INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D22/92

Salaries tax – whether income subject to salaries tax or profits tax – what expenses are deductible against salaries tax.

Panel: William Turnbull (chairman), Albert Ho Chun Yan and Maxine Kwok Li Yuen Kwan

Date of hearing: 30 June 1992.
Date of decision: 25 August 1992.

The taxpayer was employed as a director of a company and earned a salary and bonus. He claimed to have incurred substantial entertainment expenses which he sought to deduct from his salary income. The taxpayer was employed by another company at the same time but the taxpayer registered himself as carrying on business and claimed that the income which he received from the second employer was not employment income. He claimed that he was carrying on business for his own account and submitted an expense account which he claimed was the accounts of his business. The assessor assessed the taxpayer to tax on the basis that all of his income was subject to salaries tax and that the expenses claimed were not deductible. The taxpayer appealed to the Board of Review but was not able to attend the hearing which proceeded in his absence. The Board directed that the case for the taxpayer should be separately placed before it and this was done by the representative for the Commissioner who placed before the Board all of the submissions and papers produced by the taxpayer.

Held:

On the facts before it the taxpayer was an employee and not self-employed. The onus of proof is upon the taxpayer to prove expenses claimed and that such expenses are allowable under the provisions of the Inland Revenue Ordinance. The Board was not satisfied that any of the unallowed expenses which were claimed by the taxpayer had either been incurred or if incurred were deductible within the meaning of section 12(1) of the Inland Revenue Ordinance.

Appeal dismissed.

Cases referred to:

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Whittaker v Minister of Pensions and National Insurance [1967] 1 QB 156

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497
Collins v Hertfordshire County Council [1947] 1 KB 598
Cassidy v Ministry of Health [1951] 2 KB 343
Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576
Queensland Stations Proprietary Ltd v Federal Commissioner of Taxation [1945] 70 CLR 539
Montreal v Montreal Locomotive Works Ltd [1947] 1 DLR 161
Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248
United States of America v Silk [1946] 331 US 704
Lee Ting Sang v Chung Chi-kung [1990] 2 WLR 1173
D68/89, IRBRD, vol 5, 56
D36/90, IRBRD, vol 5, 295
Lomax v Newton 34 TC 558
Hamerton v Overy 35 TC 73
Lucas v Cattell 48 TC 353

Jennifer Chan for Commissioner of Inland Revenue.
Taxpayer in absence.

Decision:

This is an appeal by a taxpayer against a salaries tax assessment for the year of assessment 1989/90. The appeal relates to whether or not the Taxpayer was liable to be assessed to salaries tax or profits tax and, if he had been correctly assessed to salaries tax, what expenses were deductible against his salaries tax assessment. A preliminary point also arose as to whether or not the Taxpayer had filed his notice of appeal within the specified time and if not whether this Board should grant an extension of time. The facts are as follows:

1. Throughout the year ended 31 March 1990 the Taxpayer was employed by a private limited company ('X Ltd'). In his salaries tax return for the year of assessment 1989/90 the Taxpayer stated that the capacity in which he was employed was as a director of X Ltd and that he earned a total of salary and bonus of $423,100 for the year of assessment 1989/90.

2. In the said salaries tax return the Taxpayer claimed as a deduction from his income as director certain entertainment expenses totalling $17,225.90 which he described as follows:

> 'Entertainment – this is wholly, exclusively and necessarily required in the production of my assessable income (the amount spent was used in entertaining authors, principals and booksellers).'

3. In support of the alleged expenses the Taxpayer provided to the Commissioner a large number of credit card vouchers which appeared to relate to expenses incurred in various cafes, restaurants and nightclubs. No explanation or information was given by the Taxpayer with regard to what relationship these credit card vouchers had either to his employment or to the business of X Ltd. No breakdown nor list thereof was provided nor were any details given with regard to the alleged authors, principals, and booksellers whom the Taxpayer had claimed in his salaries tax return had been entertained. No information was given by X Ltd regarding these alleged expenses nor in what way they related to the employment of the Taxpayer or the business of X Ltd.

4. The nature of the work performed or duties of the Taxpayer as director of the X Ltd are not known. In a letter dated 5 June 1992 the Taxpayer informed this Board of Review that he had a full-time directorship with X Ltd with an income of $423,100 in the year of assessment 1989/90 and that his working hours in that job were 9:30 am to 5:30 pm. However in view of many inconsistencies in the evidence before us we are not able to find as a fact that this statement is either true or false. In an earlier letter dated 24 February 1992 also sent to this Board the Taxpayer had stated that he had been a director of X Ltd for 12 years and that he was required to attend normal office hours of 9:30 am to 5:30 pm on week days and 9:00 am to 1:00 pm on Saturdays. Here again on the evidence before us we are unable to find as a fact that this statement is either true or false. He also stated that in addition to his salary and bonus stated in his tax return he was entitled to a share of the company profits. As the share of the company profits was not included in his tax return it is assumed that the Taxpayer was a shareholder as well as a director of X Ltd.

