INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D155/01

Salaries tax – whether employment – whether transaction for obtaining tax benefit – section 61A of the Inland Revenue Ordinance ('IRO').

Panel: Andrew J Halkyard (chairman), Peter R Griffiths and William Tsui Hing Chuen.

Date of hearing: 7 December 2001.
Date of decision: 20 February 2002.

The appellant and his wife were the only shareholders and directors of Company B.

Company B entered into an agreement with Company A to provide the appellant as the programme production manager in one of the channels of Company A in consideration of consultancy fee.

The assessor considered that the consultancy fee paid to Company B was the appellant's employment income.

Held:

1. The Board held that the transaction between Company A, Company B and the appellant was for the sole or dominant purpose of obtaining a tax benefit and thus section 61A applied (Yick Fung Estates Ltd v CIR applied).

2. The Board held that the appellant did not assume any financial risk and he was under a disguised employment with Company A.

Obiter:

If the Board were wrong in their conclusions regarding section 61A, section 9A (from the date it came into operation) would still apply and make the remuneration received from Company A be regarded as the appellant's income from employment upon the same analysis.

Appeal dismissed.

Cases referred to:

Yick Fung Estates Ltd v CIR [2000] 1 HKLRD 381
Cassidy v Ministry of Health [1951] 1 All ER 574
D19/78, IRBRD, vol 1, 323
Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631
Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374
Market Investigations v Minister of Social Security [1969] 2 QB 173
Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 3 All ER 817
Hall v Lorimer [1994] STC 23
D67/95, IRBRD, vol 11, 44
D52/96, IRBRD, vol 11, 554
D47/00, IRBRD, vol 15, 422
D103/96, IRBRD, vol 12, 49
D69/98, IRBRD, vol 13, 412

Ma Wai Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the salaries tax assessment raised on the Appellant for the year of assessment 1995/96. The Appellant's major ground of appeal is that income derived from Company A was a fee paid to Company B and should not be assessed as his employment income.

Facts not in dispute

2. Company B was incorporated in Hong Kong as a private company on 24 February 1989. At all relevant times, the Appellant and his wife, Ms C, were the only shareholders and directors of Company B.

3. Company A was incorporated in Hong Kong and was a member of the listed D group of companies. At all relevant times, Company A carried on business in Hong Kong. It was primarily engaged in subscription sales and the provision of management, marketing, public relations and television broadcasting services to related companies.

4. In a document dated 30 January 1992 ('the Agreement'), Company A offered to enter into an agreement with Company B with effect from 26 March 1991 'provided that [Company B] agrees to provide [the Appellant] to serve as Programme Production

Manager/Talent in [Company A]'. The Agreement contained the following terms and conditions:

' 1. Payment

[Company A] will pay [Company B] HK$60,000 per month in arrears. Payment will be reviewed in December of each year effective from the 1st January in the subsequent year.

2. Notice for Termination of Agreement

Six months' notice in writing has to be given by either party or payment in lieu thereof. ...

Upon termination of the agreement, [the Appellant] will immediately transfer and deliver to [Company A] all documents belonging to [Company A] which he may have by reason of his position in [Company A] in any way relating to the business of [Company A] ...

3. [Group D] Medical Scheme

[The Appellant] and his dependants (i.e. spouse and children) are eligible to benefit from this scheme which is entirely free to staff. ... [The Appellant's] eligibility for benefit is Group 2, including dependants, up to the limit described in the leaflet. ...

[The Appellant] is required to produce the medical card at all times when requiring treatment or hospitalisation. Also should this agreement be terminated, [the Appellant] must return the card to the Personnel Department prior to the termination of this agreement. Should [the Appellant] require any further information, please raise any queries with our Human Resources Department.

4. Holiday Entitlement – Annual Leave

[The Appellant] is entitled to 18 working days' leave with pay during the first full calendar year of this agreement and each subsequent year. ...

Termination payments in lieu of accrued holiday not taken prior to the date of leaving are calculated on the basis of 1.5 working days for the current year' s normal holiday entitlement for each complete month of service since 1 January in the year in which the agreement is terminated. From this sum will be deducted an amount equivalent to paid holiday already taken since 1 January of the

current holiday year. If paid holiday which has been taken amounts to more than has accrued at the date of leaving in accordance with the above scale, [Company A] will deduct the excess holiday payment from any payment due on termination.

[The Appellant] is expected to spend a certain amount of his leave time visiting [Company A' s] connections in places where he spends his leave. Time spent on such calls cannot be "added" to the duration of leave. This is considered a normal practice with [Company A].

5. Agreement

[Company B] will ensure that [the Appellant] will not (without the prior written notification and consent of [Company A] or such one of its subsidiaries or associated companies) directly or indirectly be interested in, engage in, be concerned with, or provide services to, any other person, company, business entity or other organisation whatsoever (whether as its employee, officer, director, agent, partner, consultant or otherwise), it being the intention of [Company A] or such one of its subsidiaries or associated companies that [the Appellant] will devote his whole time and attention to the service of [Company A] or such one of its subsidiaries or associated companies.

As [Company A] or such one of its subsidiaries or associated companies is involved in a regional business and may have interests and business dealings overseas, in the performance of the duties of a Programme Production Manager with [Company A] or such one of its subsidiaries or associated companies, [the Appellant] may and will be required from time to time to travel, within the Asia Pacific region and to other places throughout the world.

It may be necessary for [the Appellant] to work any time, including Sundays and Public Holidays for which no addition payment will be made.

6. Conflict of Interest

Without prejudice to the provisions of Clause 5 above, [Company B] agrees to declare any and all business interests whether or not similar to or in conflict with the business or activities of [Company A] or such one of its subsidiaries or associated companies, at the date hereof or in which it may subsequently become involved in reasonable detail to [Company A] or such one of its subsidiaries or associated companies.'

This Appellant signed an acceptance of the Agreement on behalf of Company B.

5. By notice of termination dated 19 March 1997, Company A notified the Appellant that: 'pursuant to paragraph 2 of [the Agreement] we are hereby providing notice that said agreement and [the Appellant's] employment pursuant thereto will be terminated effective six months from 19 March 1997. If you have any questions please do not hesitate to contact [the writer, a vice-president of sports production of Company A] or our Human Resource Department.'

