INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D15/96

Salaries tax – foreign exchange broker – remuneration by way of commission – whether taxpayer carrying on business on own account – whether contract of service or contract for services determined by the totality of facts and not mechanical ticking of a check list – Inland Revenue Ordinance section 8(1).

Panel: Andrew Halkyard (chairman), Michael Choy Wah Ying and William Zao Sing Tsun.

Dates of hearing: 21 March and 25 April 1996.
Date of decision: 25 June 1996.

The taxpayer operated as a foreign exchange broker, introducing clients to Company A and earning a commission based on the client business he (and later his sub-agents) introduced.

In February 1991 the taxpayer applied for the registration of a business under the Business Registration Ordinance. For the years of assessment 1991/92 and 1992/93, the employers' returns filed by Company A included income in respect of the taxpayer. However, in his tax returns the taxpayer declared that he had no employment income and that his income from Company A should be subject to profits tax. The assessor took a contrary view and raised salaries tax assessments on the taxpayer. The taxpayer objected on the grounds that his income was earned from a business and that he had already been assessed to profits tax. The taxpayer submitted that he had no written contract of employment with Company A, that his commission was based upon his clients' turnover, that he was not entitled to any fringe benefits and that his activities were at his own discretion. The Commissioner refused to allow the taxpayer's objection and the taxpayer appealed.

During the Board hearing it was found that the taxpayer used Company A as an umbrella under which he could shelter and attract clients to enter into foreign exchange transactions. Subsequently, he recruited so-called sub-agents to help carry out this activity. In essence the arrangement between the taxpayer and Company A was co-operative in the sense that the taxpayer used the premises of Company A, paid a fee (or rent) for that privilege, and then collected commission from Company A referable to the client business he and his cohort of sub-agents introduced.

Held:

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). No single test was determinative; ultimately it was a question of fact and all the relevant factors had to be balanced.

(1) The apparent absence of relevant control was a factor in this case but not conclusive.

(2) Nor could one conclude that the taxpayer had been sufficiently integrated into Company A to the extent that he must have been its employee.

(3) Was the taxpayer carrying on business on own account? Some factors supported the finding of employment (such as the absence of evidence relating to necessary provision by the taxpayer of his own equipment and staff and whether he had been exposed to financial risk) while other factors supported a contrary finding (such as his level of independence, overall responsibility for managing his activities and the degree to which he could profit from sound management).

Ultimately, distinguishing a contract of service from a contract for services must not become a mechanical exercise in just ticking a check list (Hall v Lorimer [1994] STC 23 considered). On the totality of the facts, including the payment of a fee to Company A for the space that he and his sub-agents occupied in Company A's premises and the sharing of commission income with Company A, the taxpayer's relationship with Company A was a collaborative one with the aim of mutual gain. The taxpayer had been carrying on business on his own account (Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764 considered and applied).

Appeal allowed.

Cases referred to:

Cassidy v Ministry of Health [1951] 1 All ER 574
D19/78, IRBRD, vol 1, 323
Chau Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631
Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764
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
D54/90, IRBRD, vol 5, 414
D77/90, IRBRD, vol 5, 525

Chiu Kwok Kit for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Taxpayer has appealed against a determination of the Commissioner of Inland Revenue relating to the salaries tax assessments for the years of assessment 1991/92 and 1992/93 raised on him. The Taxpayer claims that his income should be subject to profits tax and not to salaries tax.

The facts

The following facts were not in dispute.

1. The Taxpayer was appointed Deputy Business Director of Company A, an investment company, on 19 November 1990. At all relevant times the Taxpayer derived income only from Company A.

2. The employer's return filed by Company A for the year ended 31 March 1991 in respect of the Taxpayer disclosed the following particulars:

(a)	Capacity in which employed		:	Deputy Business Director
(b)	Period of employment		:	19 November 1990 to 31 March 1991
(c)	Income -	Salary	:	$41,500
		Commission	:	73,018
				$114,518

3. In his salaries tax return for the year of assessment 1990/91 the Taxpayer declared that he had no employment income and that his income should be assessed to profits tax.