5. With effect from 18 October 1989 the Taxpayer was employed by another company which carried on foreign exchange (forex) business. For convenience we will refer to this company as 'Company A'. The terms of the employment of the Taxpayer with Company A were set out in a letter dated 18 October 1989 which we set out in full as follows:

> 'This is to acknowledge your application and confirm your enrolment in our "Account Executive Training Course" starting on 18 October 1989.
>
> Upon opening of your first customer account, you will be employed as an assistant marketing manager of our company. The first three months of your employment shall be a probationary period during which either party may terminate this agreement on immediate notice. After the probational period, this agreement may be terminated at any time by either party giving to the other one week's notice in writing of intention so to terminate it and by the company without notice or payment in lieu thereof upon serious misconduct or persistent unpunctuality, neglect of duty or breach of regulations made by the company or upon breach of any (of) the provisions hereof or by the company by one week's notice if

> you shall be absent from your employment without the company's permission from any cause whatsoever for a period exceeding in the aggregate seven days in any one year.
>
> Your starting salary will be $4,000 per month. After one year's continuous service, you will be entitled to two weeks' annual leave (12 working days).
>
> The working hour will be as stipulated by your department head and may be revised from time to time.
>
> Should you accept this employment, please sign and return the duplicate of this agreement at your earliest convenience.'

6. The Taxpayer accepted the foregoing terms by signing a copy of the letter dated 18 October 1989.

7. As the meaning and application of the foregoing letter of employment is one of the fundamental questions which we must decide in this appeal we do not set out in these facts our findings with regard thereto.

8. By application dated 31 May 1990 the Taxpayer registered himself under the Business Registration Regulations as carrying on a business of 'investment of currencies of (and) bullion with the date of commencement stated to be 1 November 1989'. In the application for registration the word 'of' appears to have been written in error for the word 'and' which we have set out in brackets above. The address given as the place of business was the then residential address of the Taxpayer.

9. Company A filed with the Commissioner an employer's tax return dated 15 June 1990 in respect of the Taxpayer for the year of assessment 1989/90. This employer's tax return stated that the Taxpayer was employed as an assistant sales director and that during the period from 18 August 1989 to 31 March 1990 Company A paid to the Taxpayer salary or wages of $27,645.12, commission or fees of $174,865 and a 'bounty' of $44,990 making a grand total of $247,500.12

10. The assessor did not accept the salaries tax return filed by the Taxpayer (fact 1) but instead raised a salaries tax assessment for the year of assessment 1989/90 on total taxable income of $670,000, made up of the $423,100 from X Ltd and $247,500 being the income from Company A, and assessed the Taxpayer thereon to tax on $100,590. By letter dated 19 November 1990 the Taxpayer objected to this salaries tax assessment on the following ground:

> 'As the other income of $247,500 in investment of currencies and bullion service should be taxed under the category of a sole proprietorship

business concern, I should be much obliged if you could allow me to do so as the attainment of the extra income incurred a lot of expenses such as rebates, entertainment, travelling, use of pager/portable phone, printing of the name cards etc.'

11. The assessor made enquires of Company A with regard to the relationship between the Taxpayer and Company A and Company A provided the following information:

'(a) that the Taxpayer's duties were (i) to recruit new staff; (ii) to find new clients and (iii) to handle trading transactions of the clients:

(b) that the Taxpayer was not allowed to work for other organisations unless with prior approval;

(c) that the Taxpayer had to attend work at regular hours and to observe the company's regulations;

(d) that the Taxpayer had to report all his activities to his supervisor;

(e) that in the performance of his duties, the Taxpayer was not required to provide his equipment or to employ his assistant.

(f) that in the performance of his duties, the Taxpayer was not required to incur any outgoing or expense.'

12. A provisional profits tax return dated 14 January 1991 was sent by the Commissioner to the Taxpayer and was returned by the Taxpayer dated 18 January 1991. In the estimated return the Taxpayer declared the actual income of his business to be $247,500 with a net estimated profit of $104,018 after deducting expenses for the period 1 November 1989 to 31 March 1990 of $143,482. The 'accounts' attached to this provisional profits tax return comprised one sheet of paper which read as follows:

Expenses
1-11-89 – 31-3-90

	$	$	$
1. Travelling –			
(a) (car number mentioned) 1982 Mercedes 280SE Licence (6235 p.a.) $519 x 5		2,595	

			$	$	$
		Insurance (7107 p.a.) $592 x 5	2,960		
		Petrol $1500 x 5	7,500		
		Maintenance & Repair $1500 x 5	7,500		
		Cleaning $220 x 5	1,100		
		Tunnel toll $200 x 5	1,000		
		Depreciation $1800 x 5	9,000		
	(b)	MTR & taxi fare			
		$400 x 5	2,000		
				33,655	
2.	Telephone & Pager				
		Telephone $48 x 5	240		
		Pager $228 x 3	684		
		$238 x 2	476		
				1,400	
3.	Entertainment & gifts				
		Receipts available; in the Forex & Bullion trade, these expenses are a must		36,337	
4.	Company licence fee			730	
5.	Rebates to clients	A/C (xxx) & (xxx) (Big A/Cs of Mr (xxx xxx xxx))			
	($60 per trade) $60 x 656			39,360	
6.	Stationery, calculator, battery, postage			2,000	

