered into between Dr F and, to the Taxpayer' s belief, SA. The Taxpayer had not seen a copy of that contract.

58. This Board is not required and is not asked to make a finding on the nature of the relationship between the Hospital and Dr F. However, Ms Cheng relies on this part of the evidence to demonstrate the unusual arrangement in place between the Hospital and the Taxpayer and asked rhetorically 'What kind of employee has to give up part of his salary to hire a fellow worker?'.

59. There is something to be said about the point being made. It is consistent with the notion that the Hospital contracted with SA to have specialists provided to man the Divisions. With the lightening of the workload, both Dr H (via SA) and the Taxpayer (via W) would have to take a cut in their monthly income. However, it is logical to assume that with an extra pair of hands, the prospects of meeting gross receipts targets must be enhanced. This Board bears these matters in mind for purposes of this Decision. They constitute some of the details in the picture which has to be looked at.

60. So far, most of the evidence has been covered and some analysis made of the evidence when it was convenient to do so. This Board will now turn its attention to the specific issues which have to be determined.

Section 9A(3)(b): *whether the Taxpayer carried out the same or similar services for others during the term of Contract D*

61. It is to be noted that there is no argument that Contract D required the personal service of the Taxpayer (one of the requirements under section 9A(3)(b)).

62. This Board agrees with Ms Cheng that the Deputy Commissioner had erred in the application of this sub-subsection in that the issue is whether the Taxpayer carried out the same or similar services during the term of Contract D: section 9A(3)(b)(ii). The issue is not whether the Taxpayer carried out the same or similar services during the Assessment Years. Apart from the clear wording of the sub-section, this Board agrees with Ms Cheng that what one is concerned with is the nature of the relationship between the alleged employer and alleged employee under the agreement, and not the nature of the relationship during a particular year of assessment.

63. Contract D was for a term of five years, terminating on 30 November 2003. During that period, the Taxpayer carried out the following services in addition to his duties at the Divisions:

(i) Supervision and teaching of nuclear medicine doctors at University B. After he returned to Hong Kong, the Taxpayer remained an Honorary Clinical

Professor of Radiology at University B until the last quarter of 2002. Under this appointment, he was required to carry out the said duties for '2 weeks per 2 years'. His evidence is that during his appointment he had been to City G twice for about two days and three to four days respectively to perform such duties;

(ii) Teaching of medical students at University I in Hong Kong. The Taxpayer was appointed as an Honorary Associate Clinical Professor by University I from 1 July 2000 to 30 June 2004. During term time, he was providing the said service once or twice a week for one to three hours. He received MPF contribution from University I for this employment (University I and W were the only employers who had contributed to his MPF). In his Tax Return for the year 2001/02, the Taxpayer had declared an income of HK$3,150 from University I in respect of this position during the period from 1 July 2000 to 31 March 2002;

(iii) Acting as an expert witness in 2000. The work involved providing a report and attending court for '1 session' and for which the Taxpayer was paid HK$30,000 which was included as an income for W;

(iv) Providing radiological consultation services to the Nuclear Medical Division of Hospital J in 2001. The work was provided over three consecutive days, for which a fee of HK$30,000 was paid and recorded as income of W;

(v) Giving lectures to various Nuclear Medicine Departments of hospitals in the Country K, Country L, and Country A since 1999. This arose from the Taxpayer's position as honorary consultant for Company M and he was apparently invited to provide the said service for, at least partly, promotional purposes. He had been doing so two to three times a year.

64. The aforesaid evidence was not challenged in cross-examination. In respect of the work described in paragraph 63(i) to (iv), the Taxpayer's evidence is that, as a matter of courtesy, he had informed Dr H about them . However, he did not seek the approval of the Hospital in respect thereof.

65. This first issue here is whether the services in question were 'the same or similar services' as those provided under Contract D. This Board has no difficulty in finding that the work described in paragraph 63(iii) and (iv) fall within the definition. For paragraph 63(iii), the report provided by the Taxpayer must have involved clinical evaluation and possibly interpretation of scan results, something which the Taxpayer did on a daily basis at the Hospital.