4. On 27 February 1991 the Taxpayer applied under the Business Registration Ordinance for registration of a business in the name of Company B. The nature of the business was described in the application as 'Trading and Investment'. The date of commencement was stated as 1 April 1990. The business address stated in the application was the same as the Taxpayer's residential address, that is a flat in District C.

5. On 25 September 1992 the assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1990/91 on the basis of the income disclosed at fact 2.

6. The Taxpayer objected against the assessment on the ground that his income had been assessed to profits tax.

7. In correspondence with the assessor, Company A supplied the following information in relation to the Taxpayer's engagement:

   (a) His main duty was to invest for customers.
   (b) He was not permitted to undertake any other job.
   (c) He was required to attend the office at regular hours. Office hours were divided into day trade and night trade shifts.
   (d) He was permitted to take leave with the approval of his department head.
   (e) All equipment and facilities were not supplied by Company A.
   (f) All outgoings and expenses were not reimbursed by Company A.
   (g) His engagement with Company A could be terminated with immediate notice by either party.

8. Following an exchange of correspondence between the assessor and the Taxpayer, whereby the assessor agreed to allow a deduction of 10% of the Taxpayer's income as outgoings incurred to produce his income, the Taxpayer withdrew his objection to the assessment described at fact 5.

9. Employer's returns filed by Company A for the years ended 31 March 1992 and 1993 in respect of the Taxpayer disclosed the following particulars:

			31 March 1992	31 March 1993
(a)	Name of employer	:	---Company A---	
(b)	Name of employee	:	---Company B---	
(c)	Capacity in which employed :		[blank]	MD
(d)	Period of employment :		1 April 1991 to 31 March 1992	1 April 1992 to 31 March 1993
(e)	Income--Commission :		$230,750	$652,624
	Other reward, or allowance :		-	192,000
			$230,750	$844,624
			======	======

10. In response to the assessor's enquiry, Company A gave the following further breakdown of the Taxpayer's income for the year ended 31 March 1992:

Salary/Allowance	:	$130,500
Commission	:	100,250
		$230,750
		======

11. In his salaries tax returns for the years of assessment 1991/92 and 1992/93 the Taxpayer declared that he had no employment income and that his income should be assessed to profits tax under the name of Company B.

12. On 7 March 1994 the assessor raised salaries tax assessments on the Taxpayer for the years of assessment 1991/92 and 1992/93 on the basis of the income disclosed at facts 9 and 10. In the assessments the assessor allowed the Taxpayer a deduction in the sum of 10% of his commission income as outgoings incurred to produce his income.

13. The Taxpayer objected against the assessments on the grounds that he had no employment income and that his income was earned from his business and had already been assessed to profits tax under the name of Company B.

14. In support of his objection the Taxpayer maintained that he had no written employment contract with Company A. However, he drew the assessor's attention to a blank document which stated that a company [unnamed] appointed an individual [unnamed] as 'client's representative for the procurement of trading orders'. This document expressly stated that the individual signing it was 'self-employed' and that 'under no circumstances [should it] be construed as creating between the parties the relationship of employer and employee'. The document was not on letterhead, did not refer in any respect to either the Taxpayer or to Company A, and was not filled in or signed in any way. The Taxpayer claims that both he and Company A signed this document.

15. On 11 January 1995 the Taxpayer submitted to the assessor a copy of a letter from Company A dated 30 September 1993 headed 'To Whom It May Concern' which stated:

    (a) The Taxpayer is a commission agent. He is responsible for the introduction of clients to Company A for dealing in foreign exchange and gold contracts.
    (b) The computation of the Taxpayer's commission was based upon his clients' turnover.
    (c) The Taxpayer was not required to work at regular hours. His activities were left to his own discretion.
    (d) The Taxpayer was not entitled to fringe benefits, such as annual leave, medical benefit and provident fund, from Company A.
    (e) The Taxpayer may incur expenditure in serving his clients. This will not be reimbursed by Company A.

16. By letter dated 8 May 1995 the assessor requested the Taxpayer to provide certain information in respect of the business allegedly carried on by him. Most of these queries related to items recorded in the accounts of Company B (fact 4 refers), including a request for details of various persons allegedly employed by the Taxpayer. The Taxpayer has not replied to this letter.