7.	Salary of a sub-agent	$4500 x 5		22,500	
8.	Rent	$1000 x 5		5,000	
9.	Electricity & sanitation	$200 x 5		1,000	
			$	$	$
10.	Food allowance & drink	$300 x 5		1,500	
					143,482

We were informed by the Commissioner's representative at the hearing of the appeal that the final accounts for the alleged business for the same period were in similar form showing the gross income and the same list of alleged expenses.

13. By his determination dated 7 January 1992 the Deputy Commissioner of Inland Revenue rejected the objection by the Taxpayer and confirmed the salaries tax assessment against which the Taxpayer was appealing. The determination was sent to a wrong address but was eventually forwarded to the Taxpayer and upon receipt thereof the Taxpayer gave notice of appeal to this Board of Review dated 24 February 1992 and received by this Board of Review on 2 March 1992. By letter dated 17 March 1992 the Taxpayer applied for an extension of time within which to file his notice of appeal and pointed out that the determination had been sent by the Deputy Commissioner to the wrong address.

14. The Taxpayer has emigrated to Canada where he is now living and by letter dated 5 June 1992 addressed to the Board of Review requested that his appeal be heard in his absence.

15. In his grounds of appeal the Taxpayer took issue with the Deputy Commissioner who in his determination had stated that the Taxpayer had not provided evidence to substantiate the amounts of the claimed expenses totalling $143,482. At the hearing of appeal the representative for the Commissioner confirmed to this Board that a letter dated 16 August 1991 addressed by the Taxpayer to the Commissioner had been duly received together with the vouchers and documents referred to therein. As we will be referring to the documents and vouchers in our decision we are not setting out the same in these facts.

At the hearing of the appeal the Commissioner was represented by Mrs Jennifer Chan, a senior assessor in the Appeal Division of Inland Revenue Department. We would like to place on record our appreciation of the way in which Mrs Chan handled this appeal and placed the matter before the Board. As is apparent from the facts the Taxpayer was not able to attend the hearing as he has emigrated to Canada. As in previous cases the Board

asked the Commissioner's representative, Mrs Chan, if she would be able to present the case for the Taxpayer as well as the case for the Commissioner. This she agreed to do. In such cases as the present where the Taxpayer is through no fault of his own unable to attend the hearing it is important that the Board of Review should do whatever it can to ensure that justice is done. Mrs Chan first placed before the Board the case for the Taxpayer and it is now convenient for us to summarize the same.

Mrs Chan first referred to the determination of the Deputy Commissioner and took us through the same. She confirmed that the Deputy Commissioner was incorrect when he said in his determination that the Taxpayer had not provided any documents and vouchers and tabled before the Board a copy of the Taxpayer's letter of 16 August 1991 together with the original vouchers, copy documents and papers which accompanied the same. She also tabled before us a letter dated 3 August 1991 from the assessor to the Taxpayer. As we will be referring to this later in this decision we now set out in full the letter from the assessor and the reply from the Taxpayer:

Re: Sole Proprietorship
B/R No. xxxxxx

I am reviewing the accounts of your subject business for the period from 1 November 1989 to 31 March 1990. Under the authority of section 51(4) of the Inland Revenue Ordinance, I hereby give you notice, requiring you to submit within 14 days the following documents/records/information:

(1)	Travelling:	Licence	$2,595
		Insurance	$2,960
		Petrol	$7,500
		Maintenance	$7,500
		Cleaning	$1,100
		Tunnel Toll	$1,000
		MTR & Taxi fare	$2,000

(i) Vouchers, receipts or statements in support of the subject expenditures

(ii) Date of purchase of the motor vehicle

(iii) Purchase price and terms of purchase of the motor vehicle

(iv) Vouchers or statements in support of the purchase of the motor vehicle

(2) Telephone & Pager $1,400

Entertainment & Gifts $36,337

Rebates to Clients $39,360

(i) Vouchers, receipts or statements in support of the subject expenditures

(ii) State the names and addresses of the persons in receipt of the gifts and rebates

(3) Stationery & calculator $2,000

Vouchers and receipts in support of the expenditures

(4) Salary to sub-agent $22,500

(i) Name, address, identity card number of the sub-agent

(ii) Employment contract copy

(iii) Mode of Payment

(iv) Services provided by the employee

(v) Relationship with you

(vi) Vouchers and receipts in support of the expenditures

(5) Rent $5,000

Electricity & sanitation $1,000

(i) Vouchers, receipts or statements in support of the expenditures

(ii) Address of the premises.