6. By a notification of remuneration paid to a person other than an employee, Company A reported that the total amount of consultancy fees accruing to Company B for the year ended 31 March 1996 was $1,003,440 ('the Sum').

7. By an employer's return for the year ended 31 March 1996, Company B provided, inter alia, the following particulars in respect of the Appellant:

Capacity in which employed:	Director
Income – Salary:	$104,000
Particulars of quarters provided	
Nature of quarters:	House
Period provided:	April 1995 to March 1996
Rent paid to landlord by employer:	Yes

8. By an employer's return for the year ended 31 March 1996, Company E notified that the total amount of income accrued to the Appellant was $4,500.

9. (a) In its profits tax return for the year of assessment 1995/96, Company B described its principal business as provision of landscape architectural services and television broadcasting productions.

(b) Company B made up its accounts to 31 March. Its profits and loss account for the year of assessment 1995/96, filed with its profits tax return for that year, showed the following particulars:

	Year ended 31 March 1996	
Income	$	$
Fee income	1,415,978	
Bank interest	1,315	1,417,293
General and administration expenses		
Production expenses	318,617	
Salaries and wages	119,158	
Staff messing	108,523	
Directors' remuneration	104,000	
Directors' accommodation	346,045	

Pension scheme payments	84,000	
Overseas travel expenses	238,497	
Licence and insurance	81,530	
Medical expenses	8,948	
Repairs and maintenance	23,478	
Motor car running expenses	71,935	
Subscription fee	37,120	
Accountancy fee	28,200	
Entertainment	71,936	
Electricity and water	29,774	
Telephone and fax	31,221	
Wardrobe	21,863	
Building management fee	12,000	
Newspaper and periodicals	19,891	
Audit fee	7,500	
Printing and stationery	24,717	
Donations	1,500	
Sundry expenses	76,855	
Depreciation	108,226	
Bank interest	591	
Loss on disposal fixed asset	1,820	1,977,945
Loss before exceptional item		(560,652)

(c) Company B's fixed assets consisted of a computer, digital diary and some domestic electrical appliances.

(d) After making certain statutory and other adjustments, Company B reported an adjusted loss for profits tax purposes of $330,522.

10. The assessor considered that the consultancy fee paid to Company B should be assessed as the Appellant's employment income. She thus raised on the Appellant the following salaries tax assessment for the year of assessment 1995/96:

	$
The Sum (paragraph 6)	1,003,440
Income from Company B (paragraph 7)	104,000
Income from Company E (paragraph 8)	4,500
Rental value of quarters ($104,000 × 10%)	10,400
Assessable income	1,122,340
Tax at standard rate (15%)	168,351

11. The Appellant objected to the assessment in the following terms:

'1. Neither I nor my wife received any income from [Company A]. Not during the tax year in question, or before, or since.

2. I understand that you may wish to question whether the payments made to [Company B] during the tax year in question were in reality in the form of a salary to an employee.

I would ask you to consider the following and agree that the relationship between [Company B] and [Company A] has been operated in good faith and should not be subject to tax other than the normal Companies Ordinance whereby annual returns have already been made through [Company B's] accountants and the responsibility for tax has already been discharged.'

12. In amplification of his objection the Appellant made the following contentions:

(a) Contract with Company A

'The Agreement was between [Company A] and [Company B]. I was not a party to the Agreement. The contract was terminated, incidentally, on 19 September 1997.'

(b) Work for Company A

'[Company B] began trading in 1989 before [Company A] even existed. [Company B] initially supplied consultancy advice to [Company A] in December 1990 prior to [Company A] signing up its various broadcast partners. When it was decided to go ahead with the satellite channel as a "start-up" operation, the consultancy was extended to an open-ended commitment that envisaged work for me as a presenter as and when [Company A] began broadcasting in addition to the other programming/production advice [Company B] was already able to give.

[Company B] had existing clients, such as [Company F], who produced a weekly sports show for [Company G] in-flight entertainment, and for [Company H], who required a presenter for its major sports events, such as [a tennis tournament] and [a rugby match]. There was also regular work for magazines, newspapers and periodicals. Throughout the contract with [Company A], [Company B] was free to work on other projects and did so. For the year 1994-95 for example, [Company A's] payment to [Company B] was less than 50% of [Company B's] turnover for the year. During the tax year in question, [Company B] produced two major golf events for [Company I] and

[athletics championships] in [Country J] for [Company K]. This was in addition to the regular work mentioned above.'

(c) Employee's benefit

'(i) I was not party to the Provident Fund, which after 6 1/2 years would have been worth a considerable amount on termination.

(ii) Employees had their salaries adjusted in such a way as to apportion an amount to "Quarters" or accommodation ... This lead to a concessional tax rate. I have not benefited from this.

(iii) Most significantly, when [the operations of Company A] re-located to [Country L] in June 1997, all staff that did not wish to move were offered redundancy pay equivalent to one month's salary for every year worked. Those eligible were also given "long service awards". I was an employee of [Company B] not [Company A]. I was not entitled to any of this. My payment, had I been an employee, would have amounted to close to $1m. The existence of [Company B] as a company quite properly excluded me from the redundancy pay-outs ...'

(d) Employee's responsibilities

'I had no office hours, no fixed place of work, did not attend any of the weekly staff meetings, had no secretary and no assistants. There was no question of any "promotion" within [Company A].'

13. In response to the assessor's enquiries, Company A stated:

(a) According to the Agreement, Company B agreed to provide the Appellant to serve as programme production manager/talent performing on air presentation and assisting in production. The Appellant's scope of responsibilities was subsequently reduced to on air presentation only.

(b) The Sum was computed as follows:

Period		$
4-1995 – 12-1995	$81,980 × 9	737,820
1-1996 – 3-1996	$88,540 × 3	265,620
Total		1,003,440

(c) '[The Appellant] was allowed to work for other organisations. In instances where a conflict of interest arose, prior approval from [Company A] was required.'

(d) '[The Appellant] was not required to attend work at regular hours nor was subject to the regulations regarding employees. However, according to the agreement with [Company B], [the Appellant] was required to observe [Company A] regulations in the performance of his duties as is customary with all freelance and similarly contracted personnel. This covered the return of [Company A] property, protection of [Company A] secrecy and conflict of interest.'

