Case No. D16/03

Profits tax – income from employment or income from carrying on a business on own account – profits tax charging provision – salaries tax charging provision – onus of proof on appellant – fundamental test to be applied is the person who has engaged himself to perform these services performing them as a person in business on his own account – if 'yes', then the contract is a contract for services – if 'no', then the contract is a contract of service – relevant factors to be considered – no exhaustive list – sections 8(1), 8(1A), 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO') – no appellant has the right to amend any statement of facts.

Panel: Kenneth Kwok Hing Wai SC (chairman), Shirley Conway and Robert Michael Wilkinson.

Date of hearing: 31 March 2003.
Date of decision: 15 May 2003.

The appellant objected against the profits tax assessments for the years of assessment 1992/93 to 1995/96 raised on her, claiming that the income she received from the following (a) and (b) were income from employment instead of income from carrying on a business on her own account:

(a) the Offshore Company which was a company incorporated outside Hong Kong and a commission agent engaged in the provision of financial consultancy services;

(b) the Local Subsidiary which was incorporated as a private company in Hong Kong on 23 May 1991 and at all relevant times was a subsidiary of the Offshore Company. It was registered as an investment advisor in Hong Kong with the Securities and Futures Commission ('SFC').

The appellant further claimed that the income should be exempt from salaries tax because it was derived from an employment outside Hong Kong.

The appellant has been appointed as consultant of the Offshore Company since 8 May 1992 before she was appointed as a director of the Offshore Company on 12 December 1994.

At all relevant times, the appellant was registered with the SFC as an investment representative of the Local Subsidiary.

The appellant was also appointed as a director of the Local Subsidiary on 1 November 1994.

On 8 February 1995, the appellant signed an agreement with the Local Subsidiary under which the appellant was appointed as a consultant of the Local Subsidiary.

The appellant terminated her services with the Local Subsidiary on 31 December 1995.

The facts appear sufficiently in the following judgment.

Held:

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

2. Section 14(1) is the provision charging profits tax:

   'Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, professional or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'

3. Section 8(1) is the provision charging salaries tax:

   'Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –

   (a) any office or employment of profit'.

4. Section 8(1A) provides that:

   'For the purposes of this Part, income arising in or derived from Hong Kong from any employment –

   (a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services'.

5. The fundamental test, according to Lord Griffiths, delivering the opinion of the Privy Council in Lee Ting-sang v Chung Chi-keung and another [1990] 1 HKLR 764 at pages 766 to 767, is:

'*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:*

"This fundamental test to be applied is this:

'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'

If the answer to that question is 'Yes', then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."'

6. A few years later, in Hall v Lorimer [1994] 1 WLR 209, Nolan LJ said (at page 216):

'*In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another. I agree with the views expressed by Mummery J. in the present case [1992] 1 W.L.R. 939, 944:*

"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the

accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The detail may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in Walls v. Sinnett (1986) 60 T.C. 150, 164: 'It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in context of another case.'"'

7. Was the appellant who had engaged herself to perform the services performing them as a person in business on her own account? The Board decided that the answer was 'no' and the contract was a contract of service.

8. The Offshore Company and the Local Subsidiary had significant control over the appellant. Clause 4(B) of the agreements provided that the appellant should comply with company rules, regulations and instructions after reciting that it was primarily for the appellant to determine the manner in which she would promote the financial products. Clause 5(A) set out a list of negative covenants on the part of the appellant. Clause 8(A) and (B) listed the restrictive covenants which the appellant was bound by, even after termination of her appointment.

9. Clause 6(E) referred to the appellant as an 'independent contractor' and clause 11 provided that nothing in the agreement constituted the appellant an employee. As the respondent accepted, these provisions were not decisive.

10. Clause 7(A) provided that the appellant should bear all travelling, entertainment and other out-of-pocket expenses except with the company's written approval. Thus the rule was not absolute. In any event, most employees had to bear their own travelling and out-of-pocket expenses and were not encouraged or permitted to entertain. The respondent also relied on clause 6(A)(iv) which provided that the appellant would receive no remuneration apart from commission. Her position was no different from piece-rate workers or employees.

11. The appellant had no business or office address of her own. The Offshore Company or the Local Subsidiary provided her with a desk at their business address at no expense to her.

12. The appellant did not provide any equipment of her own and she used the telephone and fax of the Offshore Company or the Local Subsidiary. She used the facilities of the Offshore Company or the Local Subsidiary at no expense to her. Although she paid for her own pager and at a later stage her own mobile phone, this was for personal use and sometimes for work.