(iii) Name and address of the recipient of the rent

(iv) Area and nature of premises

(6) Food allowance and Drink $1,500

(i) Vouchers or receipts in support of the expenditures

(ii) State the names of the persons who received the benefits

Please note that the Inland Revenue Ordinance provides heavy penalties for any person who makes false records or submits false information with intent to evade tax.'

The reply from the Taxpayer dated 16 August 1991 read as follows:

'

Sole Proprietorship B/R No. xxxxxx
Your Ref xxxxxx

In response to your letter of 3 August 1991, I give below the information required by you for your consideration:

1. Travelling : licence (photocopy enclosed)

: insurance (receipt enclosed)

: petrol (have used Caltex petrol for decades; photocopy of Star Card with A/C no. enclosed)

: maintenance (repair record enclosed)

: cleaning (no receipts: have been cleaned by a caretaker, Mr Y at $220 per month)

: tunnel toll (no receipts)

: MTR & taxi fare (no receipts)

(i) As I have not purchased tunnel toll tickets as well as not asking the caretaker to issue receipts on cleaning, I am sorry that no receipts in these respects are available. However, I wish to draw your attention to the fact that no provisions have been made with regard to parking and fixed penalty fines in the above-mentioned expenses.

(ii) March 1985

(iii) $228,000 by cash

(iv) Not available; please refer to Vehicle Registration Document

2. Telephone (xxxxxxx solely for business use)
$48 x 5 = $240

Pager (receipts and agreement enclosed)

Entertainment & gifts (receipts enclosed)

Rebates to clients - Big A/Cs of $500,000
Mr xxx xxx xxx
x/F xyz Mansion
123 xyz Road
Hong Kong

Gifts* to Mr xxx xxx xxx (address as above) &
Mr xxx xxx xxx – A/C of $300,000
XYZ Company
x/F
ABC Building
Hong Kong
* Bottles of wine for Christmas 1989

3. Stationery, calculators & battery (receipt enclosed)
postage - $1,000

4. Salary to sub-agent
(i) xyz xyz xyz ID No. xxxxxxx(x)
King's Road
North Point
Hong Kong

(ii) Nil

(iii) Monthly salary

(iv) To look for clients; personally invested in currency with an A/C in the Forex Company. She successfully introduced three accounts during the said period.

(v) Employee

(vi) Vouchers enclosed

5. Rent
(i) (no receipts)

(ii) (Residential address of Taxpayer as per his business registration)

(iii) (Name of Taxpayer and residential address of Taxpayer as per business registration)

(iv) 80 square feet - residential

Electricity & sanitation (no receipts; cleaning & sanitation by a part-time Filipino amah named Lily)

6. Food allowance & drink (no receipts; clients and xyz xyz xyz received the benefits)

If you require further information regarding the aforesaid, please don't hesitate to contact me again.

Your kind and fair consideration of this case will be much appreciated.'

We note and mention in passing that the reason why the determination was sent to the wrong address and the reason why the Taxpayer's letter of 16 August 1991 and its enclosures were not mentioned in the determination of the Assistant Commissioner was because the Inland Revenue Department was maintaining two files, one in relation to salaries tax and one in relation to profits tax. We do not wish to place blame on either the Taxpayer or the Inland Revenue Department with regard to this. Clearly when the Taxpayer was writing to the Inland Revenue Department he was of the opinion that it was one department and that it was not material whether he was writing as a salaries taxpayer or a profits taxpayer. On the other hand our Inland Revenue Ordinance provides separate charges to tax for salaries tax and profits tax and the Inland Revenue Department has different divisions dealing with the different charges to tax. Accordingly it is understandable that when the Taxpayer informed the Inland Revenue Department of his change of address in relation to his alleged business, this change was not recorded in relation to his salaries tax affairs and likewise it is understandable that when he wrote to the profits tax division this information was not known to the salaries tax division. At the hearing of the appeal we suggested to Mrs Chan that the Inland Revenue Department might see whether there are some methods whereby they can cross-reference different divisions within the department more closely in cases such as the one before us.

Mrs Chan then on behalf of the Taxpayer took us through his two letters addressed to the Board of Review dated respectively the 24 February 1992 and the 5 June 1992.

The letter of 24 February 1992 comprised the grounds of appeal of the Taxpayer set out in the form of a submission to the Board. He said that it was not necessary for him to attend work at Company A at regular hours and he said that he never once signed the attendance book. He stressed that he was the only person in the office who could do this because the company evaluated ability by business volume and not by attendance. He said that part of the content of the employment letter which he signed with Company A was cosmetic and of no value. He said that his employment as a director of X Ltd required him to work normal office hours 9:30 am to 5:30 pm on weekdays and 9 am to 1 pm on Saturdays. He said that this was in contrast to the alleged employment terms with Company A which said that he could not work for other organisations without prior approval and was required to attend Company A at regular hours. He said that Company A knew that his post with Company A was of a part-time business nature. He challenged the truth of what

Company A had told the assessor and said that Company A did not provide any typewriter, pager or calculator. He said that there was only one non-workable typewriter in the Sales Department of Company A shared by some 300 people. He said that he was not required by Company A to employ any staff but he was obliged to employ an assistant for a monthly salary of $4,000 because he already had a full-time job with X Ltd and he needed someone to help him to manage his accounts.