(e) '[Company A] did not have control over [the Appellant's] day-to-day activities as this was the responsibility of [Company B]. However, where his services were required, [the Appellant] would come under the control of the producer of the programme concerned.'

(f) No equipment or assistant was necessary due to the nature of the Appellant's work. None was provided by Company A and the Appellant was not required to produce his own.

(g) The Appellant was not required to incur outgoings or expenses on behalf of Company A. Company A would reimburse the Appellant should he incur proper expenses directly related to the assignment.

(h) The Appellant could take leave after consultation with the executive producer or head of sports.

(i) 'Employees of an equivalent status to [the Appellant] are normally entitled to a range of benefits including Provident Fund, housing allowance, annual bonus, annual leave, medical and severance payments. [Company B] was permitted to allow [the Appellant] annual leave. [The Appellant] was part of our Medical scheme. None of the other benefits were granted as was clearly evidenced by the termination of the contract with [Company B] with effect from 19 September 1997. No redundancy or severance payments were made to [the Appellant] or [Company B], which would have been the case had [the Appellant] been an employee.'

14. In reply to the assessor's further enquiries, Company A supplied the following information and documents:

(a) The Sum was paid by autopay into Company B's bank account with Bank M.

(b) A letter dated 31 May 1991 from Company A to the Appellant regarding his employment outside Company A. The letter, which was addressed to the Appellant and which did not refer to Company B, stated:

'Per our discussions, we are willing to allow you to engage in employment activities outside of [Company A] that may be considered a conflict of interest under your Letter of Employment ... dated [blank space] provided the following conditions are met ...'. Those conditions stated, inter alia, that prior approval must be obtained on a case-by-case basis from Company A's senior vice president, programming. In addition to submitting any employment letter for prior review and approval, the Appellant was required to provide full disclosure to Company A of any outside employment. Specifically, he was not permitted to 'perform any outside employment unless [he] was identified and attributed as being "[name of the Appellant] of [Company A]" or "[Company A's] [name of the Appellant]"'. The Appellant signified his agreement to this letter by signing it.

(c) A letter dated 6 July 1993 from Company A to Bank M enclosing the Appellant's application form for a home loan under Company A's corporate staff mortgage plan. The application form signed by the Appellant stated:

Name of employer:	Company A*
Occupation:	Programme production manager/talent*
Work there since:	March 1991*
Staff number (if applicable):	XXXXXXXXX

* Typed by Company A. After the words 'Name of employer' there is a hand written annotation: 'Please note memo from [Company A]'. This is a reference to the covering letter of 6 July 1993 which stated: 'With regard to the application, please note that [the Appellant's] employment status with [Company A] is under the service agreement of [Company B] instead of [the Appellant] himself.'[1]

(d) Two letters from Company A to Company B addressed care of the Appellant dated 30 December 1994 and 29 December 1995 advising 'that the service fee for [the Appellant] will be [increased under clause 1 of the Agreement] with effect from 1 January 1995 [and 1996, respectively].'

[1] In cross-examination, the Appellant stated that although the bank was offering a special deal to Group D staff, he was not holding himself out as an employee of Company A. He stated that the bank simply wanted to know that he was paid regularly (so it would have some security). The staff number referred to in the application form was allocated to him when he first started work with Company A in March 1991. This was before his contractual arrangements were finalised. He had a staff number because this was the number on his security pass.

(e) A memorandum dated 28 March 1995 from the Appellant to the human resources/accounts department of Company A advising that 'I have now re-organised my service company bank account and would be grateful if you could arrange for the monthly salary[2] to be paid into [Company B's new bank account].'

(f) Two memoranda from the Appellant to Mr N of Company A dated 29 December 1995 and 8 February 1996 whereby 'In accordance with the terms of my contract' (Agreement, clause 6 refers) the Appellant advised details of his outside employment.[3] In the memorandum dated 8 February 1996, the Appellant noted that he could not accept an offer of outside employment because the date conflicted with a cricket event televised for Company A.

(g) Company A's annual leave transaction report for 1995. This document showed the Appellant's entitlement to leave (18 days) and the leave actually taken (16 days).

(h) 'The consultancy fee paid to [Company B] in September 1997 included HK$44,274 which was the payment in lieu of accrued holiday not taken, ie 12.5 days (12.5 / 26 × HK$92,090).'

(i) On 25 April 1997, the Appellant wrote to Company A raising 'the possibility of redundancy or long service compensation as I gather one or other is being offered to other members of staff'. The Appellant stated he understood that the view of Company A was 'that none is payable in my situation as [Company A] employs my company as opposed to me as an individual. Service companies are outside the scope of the employment legislation.'[4]

15. In a letter dated 3 August 1999, the assessor requested the Appellant to provide further information in support of his objection and, in particular, to supply information in relation to Company B's income and expenses set out in paragraph 9(b). When the hearing before us had concluded, the Appellant had still not provided the requested information.

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[2] In cross-examination, the Appellant stated the term 'salary' was used loosely because the clerks handling the matter would not understand the term 'consultancy fee'.

[3] In evidence the Appellant noted that whilst working for Company A he continued to carry on his outside jobs. He did accept other engagements without the prior consent of Company A. Over the period of six years he only asked whether there was any objection some six or seven times. In most cases these notifications were made when the Appellant's work may have conflicted with the business interests of Company A. Occasionally, such as the earlier memorandum to Mr N, this was given in a casual manner to inform the reader what work the Appellant was actually doing outside Company A.

[4] We were not shown any answer or response to this query from Company A.

16. On 25 August 2001 the Commissioner rejected the Appellant's objection to the assessment set out in paragraph 10. The Commissioner considered that:

(a) the Appellant entered into a transaction (involving the interposition of Company B between the Appellant and Company A) for the sole or dominant purpose of enabling him to obtain a tax benefit within the terms of section 61A of the IRO. In the result, the Commissioner concluded that the Sum was in substance remuneration of the Appellant for the services rendered to Company A as an employee; and

(b) in any event, from 18 August 1995 (the date section 9A of the IRO came into operation) until 31 March 1996, the Appellant is deemed to have an employment with Company A and thus the remuneration received from Company A during this period must be regarded under that section as the Appellant's income from employment chargeable to salaries tax.

