

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D32/90

Salaries tax – whether taxpayer should be assessed to salaries tax or profits tax – commission income.

Panel: T J Gregory (chairman), Raymond J Faulkner and Peter A Hall.

Dates of hearing: 8, 9, 10 and 19 January 1990.

Date of decision: 17 September 1990.

The taxpayer was an investment advisor with his own customers and clients. The taxpayer entered into an agreement with a company under which he would introduce business to the company and in return would be paid a percentage of the commission which was earned by the company from the business introduced to it by the taxpayer. He signed a staff employment contract with the company and was described as a vice-president. The taxpayer was assessed to salaries tax on the percentage of the commission which was paid to him. He appealed against this and submitted that he was carrying on a business and was not an employee.

Held:

On a true construction of the facts and evidence the taxpayer was an employee and was not self-employed. Previously the taxpayer had been self-employed and the relationship which he had with the company was materially different from the previous relationships which he had had with others.

Appeal dismissed.

Cases referred to:

Performing Rights Society Ltd v Mitchell & Booker (Palais de Danse) Limited
[1924] 1 KB 762

Morren v Swinton and Pendlebury Borough Council [1965] 2 All ER 349

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173

Montreal v Montreal Locomotive Works Ltd [1947] 1 DLR 161

Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248

D19/78, IRBRD, vol 1, 323

United States of America v Silk [1946] 331 US 704

D67/87, IRBRD, vol 3, 97

Federal Commissioner of Taxation v Barrett 4 ATR 122

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D25/87, IRBRD, vol 2, 400
Commissioner of Inland Revenue v Humphrey 1 HKTC 451
Lomax v Newton 34 TC 558

S P Barns for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. THE NATURE OF THE APPEAL

The Taxpayer appealed against salaries tax assessments raised on him with respect to the years of assessment 1985/86 and 1986/87 arguing that his liability was not to salaries tax but to profits tax.

2. THE FACTS

2.1 The Taxpayer's engagement

On 8 September 1984 the Taxpayer signed a document ('the contract') pursuant to which he was engaged by a Hong Kong incorporated company ('the company'). The contract contained the following provisions:

2.1.1 The Taxpayer's engagement was as a senior vice-president of a subsidiary of the company effective from 10 September 1984.

2.1.2 The Taxpayer's engagement was subject to satisfactory completion of a three months probationary period.

2.1.3 His remuneration:

2.1.3.1 This was to be the higher of a commission rebate or a monthly guaranteed basic salary;

2.1.3.2 It specifies the commission rebate;

2.1.3.3 It specifies the guaranteed basic salary.

2.1.4 Fringe benefits:

2.1.4.1 Membership of a 'centralised retirement scheme';

2.1.4.2 Membership of a 'group personal insurance plan';

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- 2.1.4.3 A housing loan;
- 2.1.4.4 A car loan.
- 2.1.5 It obliges the Taxpayer to assume an obligation to reimburse bad debts incurred as a result of his violation of any credit control policy.
- 2.1.6 It entitles the company to transfer clients being served by the Taxpayer during his engagement to other staff.
- 2.1.7 It permits either party to terminate on one month's written notice or payment in lieu.
- 2.1.8 It precludes the Taxpayer from engaging directly or indirectly in work similar to that which he was engaged to perform by the company for its competitors.
- 2.2 The company's returns

The company filed 'employer's returns' in respect of the Taxpayer for the years of assessment 1984/85 to 1986/87, both inclusive, as follows:

<u>Year of Assessment</u>	<u>Date Submitted</u>	<u>Salary</u> \$	<u>Commission</u> \$	<u>Total</u> \$
1984/85	19-4-1985	40,200	69,783	109,983
1985/86	18-4-1986	72,000	389,111	461,111
1986/87	22-4-1987	54,000	568,296	622,296

2.3 The Taxpayer's returns

- 2.3.1 On 29 August 1985 the Taxpayer filed a 1984/85 salaries tax return, which declared, in section B, that the Taxpayer was employed by the company as senior vice-president and was in receipt of the following income:

	<u>Period</u>	<u>Amount</u> \$
Salary/Wages	10-9-84 to 31-3-85	40,200
Commission	10-9-84 to 31-3-85	<u>69,783</u>
		<u>\$109,983</u> =====

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2.3.2 On 18 June 1987 the Taxpayer filed a profits tax return for the year of assessment 1985/86, annexed to which was an unaudited profit and loss account for the period from 1 April 1985, stated to be the date of commencement, to 31 March 1986. The profit and loss account showed commission of \$395,159 and expenses totalling \$296,506, leaving a profit of \$98,653.