17. On 1 September 1995 the Commissioner refused to allow the Taxpayer's objection to the assessments described at fact 12.

18. On 30 November 1995 the Taxpayer appealed to the Board of Review against the Commissioner's refusal to allow his objection. The Taxpayer claimed that he was not an employee of Company A and that his income should be subject to profits tax and not to salaries tax.

The evidence of the Taxpayer

During the course of the Board hearing the Taxpayer gave sworn oral evidence. We are bound to state at the outset that in certain respects the Taxpayer's evidence, specifically in relation to the accounts of Company B (see also fact 16) and the application form he allegedly signed when commencing work with Company A (see also fact 14), was evasive and, indeed, economical with the truth. In our view these matters have tainted the whole of the Taxpayer's evidence. The result has been that where there was any ambiguity or doubt arising from the Taxpayer's evidence, we have not been inclined to accept it as fact. Proceeding on this basis, and after examining the documents produced to the Board by the parties, we find the following additional facts.

19. The Taxpayer's title of Deputy Business Director (fact 1 refers) was for business convenience only. He had no formal superior in Company A and there was no Business Director to whom he was responsible. If he had any major concerns relating to his relationship with Company A, such as the level of his remuneration, he would discuss these with the shareholders of Company A.

20. When the Taxpayer commenced working with Company A his main activity was to recruit clients for dealing in foreign exchange. In enticing clients to enter into foreign exchange transactions, the Taxpayer represented that he was acting on behalf of Company A. The Taxpayer did not reveal the name of his firm, Company B, to the clients. All business with the clients was conducted in the name of Company A. When dealing with clients, the Taxpayer gave them a business card which showed he was a Deputy Business Director of Company A. The card made no reference to Company B.

21. Subsequently, the nature of his activity for which he was remunerated (although still basically representing commission income) changed. This change is described at facts 25 and 26.

22. Unlike the permanent staff of Company A, the Taxpayer received no fringe benefits from Company A (compare fact 15(d)). As a matter of practice, the Taxpayer's working hours were not strictly regulated (compare fact 15(c)), although he normally arrived at Company A's premises daily at 10.30 am. The day trade and night trade shifts referred to by Company A at fact 7(c) were an indication of normal trading hours. However, they were not set periods in which Company A required the Taxpayer to attend its premises. When the Taxpayer did not attend Company A's premises for work purposes, he would

notify one of the so-called 'bosses' (we infer this refers to one of the major shareholders) of Company A.

23. The Taxpayer was never entitled to any salary from Company A (contrast facts 2(c) and 10). In addition to commission income he did, however, receive a basic allowance from Company A which ranged from a minimum of $8,500 per month to at least $13,000 per month. If the Taxpayer failed to bring in business, Company A would stop paying the basic allowance.

24. Company B kept no separate bank account. The Taxpayer never sent to Company A any bill or debit note for services provided to Company A by the Taxpayer.

25. As indicated at fact 21 above, when the Taxpayer commenced working with Company A his main activity was to entice clients to deal in foreign exchange transactions through Company A. Subsequently, a greater part of his income was derived from the fact that he recruited various so-called sub-agents to carry out this activity. The number of sub-agents at any one time varied because of the volatility of the business and the mobility of the individuals concerned. The maximum number of sub-agents at any one time totalled 40-50. Although these sub-agents were under his control (in what way the Taxpayer controlled them was not clarified), they were remunerated by Company A on a commission basis. The Taxpayer's commission from Company A was then reduced by the amount Company A paid to the sub-agents. The Taxpayer did not enter into any formal agreement with the sub-agents although the Taxpayer stated that each sub-agent signed a formal application form with Company A (which was allegedly in the same terms as that referred to in fact 14).

26. Under the arrangement described at fact 25, Company A provided the Taxpayer with space in its premises (situated in District D) for which he was initially required to pay a 'rent' of $50,000 per month. This payment was subsequently increased to $80,000 per month. All other facilities and equipment had to be paid for by the Taxpayer, apart from minor items such as stationery. There was no document entered into between the Taxpayer and Company A which recorded the terms of this agreement. The payments made by Company A to the Taxpayer were net of the amount charged as 'rent'.