17. On 24 September 2001 the Appellant's tax representative lodged an appeal to the Board of Review against the Commissioner's determination. The grounds of appeal were:

(a) the assessment is incorrect because it was not initially raised under section 61A, because it includes income which has been subject to profits tax in the hands of Company B thus imposing salaries tax and profits tax on the same income, and because it taxes the Appellant twice to salaries tax in respect of the same income in the amount of $104,000;

(b) section 61A was not applicable and should not have been applied by the Commissioner;

(c) if section 61A did apply (which is denied), the confirmation of the assessment is wrong because the Commissioner has imposed double taxation and has not countered the tax benefit otherwise arising from the transaction;

(d) the Appellant was not an employee of Company A during the year of assessment 1995/96;

(e) section 9A was not applicable and should not have been applied by the Commissioner; and

(f) the payments made by Company A to Company B are subject to profits tax in the hands of Company B and should not be assessed to the Appellant.

The law

18. The overall issue for our decision is whether, and if so to what extent, the salaries tax assessment in paragraph 10 is correct. The Commissioner upheld the assessment on the bases described in paragraph 16. Our decision has been based upon consideration of sections 8(1), 9A, 12(1), 16(1), 61A and 68(4) of the IRO and the following propositions of law.

Section 61A

19. Yick Fung Estates Ltd v CIR [2000] 1 HKLRD 381 at 399B to H, per Rogers JA:

> *'…the tests set out in s.61A have to be applied objectively.*
>
> *There are seven matters (a) to (g) to which the section requires that regard must be had. On a clear construction of the subsection, the section would not be relevant or the subject matter of consideration unless there was a tax benefit. ... On that basis, the various matters at (a) to (g) have to be considered and if upon that exercise, the conclusion would be arrived at that the person who entered into or carried out the transaction did so for the sole or dominant purpose of obtaining a tax benefit, the Assistant Commissioner may exercise one of the two powers set out in sub-s.(2).*
>
> *In this Court, there was some discussion as to whether it is necessary for more than one item in matters (a) to (g) to indicate the sole or dominant purpose for it to be possible that that conclusion be arrived at. In my view, the posing of the question itself possibly indicates an erroneous approach to the section. Clearly, what must happen is that those matters must be considered and the strength or otherwise of the various resulting conclusions from considering those matters must be looked at globally. On the basis of that assessment, it must be decided whether the sole or dominant purpose was the obtaining of a tax benefit. It may be observed, for example, that one or other of the matters in (a) to (g) may be strongly or weakly suggestive of a purpose of obtaining a tax benefit or may be strongly or weakly suggestive of some other purpose. The Assistant Commissioner who undertakes such task has to use his own common sense and apply the results of his deliberations in respect of each matter and come to an overall conclusion.'*

Section 9A(4) and whether in substance the Appellant held an employment

20. An employment exists where there is a contract of service as opposed to a contract for services (Cassidy v Ministry of Health [1951] 1 All ER 574 and D19/78, IRBRD, vol 1, 323). In Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631, the Court of Appeal decided that no single test determined whether a contract was one of service or for services, that ultimately this is a question of fact and that it is necessary to balance all relevant factors in deciding the overall

classification of an individual (see also Halsbury's Laws of England 'Contract of Employment' volume 16, 4th edition, at pages 8 and 9). Generally, however, courts in Hong Kong have adopted the so-called 'work on own account' test to determine whether a worker was an employee or an independent contractor. The Privy Council approved this in Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764 per Lord Griffiths:

> ' *Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J at pages 184 and 185 in Market Investigations v Minister of Social Security [1969] 2 QB 173:*
>
> *"The fundamental test to be applied is this:*
>
> *Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"*
>
> *If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.*'

21. The way in which the parties themselves treat the contract and the way in which they describe and operate it are not decisive and may, if amounting to mere labelling, be wholly disregarded. What must be considered is the correct categorisation of the relationship objectively (Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 3 All ER 817).

22. A number of useful general statements of principle also emerge from the English Court of Appeal decision in Hall v Lorimer [1994] STC 23. This case accepted that the test to be generally applied in determining whether an employment exists is that laid down in Market Investigations v Minister of Social Security [1969] 2 QB 173 quoted above. The court then went on to state:

> ' *In order to decide whether a person carries on a 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.' ([1994] STC 23 per Nolan LJ at 29).

The hearing before us

23. The Appellant produced the following documents:

(a) An agreement dated 19 March 1991 between Company F and the Appellant. This agreement, which made no reference to Company B, was a contract for services to provide weekly in-flight programmes for Company G throughout 1991. Under cross-examination the Appellant stated that although he signed this contract in his own name, payment was made through Company B. In the Appellant's words "All revenue went through one pot".

(b) A schedule of 37 invoices for a total amount of $696,904 issued by Company B regarding the income included in Company B's profits tax return for the year of assessment 1995/96. This amount did not include income from Company A and income from Company B's landscaping business.[5]

(c) A letter dated 25 October 2001 from the human resources department of sports production of Company A stating that 'currently [the company] has around 100 commentators and presenters on its books. All, with the exception of some News staff, are retained as freelance contractors. Some are retained through companies and some as individuals. Various types of compensation packages are negotiated ...'

(d) Company G's in-flight entertainment guide (undated) showing the Appellant as the sports presenter for its discovery channel.

24. The Appellant also gave sworn evidence before us and was cross-examined. We summarise this evidence as follows:

[5] We were not able to reconcile this figure, when added to the income derived from Company A, with Company B' s income set out in paragraph 9(b). When asked, the Appellant could not assist in this matter.

(a) General background

His work has not changed much over the past 12 years. The income earned came from the following sources, although only the first two were relevant to his work for Company A:

(i) Presenting for television programmes – these programmes were both specific or for a series. Generally the call-time was one hour before recording so he had to be well informed before arriving at the studio. For instance, for a tennis tournament he had to know the history of the matches to date, the form of the players etc. He would be given a rundown of the programme by the production team, which would already have done a lot of work prior to his arrival at the studio. He had very little input into this aspect of the work.