66. The teaching and lecturing work is not so clear cut. Whilst under Contract D the duties of the Taxpayer included 'if required, the giving of lectures to student nurses of the Hospital and the training of student technicians …', it is plain that the main duties of the Taxpayer were to provide his specialist skill in treating patients and providing advice to other doctors at the Hospital. The teaching was incidental and might or might not be required.

67. To answer the question, one should look wider at the legislative intent behind section 9A(3). Ms Cheng argues forcefully that the purpose of the section is to differentiate between employed workers and non-employed workers and the six criteria under section 9A(3) must be construed in that light. Mr Leung submits that section 9A(3)(b) serves to distinguish a genuine contractor who has more than one client from an employee who serves only his employer. This Board agrees with both propositions.

68. Further, this Board must look at the substance of any relevant matter. Mr Leung has provided a good illustration of the point. He submits that on a literal interpretation of sub-subsection (b), rendering similar service to another person for five minutes may be said to have satisfied the sub-subsection and that must be wrong. This Board agrees.

69. With these propositions in mind, this Board is of the view that the teaching and lecturing work does not fall within the ambit of 'same or similar services'. In substance, the Taxpayer's services provided to the Hospital were not about teaching and lecturing. This is not to say that where a person's duties can be compartmentalised into a number of tasks, he needs to perform each and every one of such tasks for other persons before the sub-subsection is satisfied. The test is whether the tasks are material or incidental to the duties performed by the alleged employee for the alleged employer. The sub-subsection cannot be satisfied by the performance of incidental tasks for other people.

70. This Board now turns to the similar work (paragraphs 63(iii) and (iv)). The submission of Mr Leung is that the Taxpayer was required under Contract D to work exclusively and on a full time basis at the Divisions. The criterion is satisfied if the Taxpayer habitually provided the same or similar services to other people, as opposed to having done so ad hoc or surreptitiously. In support, Mr Leung relies on the use of the present tense 'carries out' in the sub-subsection as connoting a continual state of affairs.

71. This Board is of the view that the use of the word 'persons' in section 9A(3)(b)(i) lends support to this submission of Mr Leung. The requirement is that the alleged employee is at liberty to work for other persons. Working for other people in breach of contract with the alleged employer will not satisfy the sub-subsection, because that provides no distinction between an employee and a non-employee.

72. On the other hand, the matter must be approached sensibly. The number of occasions where the alleged employee has provided same or similar services cannot, per se, be critical, because it may be a case of simply not getting the business.

73. This Board can see no reason to believe that taking on the job as an expert witness was inconsistent with or in breach of Contract D, and it has not been put to the Taxpayer in cross-examination that it was the case. Such a job was not prohibited under Contract D. In respect of the time involved, the Taxpayer might well have written the report during his free time and/or when he was off duty.

74. As for attending court, it is obvious that the Taxpayer must have had his days off. This Board infers that the Taxpayer and Dr H must have, between themselves, worked out when they were going to take their holidays. More likely than not, they took turns to have their leave when the work at the Divisions was less pressing. Hence, there is no evidence that any radiologist was ever provided to stand-in for either of the doctors. The Hospital was happy to leave the matter in their hands (and had not insisted on the provision of a substitute radiologist) as it must have trusted the doctors and believed that the arrangement they made was going to be a sensible one. It is quite likely, and this Board so finds, that the Taxpayer attended court on his off day, because he had spoken to Dr H about it and it is unlikely that Dr H would have been very happy for the Taxpayer to simply go off to earn extra income leaving all the work to him.

75. Although the evidence is that the Taxpayer had acted as an expert witness only once, for the reason already stated, that itself does not inhibit this Board from finding this sub-subsection satisfied. This Board believes that if the Taxpayer had had the opportunity to so act again during the term of Contract D, he would have agreed to it if the terms were acceptable. For these reasons, this Board finds that section 9A(3)(b) is satisfied.