27. Company A kept a brief record of the Taxpayer's work history. This record was headed 'Staff History Enquiry'. It detailed the Taxpayer's name and identity card number, his position ('Deputy Business Director' – there were three Deputy Business Directors in all), his group number ('CS' – there were three groups in all), and his individual agent number ('AE' code – we infer that AE stands for Account Executive).

28. The Taxpayer could not recall clearly when Company B ceased business. He stated that he paid no attention to this matter once he ceased working with Company A.

29. The Taxpayer had no registration under the Securities Ordinance.

30. A petition for winding up Company A was made on 28 February 1994. An order for winding up Company A was made by the Supreme Court on 30 March 1994.

Cross-examination of the Taxpayer

During the course, of the hearing, the Taxpayer was subject to detailed cross-examination by the Commissioner's representative, Mr Chiu Kwok-kit. The Taxpayer's responses to many of Mr Chiu's questions have been incorporated in our findings of fact set out above. There are, however, two specific items arising out of the cross-examination which we particularly wish to highlight.

The alleged document signed by the Taxpayer before commencing work with Company A

During the first day of a two-day hearing the Taxpayer stated that he did not sign any contract with Company A other than an application form (see fact 14) which he completed during the job interview. The Taxpayer asked the Board to note that the document clearly states that he was not an employee of Company A. The Taxpayer then stated that the original of this document was kept by Company A and that he was only able to supply the Board with a blank copy because Company A had ceased business and he could not contact any staff in Company A to help him in this matter.

During this first day's hearing we had unresolved doubts whether the Taxpayer could satisfy us that he had signed this form. Specifically, he cannot read English, he stated that he did not read the form before signing it and, contrary to his protestations, we could not see how he could be sure that this was the exact form that he allegedly signed with Company A.

During the second day's hearing the Taxpayer commenced by producing to the Board an additional copy of the form allegedly signed both by him and Company A. He stated he obtained it from the former accountant of Company A, described only as X. Under cross-examination, the Taxpayer could not tell us X's address; he could not tell us how X would have retained a copy, but not the original, of this single form (of which Company A would have had hundreds of separate forms signed by different agents); he could not tell us X's telephone number; and he even intimated that he could not contact X again.

The Taxpayer's evidence in this respect was evasive and wholly unbelievable. We reject the contention that this document was a true copy of a form signed by Company A. In short, the Taxpayer's production of this document at this late stage and his explanation of how he obtained it has caused us to reject his evidence on this matter. We

have, therefore, accepted Mr Chiu's submission and proceeded on the basis that the Taxpayer did not sign the form which he alleges he signed.

The accounts produced by the Taxpayer in the name of Company B

In support of his argument that he was carrying on business on his own account the Taxpayer produced books of account in the name of Company B. We find these accounts, at best, to be of marginal value and, to the extent to which they supported the Taxpayer's case, we have not relied upon them.

To take but one example. The Taxpayer claims to have employed both his mother and father in conducting his business. Our findings on this matter are as follows. Neither parent is particularly young (both are in their sixties); neither was shown to have any particular expertise in dealing in foreign exchange; unlike other sub-agents, they were allegedly employed by the Taxpayer (although the Taxpayer stated that his mother was also remunerated by Company A); the Taxpayer was unable to explain why details of other sub-agents were not recorded in his accounts; the Taxpayer was unable to explain how the remuneration paid to his parents was calculated other than by making a vague statement that 'payment was made according to certain criteria relating to recruiting a certain number of customers'; and in no realistic way were the alleged payments shown to be incurred in the production of the Taxpayer's commission income. In short, the Taxpayer's explanations relating to his employing ageing parents lacked all credibility. In our view it was no coincidence that the alleged salaries paid by the Taxpayer to his parents were pitched at amounts that never significantly exceeded the tax free, or minimum tax, thresholds for individuals during the relevant years of assessment.