13. The appellant did not hire any helper of her own and the Local Subsidiary gave her a team of consultants at the Local Subsidiary for her to lead in January 1993. She was also assigned some potential customers who had responded favourably to cold calls made by a cold caller of the Offshore Company or the Local Subsidiary.

14. The appellant was given a week's training at no expense to her when she first joined the Offshore Company and at a later stage she was sent abroad on an all expenses paid training.

15. The Local Subsidiary supplied the appellant with name cards holding her out as 'Principal Consultant'. While she would 'profit' from successful sales of financial products, that might not have much to do with sound management in the performance of her task and there was no question of any loss on her part no matter how badly or poorly she went about her task.

16. 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, the Board concluded that she was not carrying on business on her own account.

17. The appellant had thus discharged the onus of showing that the profits tax assessments are incorrect in that she was not carrying on business on her own account. The Board allowed the appeal and thereby annulled the profits tax assessments concerned.

18. As there was no determination by the Commissioner on her objection against the salaries tax assessments, the Board expressed no view on whether she was chargeable with salaries tax under section 8(1) or section 8(1A) of the IRO.

Obiter:

No appellant has the right to amend any statement of facts. Facts may be agreed by the parties, that is, the appellant and the respondent. Facts may be proved. But facts may not be amended at the appellant's pleasure or leisure.

Appeal allowed.

Cases referred to:

Market Investigations Limited v Minister of Social Security [1969] 2 QB 173
Lee Ting-sang v Chung Chi-keung and another [1990] 1 HKLR 764
Hall v Lorimer (1994) STC 23 {also reported in [1994] 1 WLR 209}
D103/96, IRBRD, vol 12, 49
CIR v Geopfert 2 HKTC 210
D79/97, IRBRD, vol 12, 461

Tse Yuk Yip for the Commissioner of Inland Revenue.
Lau Kam Cheuk of Messrs S Y Leung & Co, Certified Public Accountants, for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 21 November 2002 whereby:

(a) Profits tax assessment for the year of assessment 1992/93 under charge number 2-5016126-93-A, dated 5 January 1998, showing assessable profits of $883,869 with tax payable of $132,580 was reduced to assessable profits of $842,174 with tax payable of $126,326.

(b) Profits tax assessment for the year of assessment 1993/94 under charge number 3-2715325-94-5, dated 5 January 1998, showing assessable profits of $1,463,969 with tax payable of $219,595 was increased to assessable profits of $1,495,548 with tax payable of $224,332.

(c) Profits tax assessment for the year of assessment 1994/95 under charge number 3-2627620-95-3, dated 5 January 1998, showing assessable profits of $1,290,455 with tax payable of $193,568 was increased to assessable profits of $1,404,687 with tax payable of $210,703.

(d) Profits tax assessment for the year of assessment 1995/96 under charge number 3-3776434-96-6, dated 5 January 1998, showing assessable profits of $189,469 with tax payable of $28,420 was increased to assessable profits of $193,078 with tax payable of $28,961.

The agreed facts

2. Subject to changing the date of incorporation in 'fact' (3) to 23 May 1991, and subject to correction of a number of clerical and grammatical errors, the facts in the 'Facts upon which the determination was arrived at' in the determination were agreed by the parties and we find them as facts. For the purpose of our decision, the following statement of those facts suffices.

3. The Appellant objected against the profits tax assessments for the years of assessment 1992/93 to 1995/96 raised on her, claiming that the income she received from the Offshore Company and the Local Subsidiary was income from employment instead of income from carrying on a business on her own account. The Appellant further claimed that the income should be exempt from salaries tax because it was derived from an employment outside Hong Kong.

4. The Offshore Company is a company incorporated outside Hong Kong. At all relevant times, the Offshore Company was a commission agent engaged in the provision of financial consultancy services. It commenced business on 23 July 1991 and earned commission income by referring investors' applications for financial products to financial product providers. The Offshore Company appointed individual consultants to solicit on its behalf investors' applications for financial products in Hong Kong.

5. The Local Subsidiary was incorporated as a private company in Hong Kong on 23 May 1991. At all relevant times, it was a subsidiary of the Offshore Company. It was registered as an investment advisor in Hong Kong with the Securities and Futures Commission ('SFC').

6. On 8 May 1992, the Appellant signed an agreement with the Offshore Company ('the First Agreement') under which the Appellant was appointed as a consultant of the Offshore Company.