76. For completeness, this Board shall deal with the Taxpayer's work for the Nuclear Medicine Division Hospital J. Mr Leung suggests that this was an one off occasion and the Taxpayer had no entitlement to carry out the work given his obligations to work exclusively and on full time basis for the Hospital. To those obligations, one may add that the Taxpayer was not entitled to work for a competitor of the Hospital. Although Contract D did not state so expressly, the Taxpayer has accepted the proposition in his evidence.

77. Ms Cheng is right to contend that Mr Leung has not put to the Taxpayer that he was 'moonlighting'. On the other hand, the evidence itself does give rise to the suggestion that the Taxpayer was not acting within Contract D when he provided his service to Hospital J. Here, the fact that it was an one off event over a long period of time and that the Taxpayer did not seek approval from the Hospital suggest, and this Board so finds, that it was more likely than not that the Taxpayer was not acting in accordance with Contract D.

78. For these reasons, this sub-subsection cannot be satisfied by having worked for Hospital J.

Sectuib 9A(3)(c): *whether the Taxpayer was subject to control or supervision commonly exercised by employer*

79. First of all, this Board accepts Ms Cheng's submission that the question is not any kind of control. Ms Cheng uses the example that if the Hospital contracts out its cleaning services, there are bound to be rules which the cleaning contractor has to obey – when can the cleaners enter patients' rooms, what hygiene precautions they have to take, etc.

80. The Taxpayer was at all material times one of the most acclaimed in his profession. Further, he practised in a highly specialised area and he must have known more about the kind of medicine that he was practising than most, if not all, of the other doctors at the Hospital. What control and supervision exercised by the Hospital over him must be viewed in that light (see also paragraph 49 above). There are, nevertheless, a number of indicia of control and supervision by the Hospital as employer:

(i) The Taxpayer had to work exclusively and at prescribed hours at the Hospital;

(ii) He required the approval of the Hospital for accepting honorary appointments and for the use of title(s) associated with the Hospital;

(iii) The Hospital was in control of and running the Divisions. Not only did the Taxpayer carried out his duties at the Hospital, he had to integrate his work with the staff and system that was in place there;

(iv) The nature of his work suggests that he was part and parcel of the organisation of the Hospital and under its control, e.g., teaching the nurses when required and participating in discussion at the Tumour Board or Breast Cancer Board of the Hospital;

(v) The Hospital had the final say over the charges to the patients.

81. Ms Cheng makes the point in respect of the Taxpayer's working hours that, as a matter of fact, he could leave early, use his working day to carry out personal research and take time off to give lectures or run personal errands. This Board accepts such evidence. However, it must be put in the proper context. There can be no doubt that the Hospital allowed a good deal of latitude on the part of the Taxpayer in terms of being physically present at the Divisions. One must not overlook the fact that, overall, the Taxpayer was spending longer than the prescribed hours at the Hospital. Obviously, he would not have left the Hospital to run his personal errands when he was needed. His evidence is that 'I would always ensure that the interests of my patients come first.

As a matter of professional etiquette, I would try my best to make sure unless necessary that my appointments would not be re-arranged on account of personal reasons and my patients would not have to wait for a long time for their appointments.' [A1/12, para.30].

82. In respect of the personal research, the evidence is that the Hospital encouraged this, because the results of the research might be published in medical journals. No doubt the reputation of the Hospital would be enhanced with such publication.

83. As regards the lectures, it appears to this Board, and we so infer, that given the terms of Contract D and the knowledge of the Taxpayer' s reputation, the Hospital must have appreciated that the Taxpayer was likely to receive honorary appointment(s) of an academic nature which entailed lecturing obligations. Such appointment(s) might well be good for the reputation of the Hospital and for the referral business of the Divisions. In any case, the Hospital retained control over the appointments. This Board does not agree that the liberty to give lectures takes anything away from the control and supervision by the Hospital over the Taxpayer.