We stress, however, that this is but one example. Mr Chiu cross-examined the Taxpayer on various book entries. In no case were the Taxpayer's explanations satisfactory. Indeed, the Taxpayer all but admitted that the accounts were in total disarray and he did admit that they were 'disorganized'. He stated that he just sent whatever details he had to his accountant (no longer retained by him), who then simply prepared accounts which the Taxpayer was in no position to explain.

In this regard also, it should be reiterated (see fact 16) that well prior to the hearing the assessor had requested the Taxpayer to provide various details in relation to the accounts produced for Company B. Various invoices and receipts were requested by the assessor. Under cross-examination the Taxpayer admitted that he could not produce the requested documents. In all the circumstances, we have no hesitation in finding that no reliance whatsoever should be placed upon the accounts produced for Company B.

The Taxpayer's contentions

During the Board hearing, the main thrust of the Taxpayer's argument was that essentially he had a 'co-operation agreement' with Company A and that he should thus be liable to profits tax rather than salaries tax. In the Taxpayer's own words:

> 'Company A and I co-operated in that Company A provided the resources and I then recruited clients for Company A.'

He then described the arrangement between himself and Company A in the following way:

> 'Because Company A is a large company, I use that name rather than the name of my own firm, Company B. Accordingly, no receipt or other document was given by Company B to any of the customers since Company B does not appear in Company A. I simply used Company A's name to make money… Both the sub-agents and the clients would have more confidence in dealing with a big company such as Company A [than with me individually].'

The Taxpayer also used an unusual metaphor to describe his arrangement with Company A. He stated that, under the umbrella of Company A, he was the head of a ship (船) for which he had to pay rent (see fact 26). The rent was not charged on the basis of how many sub-agents he had recruited; rather it was based on the physical space referable to the desks (桌) occupied by members of his ship. This, in the Taxpayer's view, showed the true nature of the co-operation agreement between himself and Company A.

The Taxpayer then listed the following factors why he should be considered to be in business on his own account:

(1) He had to bear any profit or loss from his activity.
(2) He was simply an agent working on a contract basis. Also, in recruiting sub-agents, he was acting as a contractor, or sub-contractor, for Company A.
(3) Unlike the permanent staff of Company A he did not receive any fringe benefits; he was simply a commission agent.
(4) In earning his income he had to incur expenses such as entertainment, communication, travelling, assistants and equipment, none of which was reimbursed by Company A.

The Commissioner's contentions

The Commissioner's first argument was that we should pay no attention to the terms of the application form allegedly signed by the Taxpayer. We have already dealt with this matter and, as our reasons will show, we have accepted the Commissioner's argument that for the purposes of this appeal we are not concerned with the construction of this form.

On the basis of the evidence before the Board, the Commissioner then argued that the Taxpayer was integrated into the business of Company A. To support this claim, the Commissioner relied upon factors such as evidence of the 'Staff History Enquiry' (fact 27) and the fact that the Taxpayer received a 'salary' or 'allowance' (facts 9 and 10).

The Commissioner then proceeded to argue that various restrictions placed by Company A upon the Taxpayer in relation to matters such as the restriction on him

undertaking any other job (fact 7(b)) and regular working schedule (fact 7(c)) show a level of control by Company A which is wholly consistent with the existence of an employment relationship.

The Commissioner also contended that facts such as the submission of employer's returns by Company A in respect of the Taxpayer (facts 2 and 9), the agreement by the Taxpayer that he was liable to salaries tax in the year of assessment 1990/91 (fact 8), the absence of any separate bank account for Company B (fact 24), the failure to send Company A any debit note or invoice for services rendered (fact 24), the lack of evidence to show that the Taxpayer risked his own capital, the lack of any credible evidence that the Taxpayer provided his own equipment and hired his own helpers, and the total non-disclosure of the existence of Company B to anyone other than the Inland Revenue Department, all indicate that the Taxpayer was not trading on his own account. In the Commissioner's submission, the existence of Company B was co-extensive with the Taxpayer's relationship with Company A: in essence the Commissioner argued that it started and ended with the commencement and cessation of the Taxpayer's employment in Company A.