(ii) Commentating – this was a spin-off from presenting, but it did not require on-air presence. Call-time was only 30 minutes before recording so he had to be well versed in both the relevant sport and the individual(s) or teams participating. Although he did not employ any assistant, he had to purchase certain equipment such as binoculars, stopwatch, calculator, library materials (sports magazines) and a computer. Company A did not provide him with any of these items.

(iii) Production – involves television coverage of an event. The most time consuming part was the post-production phase whereby the television tapes had to be edited into a coherent one to two hour programme.

(iv) Journalism – involves writing for golf and football magazines on a regular basis.

(v) Master of ceremonies – involves events having a sporting angle.

(b) Background regarding Company B

Company B was originally formed in 1989 as the vehicle for his wife's landscape architecture business. At that time he was employed full-time by Company O. Thus, in the beginning his wife made the major contribution to the company's profits. Subsequently, having the responsibility of looking after their young children, her contribution was reduced. By the year of assessment 1995/96 this amounted to only $55,667.

(c) Starting with Company A

His contract with Company O ended in 1990. Company B's memorandum was then altered so as to include broadcast services and television production activities. One thing led to another (for example, work on the tennis tournament) and at the end of 1990 he agreed to be a consultant for Group D, which was considering setting up a satellite television channel. The consultancy was for two months and was part of Company B's business. No formal contract was executed to evidence this relationship.

In summary, the period around the end of 1990 was very exciting both for him and for sport generally in Asia. Many new possibilities for work were opening up.

In the early part of 1991 he entered into a formal agreement with Company F to produce Company G's in-flight programme (paragraphs 23(a) and (d) above refer). Although he made this contract personally, payment was made through Company B.

Mr P, the senior vice-president of programming for Group D, then contacted him. Mr P asked him to work full-time for Company A. He refused, citing his work for Company G and other possible work opportunities. However, he told Mr P that he would be a television presenter for Company A once the company commenced broadcasting. In the event, he worked from the end of March to May 1991 for Company A by assisting a programme manager who had been engaged by Group D to run the sports channel. She was from Country Q and had no real Asian sports television experience.[6] This work was an extension of his consultancy and no formal agreement was entered into during this period. His title was 'Programme Production Manager' but Mr P explained that once Company A commenced broadcasting he would be a 'Presenter'. Group D then recruited a manager as well as an executive producer for Company A and his job as programme production manager became redundant. During the period from the end of 1990 to June 1991 he continued to do outside work, such as producing rugby and golf programmes and presenting the tennis tournament for Company H.

In May 1991 Company A presented him with a contract. This was a standard Group D employment contract, but with a side letter permitting him, with prior approval, to work for any other organisation.[7] He signed the side letter – he felt

[6] At this point in time, the only other employee engaged for Company A was a sports researcher.

[7] The side letter is that referred to in paragraph 14(b). It was handed to the Appellant personally and did not refer to Company B. The Appellant contended that it was a mistake that it was addressed to him and not Company B.

he needed to do this because he had not yet been paid for the work he had performed from March to May 1991 – but he returned the contract unsigned since it was not appropriate.

The contract was then shelved (he cannot remember why), but he was not worried because Company A was a start-up company, and its future seemed precarious since it was still some time before it would commence broadcasting. At this time, he worked when required and not five days a week.

On 30 January 1992 he signed a formal contract with Company A,[8] backdated to 26 March 1991, the date he commenced work as programme production manager. This was concluded in a hurry because his name had been linked to a rugby match's broadcast (taken over by Company H), an event in which Company A was interested. When Group D's lawyers discovered that he had no written contract with Company A, they were very concerned and Mr P implored him to sign. The contract was still largely in the form of the standard Group D employment contract but with certain changes from the earlier version. These changes were: (1) the contract was now in the name of Company B, and (2) the normal provident fund or redundancy payment provisions had been removed. Although he noted that there were references in the contract to holidays[9] and medical benefits[10], he did not object and would take them if offered. In his view, given that he did not have much confidence in the future of Company A at that time and his view that he was not particularly bound by the contract,[11] he signed. He stated Mr P knew that he wanted to distance himself from Company A and that he would continue his outside work.

After the contract had been signed, the parties carried out its operative terms and these were not altered. He carried out all services under the contract personally. Payment under the contract was reviewed annually and Company A granted increments without any involvement on the part of the Appellant.

Speaking of Company B, the Appellant stated that he wanted to put all his sources of income under one banner. The expenses set out in Company B's accounts (paragraph 9(b) refers) had very little to do with the income earned from Company A except for the few items of equipment he purchased for research or preparation for his work.

When asked in cross-examination whether Company B had any real role in the arrangement with Company A, the Appellant stated that it had and reiterated that he wanted to stay at arm's length from a company whose future was precarious. He indicated that he wanted the protection of Company B's limited liability.

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[8] This is the Agreement referred to in paragraph 4.

[9] The Appellant was required to apply for leave. On one occasion he had to cancel leave when it conflicted with a major sporting event, namely the Winter Olympics in Country R. The Appellant reminded us that he received his monthly work schedule from Company A in advance and he had to fit in with that.

[10] Company A arranged for a medical card to be issued in the Appellant's name.

[11] The Appellant's evidence on this matter was not particularly clear, but he appeared to focus upon the question of liability under the contract and the fact that the contract was in the name of Company B and not himself personally.

(d) Other matters

In relation to his income from Company E (paragraph 8 refers), the Appellant stated that the amount of $4,500 was payment for a voice over. Although the cheque was made out in his name, this was really for Company B and Company E wrongly treated him as an employee in its employer's return.

Post-hearing matters

25. After the Appellant had given evidence, been cross-examined and presented his arguments on his appeal, the time allotted for the hearing had expired and both board rooms were booked for other cases. An adjournment would be inconvenient given that the Appellant no longer lives in Hong Kong. With the agreement of both parties, the Commissioner's arguments and the Appellant's right of reply thereto were dealt with by way of an exchange of documents, in accordance with a timetable.