84. Ms Cheng also takes the point that the Taxpayer was free to decide whether to take on a case. In paragraph 22 of the 1st W/S, the Taxpayer stated that 'I have complete discretion and control as to whether or not a patient would be accepted by me for diagnoses and treatments. Having said that, I would not usually refuse to see a patient.' [A1/9]. If it is meant that the Hospital would defer to the expertise of the Taxpayer when it came to treating patients, that is expected. If it is meant that the Taxpayer could refuse to treat a patient who attended one of the Divisions for no good reason, it is not accepted that such proposition is consistent with the duties of the Taxpayer under Contract D. With respect, this Board does not see anything in this point.

85. In the premises, this sub-subsection is not satisfied by the Taxpayer and his case on section 9A(3) must fail. However, in case that this Board is wrong and out of deference to the arguments ably advanced by Counsel, we shall proceed to consider the other criteria.

<u>Section 9A(3)(d): *whether the Taxpayer was paid periodically and on a basis commonly used in employment contracts*</u>

86. The conclusion is fairly clear here. There is no issue that the Taxpayer was paid periodically (via SA and W). It must have been an important matter for the Taxpayer in deciding whether to accept Dr H' s invitation to come back to Hong Kong, because of the job security element (see paragraph 21 above).

87. As far as the bonus is concerned, this Board believes that such a feature in a remuneration package was commonplace in Hong Kong, especially where high earning staff were concerned.

88. Ms Cheng seeks to capitalise on the arrangement concerning Dr F (see paragraph 56 above) to springboard the argument that the remuneration arrangement for the Taxpayer was not consistent with an employment contract.

89. There is a point of law which needs to be addressed. Is the evidence concerning Dr F relevant for purposes of section 9A(3)(d) given that such evidence fell outside the Assessment Years? In contrast with section 9A(3)(b), there is no reference to 'during the term of that agreement' (see paragraph 62 above). However, there is a reference to 'remuneration referred to in that subsection'. Looking back at section 9A(1), it refers to 'remuneration for any services carried out under the agreement …'. The proper interpretation of remuneration must be remuneration received pursuant to the contract in question and it would not be right to confine the consideration to any particular assessment year. Further, the point that one is concerned with the nature of the relationship between the alleged employer and alleged employee under the agreement, and not the nature of the relationship during a particular year of assessment, must apply equally to this sub-subsection.

90. However, this Board is unable to see how the matter concerning Dr F has any bearing on the application of this sub-subsection. There are two elements to this subsection – periodical payment and whether the payment was on a basis common for employment contracts. Both elements are satisfied.

91. If this Board is wrong about the relevance of the matter concerning Dr F, the arrangement in question can be argued both ways. It may be said that if the Hospital had in truth sub-contracted the specialist work required for the Divisions to SA, why should it be involved when the workload became excessive for SA to the extent that it was required to pay the bulk of Dr F's monthly remuneration? In short, the matter concerning Dr F is not, in the view of this Board, determinative of the true nature of the relationship between the Taxpayer and the Hospital.

92. In the premises, this sub-subsection has not been satisfied.

Section 9A(3)(e): *whether the Hospital had a right to cause the Taxpayer's 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*

93. This is a point raised by this Board. In other words, this sub-subsection was decided in the Taxpayer's favour in the Determination. The reason given was that 'Contract [D] did not contain any provision on the termination of the Taxpayer's services'. It appears that the Deputy Commissioner was referring to an express provision.

94. The wording of this sub-subsection requires a little digestion. However, it is tolerably clear that the issue is whether the alleged employer is entitled to terminate the services of the alleged employee in a manner (or for a reason) which one normally expects an employer can do.

95. Ms Cheng takes an interesting and fundamental point. She accepts tacitly that if the Taxpayer committed a serious wrong, e.g., had stolen a wallet from a patient, the Hospital would have the right, implied in Contract D, to terminate the Taxpayer' s service via SA [para.30 of the Appellant' s Closing Submissions]. However, Ms Cheng submits that this is not the approach intended under section 9A(3)(e).

96. Ms Cheng submits powerfully that the point of section 9A(3) is to differentiate employees from non-employees. No matter whether a person is an employee or not, if he has committed a serious wrongful act it must be the case that the alleged employer would be able to rely on 'some kind of implied term' to terminate his service. It is therefore said that 'the right to cause any of those services to cease to be carried out' in section 9A(3)(e) does not extend to potential implied right, because such right invariably exists whatever is the nature of the relationship and such right does not assist in differentiating between employees and non-employees.