He said that the Deputy Commissioner in his determination was completely wrong in saying that he was not required to incur any outgoings or expenses and said that in his business it was necessary to spend substantial sums of money on entertainment, gifts, and rebates to convince persons to invest in companies of this field which had a notorious history of insecurity and dishonesty. He said that in business of this field it was not necessary for you to attend at an office or show up for work. The only thing which mattered was the business volume and the money which you could bring into Company A.

The Taxpayer's letter of 5 June requested the Board to hear the appeal in the absence of the Taxpayer and substantially repeated the submissions made in his letter of 24 February 1992. He emphasized the points which indicated that the letter of appointment dated 18 October 1989 did not reflect the true terms of his agreement with Company A. He said with regard to the expenses which he was claiming everyone in the trade knows that entertainment is absolutely necessary if you want to win or maintain business relationships. He re-affirmed the fact that he had provided documentation to substantiate the expenses which he claimed he had incurred.

Mrs Chan said that the first matter for the Board to consider was whether or not an extension of time to give notice of appeal was necessary and if so she indicated that in all of the circumstances the Commissioner would have no objection to the Board granting an extension of time under section 66(1A) of the Inland Revenue Ordinance.

Mrs Chan then said that assuming that the Board would grant the extension of time it was necessary to decide whether or not the income from Company A was subject to salaries tax or profits tax. Having made this decision the Board should then consider whether or not the expenses claimed to have been incurred by the Taxpayer were allowable as deductions or not.

That concluded the submission on behalf of the Taxpayer and as stated above we are much indebted to Mrs Chan for the manner in which she placed the Taxpayer's case before us.

Mrs Chan then, in the customary way, tables before us and read a submission on behalf of the Commissioner. She referred us to a number of legal authorities to which we will refer later in our decision. She submitted that on the facts and evidence before us and as a matter of law we should find that the Taxpayer was not carrying on a business but was an employee of Company A and accordingly the income he had received had been correctly brought within the charge to salaries tax. She then went on to submit that the expenses

which the Taxpayer claimed had been incurred had not been proved to have been incurred and furthermore were not deductible for salaries tax purposes.

Mrs Chan on behalf of the Commissioner then submitted that even if we were to hold that the Taxpayer had been carrying on business and that the expenses had been incurred, the expenses should still not be allowed because they had not been proved to have been incurred in the course of earning the income which would then be subject to profits tax.

We first of all deal with the procedural point with regard to the time when the notice of appeal was given. It appears to us that the Deputy Commissioner did send his determination to the wrong address contrary to section 64(4) of the Inland Revenue Ordinance. However we do not make any final ruling in this regard because it is not necessary for us so to do. It is a fact agreed by the Commissioner that the Taxpayer had informed the Commissioner of a change of address in relation to his alleged business, but whether such a notification is valid for salaries tax purposes would appear to be a moot point. However it is also a fact that the determination was sent to the Taxpayer and was ultimately received by him. In such circumstances if an extension of time is necessary, we have no hesitation in giving it under section 66(1A) of the Inland Revenue Ordinance. Clearly the Taxpayer was prevented by a reasonable cause from giving notice of appeal within the one month period specified. Accordingly we hereby grant the Taxpayer an extension of time if it is necessary.

We now turn to consider the question of whether or not the Taxpayer was carrying on business or whether he was an employee of Company A. This is an interesting question which has been the subject matter of many appeals recently and it appears to us that it would be beneficial if we review the authorities and make a number of statements with regard to the principles to be applied.

As will be seen from the cases when we review them, whether or not a person carries on business and is thereby self-employed or is an employee is primarily a question of fact. Over the years various judges and tribunals have suggested a number of tests which can be applied but in reality there are no comprehensive tests which can be applied to the diverse situations which can arise. Clearly when handling cases of a similar nature it is possible to formulate tests which have application to such cases but great care must be taken because the facts of different cases may be as diverse as are the cases themselves. It is necessary to look at all of the facts and not some of the facts in isolation. It is dangerous to try either to categorise cases or to develop tests of universal application. To do so tends to lead to distorting the facts to make them fit the category or the test. If there is any comprehensive test then it must be to ask oneself what would an ordinary person in Queen's Road Central decide if confronted with all of the facts. Perhaps the approach to take in most cases is to ask oneself whether, on all of the evidence, a person is carrying on a business rather than whether or not a person is an employee. Whether a person is an employee or not may in some cases be equivocable whereas the answer to the question whether or not a person has embarked upon a business with all of the trappings and attributes of a business may be much clearer.