The Appellant's contentions

Section 61A

26. The Appellant argued that we should not ignore the existence of Company B unless its sole or dominant purpose was to obtain a tax benefit within section 61A. Section 61A should only operate to strike out blatant or contrived tax avoidance schemes, but not inhibit normal commercial transactions by which taxpayers legitimately take advantage of opportunities to manage their affairs (see Departmental Interpretation and Practice Notes No 15, paragraph 19). In this regard, the Appellant urged us to look at the overall picture and, while acknowledging that a 'tax arrangement' was part of that picture, it is clear that the non-tax purposes far outweigh the tax purpose (see paragraph 26).

27. Regarding the factors set out in section 61A(1) to determine the 'purpose' of the transaction, the Appellant stressed the background to the transaction and the role of Company B. He referred us to his evidence whereby he stated that Company B was established before Company A came into the picture, that there were cogent commercial reasons for setting up and operating the company, that he wanted to keep his distance from Company A and keep his options open, and that he had no intention of giving up his outside work, particularly in relation to Company G (compare D67/95, IRBRD, vol 11, 44, an example of a commercially driven transaction that had a much wider purpose than obtaining a tax advantage). The Appellant also referred us to the form and substance of the transaction and stressed that if Company B had not been set up then, in accordance with industry practice, he would still be a contract freelancer and not an employee (compare D52/96, IRBRD, vol 11, 554, another example where section 61A did not apply because the transaction was neither blatant nor contrived). In short, the Appellant contended that

on the basis of the evidence before us, we would not be able to conclude that the tax purpose of the transaction was dominant over all other purposes combined.

Section 9A

28. The Appellant argued that he was not an employee of Company A and asked us to note that he was not covered by any provident fund of Company A; nor was he entitled to any redundancy payment when the company's operations moved to Country L. In particular he stressed the industry practice that a television presenter is generally considered a freelancer, not an employee.

29. Regarding the issue of control, the Appellant stated that he had no office hours, was not provided with a desk or computer, and did not attend weekly staff meetings. He stated that he received a programme roster one month in advance (this was faxed to his home and designated the time and place for recording) and he would then confirm his availability. There was hardly any day-to-day control over him; the only control was when he was subject to direction in the recording studio and this was to the extent customary for all freelance or similarly contracted personnel.

30. Regarding the issue of integration, the Appellant acknowledged that he was integrated into Company A's business when he was programme production manager, but not thereafter. Although he also acknowledged that he was referred to as '[Company A's] [name of the Appellant]', this same appellation also applied to the well-known tennis and cricket presenters, Mr S and Mr T, and no one would suggest they were integrated into the business of Company A.

31. Regarding the issue of economic reality, the Appellant stated that although he did purchase some of his own equipment (for programme research and preparation), lack thereof were only indicia of whether a person carried on business on one's own account and were not determinative (see Hall v Lorimer).

The Commissioner's contentions

32. Ms Ma Wai-fong represented the Commissioner.

Section 61A

33. Ms Ma referred us to the following cases:

(a) Yick Fung Estates Ltd v CIR.

(b) D47/00, IRBRD, vol 15, 422: a service company case where the evidence clearly showed the company to be the taxpayer's alter ego. By interposing the company, what would have been the taxpayer's salary had been presented to the Revenue as profits of the company. The taxpayer carried out this transaction

for the sole or dominant purpose of obtaining a tax benefit. The tax benefit lay in the much greater amount of expenses available for deduction to the company for profits tax purposes compared with the restrictive rules applicable to the taxpayer under salaries tax.

34. Ms Ma submitted that under section 61A(1) the relevant transaction in the present case consisted of the entering into the Agreement between Company A and Company B as well as the interposition of Company B between Company A and the Appellant. Determined objectively and globally by reference to the criteria set out in section 61A(1)(a) to (g) (see Yick Fung Estates Ltd v CIR) it would be concluded that the Appellant entered into this transaction for the sole or dominant purpose of enabling him to obtain a tax benefit. The Commissioner had properly countered the tax benefit by raising the salaries tax assessment under appeal.

Section 9A

35. Ms Ma referred us to the following cases:

(a) Lee Ting-Sang v Chung Chi-keung.

(b) Hall v Lorimer.

(c) D103/96, IRBRD, vol 12, 49: a case applying 35(a) and (b) above.

(d) D69/98, IRBRD, vol 13, 412: the taxpayer claimed that by entering into a contract with the paymaster he lost his employment fringe benefits and was thus not an employee. The Board found that the loss of benefits was referable to commercial negotiations between the parties and did not preclude a finding that the taxpayer had entered into a contract of service (namely, an employment).

36. Ms Ma contended that it was clear that the Appellant could not satisfy all the conditions set out in section 9A(3) (for example, under section 9A(3)(a) the remuneration paid by Company A included medical payments) and the Commissioner was not satisfied on the basis of section 9A(4) that, when carrying out his duties under the Agreement, the Appellant did not in substance hold an employment with Company A.

Our analysis

Section 61A

37. It is our view that the transaction identified by the Commissioner involving the entering into the Agreement between Company A and Company B and the interposition of Company B between Company A and the Appellant, if disregarded, would reveal a disguised employment between the Appellant and Company A. In accordance with Yick Fung Estates Ltd v CIR, taking

a global perspective and looking objectively at the seven factors set out in section 61A(1), we have concluded that the transaction was entered into for the sole or dominant purpose of obtaining a tax benefit.

(a) Application of section 61A(1)(a) to (g)

(i) The manner in which the transaction was entered into or carried out

We take this criterion to refer to the background to the transaction and the various reasons that could properly be attributed to the parties involved. The Appellant has given detailed evidence on this matter. We find that he commenced work with Company A towards the end of 1990 (initially as a consultant) and that this developed in March 1991 into a substantive position with the title of programme production manager/talent. On 31 May 1991, when Company A discovered that it had no formal agreement with the Appellant, Company A pressured the Appellant to enter into an agreement placing certain restrictions upon his employment outside of Company A. The letter was addressed to the Appellant and was agreed to and signed by the Appellant in his own name. The letter made no reference to Company B whatsoever. It was not until much later, namely 30 January 1992, that the agreement between Company A and Company B was formally executed by the Appellant on behalf of Company B.

The Appellant has told us why he did not sign the earlier agreement presented to him by Company A. He said this was because he had no real confidence in Company A in its start-up phase. He also said that he did not want to contract with Company A on an exclusive basis because he wanted to retain the right to carry on outside work – but we note he carried on his outside work in any event, and this was well before Company B became a party to the Agreement signed on 30 January 1992.