97. Ms Cheng relies upon the Chinese version of section 9A(3)(e) to further support her argument in that instead of employing the equivalent Chinese word(s) for 'right', Chinese words denoting 'arranged or made arrangements' are used. Ms Cheng submits that such words 'connote a situation where the relevant person has taken *active* steps to make provision (eg. by stipulating for an express right), rather where the relevant person has made no arrangements, but can rely on an implied right'. Where necessary, says Ms Cheng, the Taxpayer will rely upon section 10B of the Interpretation and General Clauses Ordinance, Chapter 1. This Board' s ability to understand the Chinese language is confined to the Chairman.

98. This Board has given this submission careful consideration and for the reasons set out below, disagrees with it:

(i) The word 'right' is employed in section 9A(3)(e). Plainly, in a consideration of this sub-subsection, one is necessarily dealing with a relationship that is governed by an agreement (hence the terms of section 9A(1)). A right under an agreement can be expressly provided for or can be implied or arise by operation of law. There is nothing in the language of the sub-subsection to suggest that the word 'right' should be given a restrictive meaning;

(ii) Whilst the existence of a right is a necessary element, the real point of this sub-subsection is the manner in or the reason for which the right of termination can be exercised, because that provides the distinction between an employer-employee relationship and one which is not;

(iii) If the legislature had intended that the distinguishing feature was the existence of an express provision, that could and would have been made clear by

different wording. In the premises, there is no reason to interpret the sub-subsection narrowly;

(iv) Whether there is any inconsistency in the Chinese text arising from the use of different words as aforesaid does not take anything away from the above analysis. For that reason, this Board does not see the necessity to deal with that point of Ms Cheng.

99. This Board is of the view that the Hospital did have the right to terminate the services of the Taxpayer which could be exercised in a manner (or for a reason) that one would expect an employed doctor would be dealt with by the Hospital. It is clear that if the Taxpayer was habitually late for work, it would be likely for the Hospital to terminate his service. Another example may be a serious breach of the Hospital's guidelines or standard of practice. It is likely that in such a scenario, the MS would have a quiet word with the Taxpayer and tell him that he would no longer be required to turn up for work. The lack of express termination provision in Contract D or the fact that, technically, the termination might have to involve SA (being the contracting party under that contract) matter not for purposes of this sub-subsection.

100. In evidence, the Taxpayer said that he did not accept as a matter of his contract that the Hospital had the right to tell him to leave even for cause without paying him. That may be the Taxpayer's perception of his right, but it is not relevant for the present purpose.

101. In the premises, section 9A(3)(e) is not satisfied. Before dealing with the last of the sub-subsections, it should be said that it cannot be intended that the application of any of the criteria under section 9A(3) would individually produce the correct result in the determination of the true nature of the relationship in question. That is the reason for the prescription of six criteria. Further, even where a taxpayer cannot satisfy all the six criteria, he can still fall back upon section 9A(4) to get out of section 9A(1).

Section 9A(3)(f): *whether the Taxpayer held out to the public as an officer or employee of the Hospital*

102. This Board believes that this part of the case is open and shut. At all material times, the Taxpayer had only one full time job. It is difficult to envisage that he would normally introduce himself (with the use of his name card where he saw fit) as someone other than the Deputy Director or the Consultant (depending on the timing) of the Divisions at the Hospital.

103. Ms Cheng valiantly argues that the title of Consultant connotes a degree of independence, relying on Abdalla v Viewdaze Party Ltd 53 ATR 30, paragraph 46. The title of Consultant was chosen by the Taxpayer with the approval of the Hospital. He could have chosen a different title which no doubt would be approved by the Hospital unless it was thought to be inappropriate. The real point must be that whatever he chose to call himself, he must have been

held out to the public as an officer of the Hospital. His name card would have been the same, apart from the title, with the motif and contact details of the Hospital.