2.3.3 On 17 December 1987, the Taxpayer filed a profits tax return for the year of assessment 1986/87, annexed to which was an unaudited profit and loss account for the period from 1 April 1986 to 31 March 1987. The profit and loss account showed commission of \$622,297 and expenses totalling \$595,982, leaving a profit of \$26,315.

2.4 The Business Registration Certificate

On 27 December 1985, the Taxpayer took out a Business Registration Certificate and in the application form stated that he had commenced an 'investment' business as from April 1985.

2.5 The assessments to salaries tax

2.5.1 Year of assessment 1984/85:

The assessor rejected the Taxpayer's claim that his 1984/85 income should be assessed to profits tax and issued a salaries tax assessment on 20 July 1987. No objection was lodged against this assessment but the Taxpayer complained that the assessor had not properly considered his case and submitted a letter on 8 September 1987 providing information which the Taxpayer submitted established that his commissioned income should be taxed as profits tax.

2.5.2 Year of assessment 1985/86:

Because of the correspondence exchanged between the Inland Revenue Department and the company, detailed in paragraph 2.6 below, the assessor raised a salaries tax assessment for the year 1985/86 in an amount of \$461,111 with tax payable thereon of \$78,388.

2.5.3 Year of assessment 1986/87:

Because of the correspondence exchanged between the Inland Revenue Department and the company, detailed in paragraph 2.6 below, the assessor raised a salaries tax assessment for the year 1986/87 in an amount of \$622,296 with tax payable thereon of \$105,790.

2.6 The correspondence

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2.6.1 As a result of the Taxpayer's claim for additional deductions against his salary for the year of assessment 1984/85, made in a letter dated 15 August 1985, by letter dated 18 November 1985 addressed to the company, the assessor asked for details of the Taxpayer's duties and responsibilities with the company and for a copy of his contract of employment. By letter dated 19 June 1986, the Taxpayer stated, inter alia, that he had no employment contract with the company and stated:

‘I hereby request my case to be treated under profits tax and then being treated as personal assessment.’

2.6.2 In response to a further letter from the assessor dated 14 April 1987, by letter dated 28 April 1987, the company supplied information to the assessor, the content of which could only reasonably be interpreted as a statement from the company to the effect that the Taxpayer was an employee.

2.6.3 Thereafter, the company addressed letters dated 22 July 1987 and 29 October 1987, and the Taxpayer wrote his letter of 8 September 1987 to the complaints officer. The letters from the company referred to its earlier answers to enquiries from the assessor. The letter from the Taxpayer was to the effect that he was not an employee of the company and his income, which he described as commission revenue, should be taxed under profits tax.

2.6.4 By letter dated 11 March 1988, a representative for the Taxpayer objected to the salaries tax assessments referred to in paragraphs 2.5.2 and 2.5.3 above, stating that it would be more appropriate for the Taxpayer to be assessed to profits tax than salaries tax for various reasons stated.

2.6.5 As a result of the Taxpayer's letter of complaint of 8 September 1987, another assessor took over the file and by letter dated 17 April 1989, further information was requested. The reply from the company was eventually addressed to the assessor on 14 June 1989.

2.7 The determination

In due course the Taxpayer's objection to the salaries tax assessments for the years of assessment 1985/86 and 1986/87 was referred to the Commissioner, who in his determination ('the determination'), issued on 28 July 1989, rejected the objection. Relying on information provided, the Commissioner reduced the original salaries tax assessments as follows:

<u>Year of Assessment</u>	<u>Net Chargeable Income</u>	<u>Tax Payable</u>
	\$	\$

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1985/86	422,200	71,774
1986/87	565,467	96,129

2.8 The appeal

The Taxpayer was dissatisfied with the determination and on 28 August 1989 lodged with the Clerk to the Board a letter which constitutes the Taxpayer's notice and grounds of appeal. In essence the grounds of appeal are that certain of the facts upon which the determination was arrived at were incorrect whereby the Board is requested to consider the facts as to be presented by the Taxpayer to determine whether or not the assessments appealed against were correct.