7. On 8 August 1992, the Appellant applied to the SFC for registration as an investment representative. In the application form, the Appellant filled in the following particulars:

Name of employer in English : [The Local Subsidiary]

Capacity employed : Consultant trainee

8. At all relevant times, the Appellant was registered with the SFC as an investment representative of the Local Subsidiary.

9. The Appellant was appointed as a director of the Local Subsidiary on 1 November 1994.

10. The Appellant was appointed as a director of the Offshore Company on 12 December 1994.

11. On 8 February 1995, the Appellant signed an agreement ('the Second Agreement') with the Local Subsidiary under which the Appellant was appointed as a consultant of the Local Subsidiary. The terms in the Second Agreement were identical to those in the First Agreement save that the governing law under clause 15 was the laws of Hong Kong.

12. By notice dated 8 February 1995, the Local Subsidiary confirmed with the Appellant that the Second Agreement superseded the First Agreement.

13. The Appellant terminated her services with the Local Subsidiary on 31 December 1995.

14. The Local Subsidiary filed employer's return for the year ended 31 March 1996 in respect of the Appellant showing the following particulars:

Capacity in which employed	:	Director
Period of employment	:	1-4-1995 to 31-12-1995
Income:		
Salary	:	$130,000
Bonus	:	$781,251
Total		$911,251
Quarters provided:		
Nature of quarters	:	Flat
Period provided	:	1-4-1995 to 31-12-1995
Rent paid to landlord by employer	:	$360,000

15. On 10 July 1996, the Appellant filed tax return for the year of assessment 1995/96 and declared in the return the following income under salaries tax:

Employer	:	[The Local Subsidiary]
Capacity in which employed	:	Director
Period of employment	:	1-4-1995 to 31-12-1995
Particulars:		
Salary	:	$130,000
Bonus	:	$762,816
Total		$892,816
Quarters provided	:	(same as that in the employer's return)

16. The assessor raised on the Appellant the following salaries tax assessment for the year of assessment 1995/96:

	$
Self income	911,251
Residence	89,281
Assessable income	1,000,532
Tax payable	150,079

The Appellant did not object against the assessment.

17. The assessor commenced an investigation into the tax affairs of the Appellant. On 13 June 1997, the appellant attended an interview with the assessors. During the interview, the assessor proposed to assess the Appellant's income from the Offshore Company and the Local Subsidiary under profits tax and allow deductions for outgoings and expenses to the extent of 20% of the commission income.

18. The Appellant did not accept the assessor's proposal and contended that she was an employee of the Offshore Company.

19. The assessor issued returns for the years of assessment 1992/93 to 1994/95 to the Appellant. In the profits tax return for the year of assessment 1992/93, the Appellant declared that she had not carried on any business during the year of assessment. In the salaries tax return for the year of assessment 1992/93 and the tax returns for the years of assessment 1993/94 and 1994/95, the Appellant reported the following income under salaries tax with the Offshore Company as the employer:

		1992/93	**1993/94**	**1994/95**
Capacity in which employed	:	Consultant	Consultant	Consultant
Period of employment	:	1-4-1992 to 31-3-1993	1-4-1993 to 31-3-1994	1-4-1994 to 31-3-1995
Particulars:				
Commission	:	£64,682	£157,478	£136,218

20. The assessor had accepted the Appellant's claim that out of the total amount paid to her during the year ended 31 March 1993, £6,597.33 was another person's income. She had subsequently refunded the sum to the other person.

21. On 5 January 1998, the assessor raised on the Appellant the following estimated profits tax assessments:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
	$	$	$	$
Assessable profits	883,869	1,463,969	1,290,455	189,469
Tax payable	132,580	219,595	193,568	28,420

22. The Appellant, through her then representatives, objected against the above profits tax assessments on both the quantum of the assessable income and the basis of the assessment.