We reject the first part of this evidence. If true, the Appellant would have ensured that a contract was immediately in place between Company B and Company A. He would not have let matters drag for the better part of ten months with the Appellant providing services to Company A in a personal capacity. The clear implication is that it was not important for the Appellant to immediately conclude a contract between Company B and Company A. At this time he did not, as he claimed, 'distance [himself] from [Company A]'. In the meantime, and thereafter, the Appellant provided personal services to Company A as '[Company A's]

[name of the Appellant]'. Under the Agreement he was the only one to provide the services and he had no right of substitution. Once the Agreement was concluded, other than the promise to procure the services of the Appellant, Company B had no role whatever. Its sole function was to serve as a receptacle into which the Appellant's fixed monthly remuneration would be paid. As the Appellant said, he wanted to put all his commercial activities under one commercial umbrella, Company B. The Appellant also told us that he did not want to sign the earlier contract of employment produced to him. Why these two matters were important to the Appellant becomes very clear when regard is had to criteria (iii) to (vi) below.[12]

(ii) The form and substance of the transaction

In form, the Agreement was entered into between Company B and Company A for the provision of the Appellant's services at a set monthly remuneration, subject to annual review. But, as noted above, thereafter Company B had no real function other than as the receptacle for the remuneration paid by Company A.

Let us turn now to the substance of the Agreement and the facts relating to how it was carried out. We conclude that it looks like, and operated as, a disguised employment.

– First, it is an agreement for personal services by the Appellant with no right of substitution.

– Second, a fixed rate of remuneration was payable monthly, reviewable annually by Company A with no input or negotiation on the part of the Appellant.

– Third, the Appellant was entitled to certain fringe benefits commonly found in contracts of employment, such as annual leave, termination payments in lieu of accrued holiday and medical coverage. As a staff member of Company A the Appellant joined Company A's corporate

[12] At this juncture, we note the Appellant's evidence that the agreement with Company F on 19 March 1991 (see evidence in paragraph 24(c)) was made with him personally but that payment was made through Company B. The Appellant could not explain why this business income was booked in Company B's accounts, other than to say that 'All revenue went into one pot'. Again, the answer is clear if regard were had to paragraphs (iii) to (vi) below and we agree with the Commissioner's submission that we should draw the inference that Company B had no real role in this transaction. In substance, Company B was a vehicle used by the Appellant to generate significant tax advantages through what appears to be an extraordinary level of expenditure booked in its accounts.

staff mortgage plan. We appreciate from the Appellant's evidence that other fringe benefits were not made available to him. But neither the availability nor non-availability of these benefits is conclusive. They simply form part of an overall picture.

– Fourth, the Appellant was required to seek approval from Company A for outside work where any conflict of interest arose. From Company A's perspective this is understandable no matter what its relationship with the Appellant was, but the evidence also shows that the Appellant (albeit on limited occasions only) obtained approval even when no apparent conflict of interest arose. According to Company A the Appellant must not perform any outside employment unless he identified himself as being closely associated with Company A.

– Fifth, there was a reasonable level of control by Company A over the Appellant's work schedule and performance of his duties. The Appellant told us that Company A faxed him one month in advance with his monthly work schedule, and that he had to work at a designated studio at a certain time. There is no evidence before us that the Appellant did not turn up for work as requested. Indeed, there is evidence that the Appellant turned down other work because it conflicted with his duties to Company A. We find that, although the Appellant had no fixed hours of work, he was required to work when directed by Company A, he invariably complied with this direction, and once in the television studio he was under the control of the director of the programme concerned.

– Sixth, the evidence clearly shows a certain degree of integration of the Appellant into Company A's business. The references to '[Company A's] [name of the Appellant]' and the Appellant's participation in Group D's home mortgage scheme, whilst not being determinative, add to the overall picture that it would be wrong, as the Appellant argues, to regard him simply as a freelancer for Company A.

– Seventh, Company A has stated that the Appellant was not required to incur his own expenses in the performance of his duties and that no equipment was necessary in this regard. The Agreement was silent on this matter. We accept that he did purchase several items of equipment (including binoculars, calculator, stop watch, and library material) to assist in performing his duties, but overall we have the impression that

the nature of the Appellant's work for Company A involved no major purchase of equipment or assistance.

– Eighth, the Appellant's work for Company A did not involve him assuming any degree of financial risk or, conversely, being able to profit from sound management in carrying out his tasks.

– Ninth, there are various references by both the Appellant and Company A in the documents placed before us referring to the Appellant's 'salary' and his 'employment'. We appreciate that these may have been used loosely, but they again form part of a mosaic that culminated in the Appellant's letter dated 25 April 1997 to Company A where he raised 'the possibility of redundancy or long service compensation' which is only applicable to employees.

In the event, we agree with the Commissioner that, on balance, the sum of all the facts before us indicates that the Appellant was, to a certain degree, part and parcel of Company A's organisation, that he was subject to a reasonable amount of control in relation to his time and manner of work for the organisation, and that the indicia showing the existence of an employment-type relationship outweigh those showing the Appellant to be carrying on business on his own account. In conclusion, we find that the remuneration paid to Company B was for the Appellant's services under an agreement that was in substance an employment.

(iii) The result in relation to the operation of the IRO that, but for this section, would have been achieved by the transaction

If Company B had been accepted for tax purposes as having entered into a contract for services with Company A, the taxation result is dramatic. The Sum of $1,003,440 (paragraph 4) which on the basis of applying section 61A would have been taxable to the Appellant was reduced by the extraordinary level of expenses of $1,977,945 (paragraph 9(b)) claimed in Company B's profits tax return for the year of assessment 1995/96, which disclosed a loss of $330,522.[13]

[13] We do not know whether the Commissioner has accepted these expenses as proper deductions under section 16(1). Suffice to say that we have based our analysis on the objective fact of Company B's profits tax return and the conclusion that virtually none of the expenses would have been allowed under the restrictive salaries tax rules in section 12(1) and would have been significantly decreased if, contrary to our decision, the Appellant were liable to profits tax as an individual (in which case the myriad of director or employee fringe benefits disclosed in the accounts, which are prima facie deductible to Company B under section 16(1), would not be allowed to the Appellant as an individual profits tax taxpayer).