The best starting point for a review of the legal authorities is the United Kingdom case of Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173. In that case the court had to decide for the purposes of the United Kingdom National Insurance Act 1965 whether a person was an 'employed person' under a contract of service or was a 'self-employed person'. The question which the learned judge in that case had to decide for the purposes of the National Insurance Act was similar to that which we must now decide in this case. For the purposes of the National Insurance Act in the United Kingdom persons were divided into different categories. One of which was 'employed persons', that is to say, persons gainfully occupied in employment being employment under a contract of service as opposed to 'self-employed persons', that is to say, persons gainfully occupied in employment who were not employed persons.

The fact of that case were that a lady was a member of a panel of persons available to a company to conduct interviews to obtain information for the benefit of customers of the company. During the period in question the lady was contractually engaged on a number of separate occasions by the company to conduct interviews on their behalf. The question to be decided was whether or not the lady was an employed person within the National Insurance Act 1965 or whether she was self-employed.

Cooke J after reviewing the facts said as follows:

> 'The authorities on the distinction between a contract of service and a contract for services have been extensively reviewed in a number of recent cases, and in particular I refer to the judgment of Mocatta J in Whittaker v Minister of Pensions and National Insurance [1967] 1 QB 156 and the judgment of MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.'

With these and other recent decisions before me, I do not myself propose to embark on a lengthy review of the authorities. I begin by pointing out that the first condition which must be fulfilled in order that a contract may be classified as a contract of service is that stated by MacKenna J in the Ready Mixed Concrete case [1968] 2 QB 497, 515, namely, that A agrees that, in consideration of some form of remuneration, he will provide his own work and skill in the performance of some service for B. The fact that this condition is fulfilled is not, however, sufficient. Further tests must be applied to determine whether the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service.

I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive. Thus in Collins v Hertfordshire County Council [1947] 1 KB 598, it had been suggested that the distinguishing feature of a contract of service is that the master cannot only order or require what is to be done but also how it shall be done. The inadequacy of this test was pointed out by Somervell L J in Cassidy v Ministry of Health [1951] 2 KB 343, 352, where he referred

to the case of a certified master of a ship. The master may be employed by the owners under what is clearly a contract of service, and yet the owners have no power to tell him how to navigate his ship. As Lord Parker C J pointed out in Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576, 582, when one is dealing with a professional man, or a man of some particular skill and experience, there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test.

Cases such as Morren's case [1965] 1 WLR 576 illustrate how a contract of service may exist even though the control does not extend to prescribing how the work shall be done. On the other hand, there may be cases when one who engages another to do work may reserve to himself full control over how the work is to be done, but nevertheless the contract is not a contract of service. A good example is Queensland Stations Proprietary Ltd v Federal Commissioner of Taxation [1945] 70 CLR 539, the 'drover' case, where Dixon J said, at page 552:

> 'In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered.'

If control is not a decisive test, what then are the other considerations which are relevant? No comprehensive answer has been given to this question, but assistance is to be found in a number of cases.

In Montreal v Montreal Locomotive Works Ltd [1947] 1 DLR 161, Lord Wright said, at page 169:

> 'In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortuous liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the

> business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.'

In Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248, Denning L J said, at page 295:

> 'The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.'

In United States of America v Silk [1946] 331 US 704, the question was whether certain men were 'employees' within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court decided that the test to be applied was not 'power of control, whether exercised or not, over the manner of performing service to the undertaking,' but whether the men were employees 'as a matter of economic reality'.

The observations of Lord Wright, of Denning L J and of the judges of the Supreme Court suggest that 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 not 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.

The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

We make no apology for quoting the words of Cooke J at such length because they ably summarize the law in a practical and simple manner and we could not improve upon them.

The Privy Council in Lee Ting Sang v Chung Chi-kung [1990] 2 WLR 1173, a case originating in Hong Kong, gave approval to the words of Cooke J which we have cited above. That was a case relating to the Hong Kong Employees' Compensation Ordinance. Again the question to be decided was similar to that which we have to decide in the present case, namely, whether a mason was an employee or self-employed. Lord Griffiths delivered the judgement of the Privy Council and at page 1176 said the following:

> 'What then is the standard to apply? This has proved to be the most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J in Market Investigations Ltd v Minister of Social Security.'

The Privy Council then went on to cite the words to which we have already made reference. It is perhaps worth repeating the words of Cooke J to which the Privy Council gave great weight which are as follows:

> '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 not a contract of service.'

As we have said above, when reduced to its essentials, the question which arises is what would the average person in the street say if confronted with the problem and asked to give an answer. At page 1177 Lord Griffiths in the Lee Ting Sang case says the following:

> 'Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks.'