23. On divers dates, the assessor raised on the Appellant the following alternative salaries tax assessments for the years of assessment 1992/93, 1993/94 and 1994/95 and additional salaries tax assessment for the year of assessment 1995/96:

(a) Salaries tax assessments

Year of assessment	**1992/93**	**1993/94**	**1994/95**
	$	$	$
Self income	1,104,836	1,822,911	1,755,864
Tax payable	165,725	273,448	263,379

(b) Additional salaries tax assessment 1995/96

	$
Self income	1,149,952
Residence	114,995
Total assessable income	1,264,947
Less: Amount previously assessed [paragraph 16]	1,000,532
Additional net chargeable income	264,415

Tax payable	189,742
Less: Tax previously assessed	150,079
Additional tax payable	39,663

24. Messrs S Y Leung & Co, on behalf of the Appellant, objected against the above salaries tax assessments.

25. During the period from 1 April 1992 to 31 March 1996, the Appellant had travelled outside Hong Kong on the following days:

Date of departure from Hong Kong	**Date of arrival in Hong Kong**	**Number of days outside Hong Kong**
6-2-1993	7-2-1993	1
2-4-1993	14-4-1993	12
29-11-1993	14-12-1993	15
4-2-1994	11-2-1994	7
5-11-1994	20-11-1994	5
30-12-1994	2-1-1995	3
15-8-1995	20-8-1995	5

26. The assessor issued a statement setting out the facts of the case to the Appellant and Messrs S Y Leung & Co for comments. In reply, Messrs S Y Leung & Co stated that the Appellant considered that her income from the Local Subsidiary should be chargeable to salaries tax. The Appellant confirmed that during the period from April 1992 to October 1994, she was not subject to any fixed working hours and that she was not entitled to annual leave.

27. The assessor accepted the Appellant's claim that her income derived from the Local Subsidiary in her capacity as director should be charged to salaries tax. The assessor maintained that the income derived by the Appellant under the First Agreement and the Second Agreement should be charged to profits tax. He proposed to revise the profits tax assessments for the years of assessment 1992/93 to 1995/96 as follows:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
	$	$	$	$
Commission	1,052,717	1,869,435	1,755,858*	241,347**
Less: 20% expenses	210,543	373,887	351,171	48,269
Assessable profits	842,174	1,495,548	1,404,687	193,078
Tax payable	126,326	224,332	210,703	28,961

* 1994/95: £145,445.26 × 12.0723

** 1995/96: (£7,856.93 + £12,000) × 12.1549

The determination

28. By his determination, the Commissioner:

(a) concluded that at all material times, the Appellant was carrying on a business on her own account in carrying out her duties under the First and Second Agreements (' the

Agreements') and hence her income from the Offshore Company and the Local Subsidiary in her capacity as consultant should be assessed under profits tax;

(b) endorsed the assessor's computation and proposed revision of the profits tax assessments for the years of assessment 1992/93 to 1995/96;

(c) added that even if the Appellant's agreement with the Offshore Company were a contract of service, her income derived therefrom would be chargeable to salaries tax because there was no evidence that it was an offshore employment;

(d) further added that even if that were an offshore employment, her income would still be chargeable to salaries tax under section 8(1A) of the IRO in respect of all income derived from services rendered in Hong Kong and that the periods the Appellant was out of Hong Kong were short and there was no evidence to suggest that any of her commission was referable to services rendered outside Hong Kong; and

(e) stated that after the profits tax assessment should have become final and conclusive, the salaries tax assessment raised for the years of assessment 1992/93 to 1995/96 and the alternative additional assessment for the year of assessment 1995/96 were to be revised to exclude the income that had been assessed under profits tax.

Reserving right to amend statement of facts

29. By letter dated 20 December 2002, Messrs S Y Leung & Co gave notice of appeal on behalf of the Appellant and added in their letter that:

> ' The appellant reserves the right to amend the Statement of Fact before or during the Board hearing.'

30. In their letter dated 7 March 2003 to the assessor, Messrs S Y Leung & Co enclosed an 'amended' statement of facts and stated that:

> ' As usual, our client reserves the right to amend the fact before or during the Board hearing.'

31. This is wholly misconceived, no appellant has the right to amend any statement of facts. Facts may be agreed by the parties, that is, the appellant and the respondent. Facts may be proved. But facts may not be amended at the appellant's pleasure or leisure.

The appeal hearing

32. At the hearing of the appeal, the Appellant was represented by Mr Lau Kam-cheuk and the Respondent by Ms Tse Yuk-yip, senior assessor.

33. Mr Lau Kam-cheuk called the Appellant to give evidence. We get the impression that Mr Lau Kam-cheuk was adducing evidence on what he thought relevant in an appeal against penalty tax assessments instead of relevant evidence on whether the profits tax assessments appealed against were excessive or incorrect.

34. Ms Tse Yuk-yip did not call any witness.

35. Mr Lau Kam-cheuk cited no authority but included the Departmental Interpretation and Practice Notes No 10 (Revised) dated 1 December 1987 in the Appellant's 'table of exhibits'.