(iv) Any change in the financial position of the Appellant that has resulted, will result, or may reasonably be expected to result, from the transaction

If section 61A did not apply to the transaction the Appellant would achieve considerable savings in salaries tax.

(v) Any change in the financial position of any person who has, or who had, any connexion ... with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction

As far as Company A is concerned, there was no additional outlay to procure the services of the Appellant though Company B. On the other hand, if for tax purposes Company B were taken to have derived the Sum paid by Company A, no profits tax liability for Company B would arise because of the deductions claimed in its profits tax return for the year of assessment 1995/96.

(vi) Whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length

In carrying out the Agreement, Company B received remuneration from Company A of $1,003,440 for the year of assessment 1995/96. On the other hand, the Appellant only derived income from Company B amounting to $104,000 for that year as well as receiving certain (unquantified) director or employee fringe benefits. Apart from the tax benefits arising from the transaction this payment clearly had no commercial justification and was not made on an arm's length basis.

(vii) The participation in the transaction of a corporation resident or carrying on business outside Hong Kong

This factor has no application to this case.

(b) Countering the tax benefit

On the basis of the analysis above, we find the Commissioner was correct in concluding that the facts revealed a transaction entered into for the sole or dominant purpose of obtaining a tax benefit. Under section 61A(3) the phrase 'tax benefit' is widely defined in section 61A(3) to mean 'the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof'. We agree with Ms Ma that if the transaction in question were not effected, the

Appellant in rendering personal services to Company A would have been directly assessable to salaries tax on the full amount of Company A's payments to him for the services. By effecting the transaction, in the absence of section 61A, the Appellant would have had his direct tax liability avoided or reduced. This would clearly have amounted to a tax benefit (compare D47/00) and the Commissioner was entitled to counter that tax benefit by assessing the Appellant to salaries tax on the Sum paid by Company A that otherwise would have been diverted to Company B in the year of assessment 1995/96.

Section 9A

38. If we were wrong in our conclusions regarding section 61A, we would conclude that with effect from 18 August 1995 (the date on which section 9A came into operation) section 9A clearly applied. The service company arrangement in this case was precisely the mischief to which section 9A was directed. In short, there was: (1) an agreement, (2) a party to which is a relevant person (Company A) carrying on business in Hong Kong, (3) under which services have been carried out by a relevant individual (the Appellant) for Company A, and (4) under which remuneration for services has been paid to a company (Company B) controlled by the relevant individual and his associates (and not to the relevant individual himself).

39. We will not repeat the analysis set out above, particularly regarding section 61A(1)(b), except to note that:

(a) all the elements for section 9A(1) to apply exist in this case;

(b) as such, subject to escape clauses under section 9A(3) and (4), the Appellant shall be treated as having an employment with Company A and the remuneration received from Company A shall be regarded as the Appellant's income from employment liable to salaries tax;

(c) the tests set out in section 9A(3) are cumulative, and the application of this provision depends upon *all* of paragraphs (a) to (f) being satisfied. In this case, the arrangement clearly cannot be exempted under section 9A(3) because various paragraphs, for example paragraph (a), are not satisfied; and

(d) the arrangement cannot be exempted under section 9A(4). In this regard, we have paid particular attention to the control test, the integration test and the carrying on business on own account test referred to above. We appreciate that factors exist in this case that support the Appellant's case (for example, he did not receive all benefits available to other employees, both he and Company A did not consider that any redundancy payment should be made on termination of the Agreement and he had no set office hours, no computer and was not

> required to attend Company A's staff meetings). But, as stated in Hall v Lorimer, we have reminded ourselves that assessment of the evidence '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'. Looked at globally, we are satisfied that at all relevant times the carrying out of services by the Appellant to Company A was in substance the holding of an employment by the Appellant with Company A. We do not find that the Appellant was simply a freelancer. The preponderance of facts points the other way.

Conclusion

40. For all the above reasons we reject this appeal. We must, however, address certain outstanding aspects arising from the Appellant's grounds of appeal and his arguments before us.

41. Ground (a): The Appellant appears to indicate that the assessment confirmed by the Commissioner was incorrect because the assessor did not make (and indeed had no power to make) the original assessment under section 61A. The Appellant did not advance this argument in the hearing before us and we have proceeded on the basis that he has abandoned it. In this regard, we note that the Appellant was extremely articulate, presented his case thoroughly and was clearly very well-prepared for this appeal.

42. In relation to the amount of $104,000 (paragraph 7 refers), the Appellant contended that the assessment is incorrect because it includes income that has been subject to profits tax in the hands of Company B, thus imposing salaries tax and profits tax on the same income. We reject this ground. This amount was director's fee or salary paid to the Appellant by Company B. There was no evidence before us that it was attributable to any of the services provided by the Appellant to Company A. Both this amount and the 10% rental value emanating therefrom were thus properly subject to salaries tax in the hands of the Appellant.

43. During the hearing the Appellant argued that if we upheld the salaries tax assessment raised on him, then 'the usual housing allowance of 30% given to [Company A's] executives in a similar salary range, should in equity be factored into the equation'. We also reject this argument. Tax liability under the IRO must be determined on the basis of what was done, not what could have been done.

44. Ground (f): We agree with the Appellant that the payments made by Company A to Company B should not be subject to profits tax in the hands of Company B and should be excluded from any profits tax assessment raised on Company B for the year of assessment 1995/96.

45. Finally, during the hearing the Appellant disputed the assessability to salaries tax of the amount of $4,500 received from Company E (paragraph 8 and the Appellant's evidence under

paragraph 24(d) 'Other matters'). We agree with Ms Ma that this was not a matter raised in the notice of appeal. Given that there is no evidence before us that the Appellant raised this issue at the objection stage, we are not inclined to allow the Appellant to argue such additional ground of appeal at this late stage. We do, however, direct the Commissioner to ensure that this amount is not subject to profits tax in the hands of Company B. As with the income paid to Company B by Company A, this amount should be excluded from any profits tax assessment raised on Company B for the year of assessment 1995/96.