The Commissioner then contended that the alleged relationships between the Taxpayer and his parents (claimed by the Taxpayer to be employees) and the sub-agents (claimed by the Taxpayer to be independent contractors) should not be accepted. In this regard, the Commissioner argued that all these persons cannot be arbitrarily split up by the Taxpayer -- some as *his* employees (his parents) and the remainder as independent agents of *Company A*. After all, according to the Taxpayer, both these groups of persons signed the same application form which he alleged he also signed.

In conclusion, the Commissioner submitted that the Taxpayer had failed to discharge the onus of proof that the assessments appealed against were incorrect or excessive. In this regard, the Commissioner expressly urged us, particularly having regard to the matters referred to above under the heading 'Cross-examination of the Taxpayer', that the Taxpayer's evidence was simply not credible and should be rejected.

The relevant law

Income from employment is liable to salaries tax; profits from a trade, profession or business are liable to profits tax (Inland Revenue Ordinance, sections 8 and 14).

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 on the overall classification of an individual (see also *Halsbury's Laws of England* "Contract of Employment" vol 16, 4th ed, 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. This was approved by the Privy Council 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."'*

The way in which the parties themselves treat the contract and the way in which they describe and operate it is 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).

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).*

Preliminary matter decided by the Board

As shown at facts 17 and 18 the Taxpayer did not lodge his appeal to the Board of Review within the normal time limit of one month after the transmission to him of the Deputy Commissioner's written determination (section 66(1)). It transpires, however, that during the whole of the appeal period the Taxpayer was absent from Hong Kong. Upon his return to Hong Kong, he lodged his appeal within one month. We have seen a copy of the Taxpayer's travel document which verifies this fact. The Commissioner does not oppose the late appeal. Accordingly, in terms of section 66(1A) we decided to extend the period for giving notice of appeal. We then proceeded to hear the substantive matter for our decision.

Reasons for decision

The relevance and extent of control. We appreciate that in distinguishing between a contract of service and a contract for services control is no longer regarded as the sole determining factor, although it will nearly always have to be considered (see Market Investigations v Minister of Social Security [1969] 2 QB 173 per Cooke J at 184).

In this regard, we do not accept the Commissioner's argument that the restrictions placed by Company A upon the Taxpayer in relation to matters such as working schedule and leave requirements show a level of control by Company A which is unequivocally consistent with the existence of an employment relationship. The evidence in relation to these matters, which we have accepted as fact, is that the Taxpayer's working hours were not strictly regulated (fact 22). Moreover, there is no evidence before us that Company A actually imposed control over the manner in which the Taxpayer carried out his work. In short, any inference of control present in this case is insufficient in degree or extent to justify the conclusion that the Taxpayer must be an employee of Company A. Indeed, the apparent absence of relevant control is a factor, albeit not a conclusive factor, supporting the Taxpayer's argument.

Integration. We accept the Commissioner's argument that the 'Staff History Enquiry' (fact 27) indicates that the Taxpayer has, to a certain degree, been integrated into Company A. However, the other factor specifically relied upon by the Commissioner, that is, the receipt by the Taxpayer of salary/allowance from Company A, stands on a different footing. In this regard, we have found that the Taxpayer was not paid a salary (fact 23); rather he was paid a monthly allowance of a peculiar nature. We accept the tenor of the Taxpayer's evidence that payment of the allowance was premised upon the Taxpayer meeting a certain client target set by Company A. The reality was that if he did not bring in a sufficient quota of

clients he would not receive any allowance. Moreover, unlike ordinary employees of Company A, the Taxpayer received no fringe benefits at all from Company A.

In these circumstances, we cannot conclude that the Taxpayer was sufficiently integrated into the enterprise of Company A to the extent that he must have been an employee of Company A. The diverse matters relied upon by both parties to illustrate the level, or lack, of integration are simply factors which to varying degrees indicate the overall classification of the Taxpayer as either an employee or as an independent contractor. They selectively justify one conclusion or the other and cannot, in our view, be determinative of the dispute before us. Our task is to balance *all* relevant factors.