36. Ms Tse Yuk-yip cited:

(a) Market Investigations Limited v Minister of Social Security [1969] 2 QB 173;

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

(c) Hall v Lorimer (1994) STC 23 {also reported in [1994] 1 WLR 209};

(d) Board of Review decision D103/96, IRBRD, vol 12, 49;

(e) CIR v Geopfert 2 HKTC 210; and

(f) Board of Review decision D79/97, IRBRD, vol 12, 461.

Our decision

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

38. Section 14(1) is the provision charging profits tax:

> *' Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'*

39. Section 8(1) is the provision charging salaries tax:

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

40. Section 8(1A) provides that:

> *' For the purposes of this Part, income arising in or derived from Hong Kong from any employment –*
>
> *(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services'.*

41. Ms Tse Yuk-yip reminded us of the test to be applied in deciding whether there was a contract of service or a contract for services. We take this opportunity to thank Ms Tse Yuk-yip for her able and helpful assistance in this appeal.

42. The fundamental test, according to Lord Griffiths, delivering the opinion of the Privy Council in Lee Ting-sang v Chung Chi-keung and another [1990] 1 HKLR 764 at pages 766 to 767, is:

> *' 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:*
>
> *"This fundamental test to be applied is this:*
>
> *' Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'*
>
> *If the answer to that question is ' Yes', then the contract is a contract for services. If the answer is ' No', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.""*

43. A few years later, in Hall v Lorimer [1994] 1 WLR 209, Nolan LJ said (at page 216):

> *' In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another. I agree with the views expressed by Mummery J. in the present case [1992] 1 W.L.R. 939, 944:*
>
> *"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in Walls v. Sinnett (1986) 60 T.C. 150, 164: ' It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by*

> *another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.' "'*

44. Was the Appellant who had engaged herself to perform the services performing them as a person in business on her own account? In our decision, the answer is 'No' and the contract was a contract of service.

45. The Offshore Company and the Local Subsidiary had significant control over the Appellant. Clause 4(B) of the Agreements provided that the Appellant should comply with company rules, regulations and instructions after reciting that it was primarily for the Appellant to determine the manner in which she would promote the financial products. Clause 5(A) set out a list of negative covenants on the part of the Appellant. Clause 8(A) and (B) listed the restrictive covenants which the Appellant was bound by, even after termination of her appointment.

46. Clause 6(E) referred to the Appellant as an 'independent contractor' and clause 11 provided that nothing in the agreement constituted the Appellant an employee. As Ms Tse Yuk-yip accepted, these provisions are not decisive. Clause 7(A) provided that the Appellant should bear all travelling, entertainment and other out-of-pocket expenses except with the company's written approval. Thus the rule is not absolute. In any event, most employees have to bear their own travelling and out-of-pocket expenses and are not encouraged or permitted to entertain. Ms Tse Yuk-yip also relied on clause 6(A)(iv) which provided that the Appellant would receive no remuneration apart from commission. Her position is no different from piece-rate workers or employees.

47. The Appellant had no business or office address of her own. The Offshore Company or the Local Subsidiary provided her with a desk at their business address at no expense to her. She did not provide any equipment of her own and she used the telephone and fax of the Offshore Company or the Local Subsidiary. She used the facilities of the Offshore Company or the Local Subsidiary at no expense to her. Although she paid for her own pager and at a later stage her own mobile phone, this was for personal use and sometimes for work. She did not hire any helper of her own and the Local Subsidiary gave her a team of consultants at the Local Subsidiary for her to lead in January 1993. She was also assigned some potential customers who had responded favourably to cold calls made by a cold caller of the Offshore Company or the Local Subsidiary. She was given a week's training at no expense to her when she first joined the Offshore Company and at a later stage she was sent abroad on an all expenses paid training. The Local Subsidiary supplied the Appellant with name cards holding her out as 'Principal Consultant'. While she would 'profit' from successful sales of financial products, that might not have much to do with sound management in the performance of her task and there was no question of any loss on her part no matter how badly or poorly she went about her task.

48. 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, we conclude that she was not carrying on business on her own account.

49. The Appellant has thus discharged the onus of showing that the profits tax assessments are incorrect in that she was not carrying on business on her own account.

50. As there is no determination by the Commissioner on her objection against the salaries tax assessments, we express no view on whether she is chargeable with salaries tax under section 8(1) or section 8(1A) of the IRO.

Disposition

51. The appeal succeeds and we annul the profits tax assessments referred to in paragraph 1 above.