The distinction between a self-employed person and an employee of another person is of great significance for tax purposes in Hong Kong. As is well-known, taxation in Hong Kong is charged according to a number of 'heads' of tax. One such head is salaries tax and another such head is profits tax. We do not have a comprehensive system of taxation in Hong Kong as may apply in other countries. Salaries tax is contained in part three of the Inland Revenue Ordinance. Section 12(1) of the Inland Revenue Ordinance permits the deduction for salaries tax purposes from the assessable income of a person of all outgoings and expenses 'wholly, exclusively and necessarily' incurred in the production of the assessable income provided that such outgoings and expenses are not of a domestic or private nature and excludes outgoings and expenses which comprise capital expenditure. The words 'wholly, exclusively and necessarily' have been given a notoriously narrow interpretation and when coupled with the exclusion of domestic or private nature outgoings and expenses and capital expenditure mean that very few deductions can be made from the assessable income of a person which is subject to salaries tax. Though the narrow meaning of deductible outgoings and expenses may at first sight seem harsh the picture changes when it is appreciated that if extensive deductions were allowed for salaries tax purposes, little or no salaries tax would be paid. For example, to be able to 'earn his living' a person must travel to work, must eat, must buy clothes, and must have somewhere to live.

However none of these expenses are deductible against income assessable to salaries tax. Similarly it is not open to the employee to decide of his own volition whether or not to incur expenses which might possibly relate to the business of his employer. This is a decision which should be made by the employer who alone is capable of making such decisions. If an employer wishes to delegate a discretion in this regard to an employee then the nature of the discretion and delegation must be clearly spelt out. If such is not the case then chaos would soon result.

The position regarding profits tax is in sharp contrast to salaries tax. A person carrying on business has a much wider discretion with regard to what can be deducted. Section 16 of the Inland Revenue Ordinance allows a person carrying on business to deduct all and any expenses which are incurred in the production of profits which are chargeable to profits tax and there are extensive provisions relating to matters such as capital expenditure, bad debts etc. It is assumed that a person carrying on business will only incur expenses to carry on or improve that business. However though the tests for profits tax purposes are much wider than those for salaries tax purposes it does not mean that all expenses can be deducted. They must have a direct reference to the earning of the assessable profits of the business. Clearly the personal expenses of the proprietor of a business cannot be deducted for profits tax purposes.

It can clearly be seen from the foregoing that many people may wish to bring their income within the profits tax provisions rather than the salaries tax provisions and this has led to many cases coming before different Boards of Review. Indeed we have seen many such cases recently and it is for this reason that we think it may be useful to have set out the legal principles and reasoning at some length in this decision.

Mrs Chan when addressing us referred us to cases D68/89, IRBRD, vol 5, 56 and D36/90, IRBRD, vol 5, 295. These were both cases involving the same question, namely whether a person was employed or self-employed. In addition there are many other Board of Review decisions where the same question has had to be considered and decided.

Mrs Chan also referred us to three other United Kingdom cases namely, Lomax v Newton 34 TC 558, Hamerton v Overy 35 TC 73 and Lucas v Cattell 48 TC 353 all of which related to whether or not expenses were deductible for United Kingdom income tax purposes and with which we need not deal in the present case.

We now come to look at the facts of the case before us. The starting point must be the contractual relationship between the Taxpayer and Company A. The Taxpayer has submitted that the terms of the employment set out in the letter of 18 October 1989 were not really valid. In his submission to the Board of 5 June 1992 he said:

> 'The signing of the appointment letter with the [Company A] was a request by the company on the understanding that I needed not adhere to what it said – my job was to bring in business, make money for the company and set up a team in the way of an insurance company.'

He went on to say that in fact there was no probational period or termination agreement whatsoever, that what he earned was based totally on what he earned for the company and that he would not be paid even if he attended the office but did not generate sufficient profits. He submitted that the usual termination notice was one day or 'mere disappearance'. As stated above he had pointed out that he had a full-time directorship with X Ltd and was required to work full time from 9:30 am to 5:30 pm for X Ltd so that he could not work office hours for Company A. He submitted that his working hours for Company A were 100% flexible and that he had to incur the expenses which he did. He said that he carried on his business at home, at pubs, at restaurants and at night clubs.

The onus of proof in a tax case is upon the Taxpayer to establish his case. With due respect to the submissions made by the Taxpayer in writing to this Board we are not able to come to any conclusion other than that he was an employee of Company A. We accept that the Taxpayer may not have been required to strictly comply with all of the terms set out in the letter of 18 October 1989 but we feel that we cannot simply ignore that letter. The letter clearly sets out terms which you would expect in an employee/employer relationship. The letter is capable of no other interpretations. We do not accept that a large independent company carrying on business would prepare a detailed employment letter and have it signed by an employee if such letter were meaningless. We then come to fact 11 which we have set out above. Company A provided information to the Inland Revenue Department. There would be no reason for Company A to write an untruthful letter to the Inland Revenue Department and again we cannot simply ignore this evidence. Once again the information provided by Company A clearly shows an employee/employer relationship and not a relationship between a company and an independent agent. This information is in turn supported by the fact that Company A has filed an employer tax return in respect of the Taxpayer. Whilst the filing of an employer tax return is of less value or importance, it demonstrates that so far as Company A was concerned they clearly considered that the relationship between them and the Taxpayer was one of master and servant.