The economic reality. Case law of the highest authority indicates that in distinguishing a contract of service from a contract for services the fundamental test is to ask whether:

> *'Is the person who has engaged himself to perform these services performing them as a person in business on his own account? [If not] then the contract is a contract of service.'* (see Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764)

In this regard, we appreciate the dangers of simply focusing upon the factors which have been considered in previous cases. We remind ourselves of the warning expressed in Hall v Lorimer [1994] STC 23 that application of this test must not become a mechanical exercise in just ticking a check list. In any event, an analysis of the factors referred to with approval in Lee Ting-sang v Chung Chi-keung does not give a clear answer to the present dispute: some factors support the finding of employment (such as the absence of evidence relating to necessary provision by the Taxpayer of his own equipment and staff and whether he has been exposed to financial risk); other factors support a contrary finding (such as his level of independence, overall responsibility for managing his activities and the degree to which he can profit from sound management).

In the result we must, as indicated by the authorities binding upon us, step back and look at the totality of the facts before us. In doing this, we do not hesitate to conclude that the Taxpayer was carrying on business on his own account.

In reaching our conclusion, we have not disregarded the arguments of the Commissioner whereby Mr Chiu ably listed a series of factors which indicated that the Taxpayer was an employee of Company A. Furthermore, in light of the specific matters discussed above under the heading 'Cross-examination of the Taxpayer', we have been particularly cautious against taking the Taxpayer's evidence at face value. But in the final analysis, we found that the Taxpayer's description of his working relationship with Company A, which was crucial to this appeal, we inherently believable. The picture that he painted, which we have accepted, is as follows:

> He used Company A as an umbrella under which he could shelter and attract clients to enter into foreign exchange transactions. Subsequently he recruited so-called sub-agents to help carry out this activity. When attracting clients he

> made no mention of Company B for the obvious reason that the clients felt more comfortable and confident with Company A (than with the Taxpayer personally) as the entity with whom they contracted. In essence, the arrangement between the Taxpayer and Company A was co-operative in the sense that the Taxpayer used the premises of Company A, paid a fee (or rent) for that privilege, and then collected commission from Company A referable to the client business he and his cohort of sub-agents introduced.

In our view, the picture which we have summarised above clearly shows that the Taxpayer was in business on his own account. Although the transactions of his clients were processed through Company A and although the clients (and presumably the sub-agents) were ignorant of Company B and the details of the co-operative nature of the Taxpayer's dealings with Company A, the Taxpayer is not thereby rendered an employee of Company A. Rather the facts indicate that the Taxpayer was an entrepreneur who had entered into a collaborative arrangement with Company A with the aim of mutual gain. In this regard, we found the use of the ship (船) metaphor (discussed under the heading 'The Taxpayer's contentions') as being highly instructive (as well as evocative) to our understanding the true relationship between the Taxpayer and Company A.

During the course of the Commissioner's argument, we drew Mr Chiu's attention to previous Board of Review decisions, namely D54/90, IRBRD, vol 5, 414 and D77/90, IRBRD, vol 5, 525, wherein commodity brokers were held to be independent contractors and not employees. Mr Chiu properly responded by referring us to Hall v Lorimer [1994] STC 23 where it was stated per Nolan LJ at 28-29:

> *'[In deciding whether or not the contracts from which the taxpayer derived his earnings were contracts of service], there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another.'*

We accept this approach but, as Mr Chiu also correctly noted, decisions of different Boards of Review should, where possible, be consistent. In our view the present case *is* similar to the case of commodity brokers working on their own account who simply sink or swim depending upon their individual ability. It was in this context that we turned to these earlier Board of Review decisions. We find them entirely consistent with our conclusion.

For all the above reasons, we conclude that the Taxpayer's income from Company A arose from his carrying on business on his own account. The income in dispute was thus properly subject to profits tax and not to salaries tax.

Before making our order we reiterate one final matter. Our findings concerning the accounts of Company B may well mean that the Taxpayer has won the battle but not the war. In view of the way in which the Taxpayer presented part of his evidence before this Board, that would not seem to be an unjust result.

On the basis of our reasons set our above, we order that the Taxpayer's appeal be allowed and the assessments under appeal be discharged.