104. This sub-subsection is not satisfied.

Section 9A(4): *whether this Board is satisfied that the Taxpayer was not in substance an employee of the Hospital*

Law

105. The parties are in agreement that the fundamental question is: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' – See Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 at 382D.

106. As pointed out by Mr Leung, a summary of the law on distinguishing employees from independent contractors is set out in the Australian authority of Abdalla v Viewdaze Party Ltd 53 ATR 30, paragraph 34. This Board finds that it is comprehensive and serves the purpose of a useful reminder for the task in hand. It is set out below without the footnotes:

> '***[34]*** *Following Hollis v Vabu, the state of the law governing the determination of whether an individual is an employee or an independent contractor may be summarised as follows:*
>
> *(1) Whether a worker is an employee or an independent contractor turns on whether the relationship to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties is to be characterised as a contract of service or a contract for the provision of services. The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own. This question is answered by considering the totality of the relationship.*
>
> *(2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant "indicia" and the relative weight to be assigned to various "indicia" and may often be relevant to the construction of ambiguous terms in the contract.*

(3) The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its term if it contradicts the effect of the terms of the contract as a whole: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract. If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another.

(4) Consideration should then be given to the various "indicia" identified in Brodribb and the other authorities bearing in mind that no list of indicia is to be regarded as comprehensive and the weight to be given to particular indicia will vary according to the circumstances. Where a consideration of the "indicia" points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. For ease of reference we have collected the following list of "indicia":

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.*
  Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of independent contract. While control of this sort is a significant factor is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where their work involves a high degree of skill and expertise. On the other hand, where there is a high lever of control over the way in which work is performed and the worker is presented to the world at large as a representative of the business then this weights significantly in favour of the worker being an employee.

> *The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions. [B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in Queensland Stations Pty Ltd v Federal Commissioner of Taxation, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.*

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*
  The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, if the individual also works for others (or the genuine and practical entitlement to do so) then this suggests independent contract.

- *Whether the worker has a separate place of work and or advertises his or her services to the world at large.*

- *Whether the worker provides and maintains significant tools or equipment.*
  Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- *Whether the work can be delegated or subcontracted.*
  If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor. This is because a contract of service (as distinct

from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*

- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*
  Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*

- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*
  Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*

- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged.*
  Such persons tend to be engaged as independent contractors rather than as employees.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*

- *Whether the worker spends a significant portion of his remuneration on business expenses.*
  This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5) If the indicia point both ways and do not yield a clear result the determination should be guided primarily by whether it can be said

that, viewed as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as a representative of another business with little or no independence in the contact of his or her operations.

(6) If the result is still uncertain then the determination should be guided by "matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" including the "notions" referred to in paras [41] and [42] of Hollis v Vabu (see above).'

107. Further, in Hall v Lorimer [1994] 1 WLR 209, at 216E Lord Justice Nolan expressed his agreement with the views expressed by Mummery J in the court below:

'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. The process involves painting a picture in each individual case… The facts as a whole must be looked at, and what may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.'

Applying the law

108. In the foregoing, a good deal of details have been painted, and analysed where necessary, concerning the relationship between the Taxpayer and the Hospital. This Board may be forgiven for not rendering this Decision even longer by repeating them here.

109. A number of facts stand out from the details. At all material times, the Taxpayer had only one full time job – working as a Deputy Director or Consultant at the Hospital. He had committed himself to work exclusively for the Hospital for five years. He received a steady monthly income from the Hospital. He was under the Hospital's control and held himself out as its officer. Last but not least, this Board is unable to see any real entrepreneurship on the part of the Taxpayer

in the picture – there was no business decision or managerial function to be made or discharged and there was no risk taken by the Taxpayer. Standing back and looking at the picture, this Board is drawn to the conclusion that the relationship in question was, in substance, one of employment. In the premises, section 9A(4) is not satisfied.

Conclusion

110. For these reasons, this appeal is dismissed and the Determination confirmed. Finally, this Board wishes to acknowledge the assistance which Counsel on both sides have rendered to us.