In his submission to us the Taxpayer has suggested that the employment letter of 18 October 1989 was 'just a cosmetic gesture'. With due respect to the Taxpayer this does not help his case. If, as he claimed, he was an independent contractor and not an employee we can see no reason why he and Company A would enter into an agreement to try and say the opposite. We would need clear evidence from both the Taxpayer and Company A stating that the relationship between the Taxpayer and Company A was not an employee/employer relationship and explaining precisely why they had clothed the relationship in false clothing. We can find no answer to the question as to why Company A and the Taxpayer would have purported to enter into an agreement which was false.

As we have mentioned above we think that in cases of this nature it may sometimes help to ask the question whether the Taxpayer was carrying on his own business rather than whether he was an employee. We can find little in what the Taxpayer did to support his claim that he was carrying on a business. We refer again to the words of Lord Griffiths which we have quoted above:

> 'Taking all the foregoing considerations into account the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks.'

In the present case it is difficult to see the Taxpayer as a person who was a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. In reality he did little more than to take out a business registration which in itself is totally meaningless.

The Taxpayer claims to have employed someone to work for him and provided the name and address of an individual together with some vouchers stating that the person had received a salary. We have minimal knowledge as to the duties which this person carried out if such person in fact existed as an employee. We have no knowledge of the qualifications, skills, or work that such a person was supposed to have carried out. It would have been an easy matter for the Taxpayer to ask the employee to come before the Board to explain the nature of her duties.

One would expect a person carrying on business on their own account to keep proper accounts, separate bank accounts etc. The Taxpayer appears to have done none of this. His 'business accounts' comprise not more than a list of alleged expenses which raises more questions than it answers. For example he claimed to have paid rent, electricity and sanitation expenses but when asked by the assessor for particulars he revealed that this was nothing more than a fiction. In fact he paid no rent but used premises which comprised his own home. The so-called electricity and sanitation expenses are nothing more than part of his domestic expenses. He apparently owned a Mercedes motor car and no doubt he had expenses relating to the same but what is very much in doubt is whether these expenses related to a so-called business or whether they were simply once again his own personal expenses. The more one looks at the conduct and the attitude of the Taxpayer the more one doubts the genuineness of what he claims. On the evidence before us there is little to show that the Taxpayer was an independent contractor who had ventured into business on his own account with all its attendant risks. He has all of the appearances of an employee who, for tax reasons, has sought to try to show himself as carrying on a business.

With due respect to the Taxpayer his claim that he was carrying on business in his own right as opposed to being an employee is little more than a figment of his imagination. We find as a fact that he was an employee of Company A.

Having found that the Taxpayer was an employee and not a self-employed person it is then necessary for us to review the expenses which he had claimed in the light of section 12(1) of the Inland Revenue Ordinance.

Bearing in mind that the Taxpayer was not able to attend the hearing and either make representations in person or give evidence himself we have tried our best to be sympathetic to his case. However we are not able to accept on the evidence before us that

any of the expenses claimed by him come within the notoriously narrow definition of section 12 of the Inland Revenue Ordinance.

It would appear that the Taxpayer received most of his income from Company A in the form of variable commission and bounty. It is well-known that individuals who rely largely upon such types of income incur expenses to earn such income. In the expenses claimed by the Taxpayer he says that he had to entertain customers and give gifts to customers and also allegedly gave rebates to customers. Out of all of the expenses claimed by the Taxpayer these are the only ones which merit our consideration. The other so-called expenses are either unsubstantiated estimates or personal expenses of the Taxpayer.

In support of the claimed entertainment and gifts totalling $36,337 the Taxpayer produced a bundle of credit card vouchers and one or two other vouchers. We note that when he filed his salaries tax return in which he declared the income which he had received from X Ltd the Taxpayer claimed expenses of $17,225.90 (fact 2 above). That claim was supported by a similar bundle of credit card vouchers and was disallowed by the assessor. No mention of this has been made by the Taxpayer in the course of his appeal. The vouchers filed by the Taxpayer in relation to his salaries tax return are similar in nature to those which he has filed in relation to his company income. The Taxpayer appears to have simply abandoned his claim to deduct $36,337 without any explanation. In such circumstances it would be very difficult indeed for us to find in favour of the Taxpayer in respect of a similar bundle of unsubstantiated vouchers.

With regard to the allegation by the Taxpayer that he paid rebates to clients we have no evidence before us. All we have is an unsubstantiated statement from the Taxpayer.

After carefully reviewing all of the items claimed by the Taxpayer we find that the Taxpayer has not proved that he has incurred any of the same either in fact or within the meaning of section 12(1) of the Inland Revenue Ordinance.

For the reasons given we dismiss this appeal.