3. CASE FOR THE TAXPAYER

The Taxpayer appeared in person.

3.1 Having been duly sworn he gave the following evidence to the Board:

3.1.1 He was employed by the company as a 'registered investment advisor'. He was registered in USA and was a member of one of the futures associations in USA. The registration meant that he was an experienced investment advisor.

3.1.2 His association with the company was on the basis that he would bring his clients to the company which was no more than a market medium for the trading he performed on behalf of his clients. In contrast to the other staff of the company he took no salary from the company and he received no bonus or entertainment expenses. His only remuneration was a percentage of the commission from the business he gave the company. This was the position throughout both relevant years of assessment namely those of 1985/86 and 1986/87 ('the relevant period').

3.1.3 The expression 'senior vice-president' was picked up from the American practice and was put on his name card to impress his clients.

3.1.4 The arrangement he had with the company was that he would receive 30% of the commission payable to the company on orders executed by the company for those whose business the Taxpayer introduced to the company. Before he joined the company he had worked for one particular investment house between 1970 and 1975 and for another between 1976 and 1981. During the period he was with the latter investment house he had taken out a Business Registration Certificate as sole proprietor of a business, because in the type of business he did he needed runners, assistants, and people to refer business to him which his

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then employer would not finance or pay for. Whilst he was with this investment house his earnings were taxed by way of profits tax.

- 3.1.5 Having joined the company he was surprised to learn that the Inland Revenue Department regarded him as being liable to salaries tax on remuneration from the company. After lengthy correspondence it seemed that the Revenue's position was that he had signed a staff contract with the company. However, the fact of the matter is that with over one thousand employees the company had only one type of staff contract. Most of the terms under the document he signed were inappropriate to his employment.
- 3.1.6 He was invited to join the company by the then managing director who confirmed that he was a commission agent and investment advisor. He remembered signing a form, which he regarded as a formality, but when the Revenue charged salaries tax he then appreciated that he had signed a normal staff contract.
- 3.1.7 Most of the facts originally provided by the company to the Revenue were incorrect and having been subsequently corrected the true facts established that he was not an employee.
- 3.1.8 That he was not an employee was established by the fact that he did not work regular hours, namely nine to five and Saturday mornings: he only worked when the US markets were open. The most important point, however, was that he was responsible for bad debts and errors. The Board was referred to the memorandum from the company with respect to the settlement of bad debts. He was liable to reimburse the company when one of his clients had not meet his liabilities and another went bankrupt.
- 3.1.9 His assistants were people who sat in his own office, as opposed to the office provided for him by the company, when a market was open and they took orders from him or some of his approved clients. The company paid for two of these assistants but as he used six he had to pay for four personally.
- 3.1.10 In 1987 he had to repay the company \$1,330,000 to cover a bad debt.
- 3.1.11 To summarise:
- 3.1.11.1 The company had confirmed that his clients were his own and could leave if he left the company.
- 3.1.11.2 His sole income was from commission.
- 3.1.11.3 He was independent and responsible for all bad debts and errors.

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3.1.11.4 In the company's office he only had a desk and very small room and he had to rent another office for his runners and those who secure clients to him; this office was shared with another firm and is the office shown in his Business Registration Certificate.

3.1.12 Originally he had dealt with a particular assessor but they had an argument which he reported to the IRD complaints office whereafter the case was taken over by another assessor. The assessor and the Commissioner seemed to have pinpointed the fact that he had a staff contract but certain facts were not brought up to the Commissioner for review. In this respect he pointed out that the letter of 17 April 1989 was totally omitted from the facts disclosed by the Commissioner in his determination and this letter had taken six weeks to compile.

3.2 Cross-examination

In answer to questions raised by the representative of the Commissioner the Taxpayer stated as follows:

3.2.1 He joined the company in 1984 and the first tax year applicable to him was the year ended 31 March 1985.

3.2.2 The salaries tax return for the year of assessment 1984/85 was signed by him. He stated that because it covered a short period it was not worth employing chartered accountants so he did not take much trouble over the return. He put it in and then claimed the expenses.

3.2.3 He was referred to the contract and confirmed that he had signed it on page 4 and initialled the deletion on page 4. He explained that it was a standard contract of employment used by the company but the effect of the document really only came to his notice when his claim to be assessed profits tax was rejected by the Revenue. When this rejection occurred he went to the personnel department and got a copy and at the time he asked them to correct the facts they had previously supplied to the Revenue. He insisted that he had not read the document when he had signed it and admitted that this was a mistake.

3.2.4 He was referred to the probation period in the contract and stated that it did not apply to him. The company had lost six senior personnel at the time he was invited to take a position with the company and probation did not apply as commission agents earn from the business they introduce.

3.2.5 The witness was shown a copy of his letter of 19 June 1986 to the Commissioner and confirmed that it had been signed by him. He was asked about the statement that there was no contract and stated that it had gone from his mind. The witness then reiterated that the first time he was reminded that he

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had signed the contract was after he had had his argument with the assessor which could have been in 1987. The witness was shown a copy of his letter to the complaints officer dated 8 September 1987 and confirmed that he had signed it. His attention was drawn to paragraph 6 in which he stated that he had not acknowledged the applicability of the document by counter-signing it and stated that this was his understanding and he had been relying on his past experience with his two prior employers which was that when brokers left they were not given or did not give notice.

- 3.2.6 He was then asked about further provisions in the contract. He explained that the commission represented a split of approximately 30% to himself and 70% to the company. When asked about the basic salary he stated that this was an amount which was advanced and would be deducted from his commission. For example, if in a month the commission earned from his clients was \$100,000 the amount to which he was entitled was \$30,000 from which the \$6,000 advance would be deducted.
- 3.2.7 He was then referred to the fringe benefits, the retirement scheme, and asked to look at the booklet annexed to the copy of contract supplied by the company to the Revenue. He stated that when he signed the contract the detail was not given to him. He did not know what a 'centralised retirement scheme' was although he agreed that \$300 had been deducted from his commission each month as his contribution. He then acknowledged that he was a member and said it would have been more appropriate for a special contract to be designed for commission agents.
- 3.2.8 He was unable to explain the group personal accident insurance plan provisions saying that no copy had been provided to him. He added that he did not know or want to know about it nor the housing or car loans. The interest rates on these two latter items were higher than banks charged. He was then asked about the medical benefits and stated that he did not know about these. He had seen doctors but he had not claimed during the relevant period. He reiterated that he had never taken advantage of the housing or car loans. He stated that he leased three cars for himself and his runners at lower interest rates.
- 3.2.9 He was then referred to the provision with respect to liability for bad debts and stated that this only applied to normal staff. A lot of the company's staff who handled accounts were paid monthly and got a year end bonus. If they made mistakes they had to indemnify to the extent of 15% of the loss. He, personally, was liable for 100% of any loss. The only people who benefited from the maximum of 15% were the salaries brokers namely those who do not go out to get business. These brokers dealt with clients allocated by the company and worked regular hours. The witness stated that his commitment to indemnify the company 100% was an oral agreement with the managing director at the time he was employed. When asked why anybody would allow such an important

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factor to be left unwritten he stated that no one had anticipated the market crash in October 1987 and as the company allowed him to pay by monthly instalments it was more beneficial for him to stay with the company.

- 3.2.10 The witness was then questioned about the amount of \$1,330,000 he had agreed to repay the company and stated that the client who had instructed the transaction subsequently denied when the market collapsed and he had had to liquidate on the first trading day after the local market closure when the index had dropped more than one thousand points. He had no documents with him to substantiate the amount of the loss.
- 3.2.11 The witness was then re-referred to the contract and asked what the credit control policy was. He said he did not know and he had no papers to explain it.
- 3.2.12 He was asked apart from the memorandum dated 30 November 1987, the company's letter of 22 June 1988 and his letter of 10 April 1989, whether there were any letters dealing with his violation of the company's credit control policy. He replied in the negative and stated that conditions were hectic and the client did not honour the trade; the relevant ticket was in his handwriting whereby it was his responsibility. When asked further about credit control policy he agreed that he would deal with people who came in off the street provided they had the minimum amount required by the company. When asked whether this was one of the credit control policies the witness replied that he personally had a higher minimum than the company.
- 3.2.13 The witness was asked to provide further details as to the \$1,330,000 and stated that this was as a result of business for two established clients. For one he had placed ten Hang Seng Index contracts on instructions and for the other, for whom he had discretion, he had placed another ten Hang Seng Index contracts. After the market was closed by the Committee of the Stock Exchange the first client denied that he had instructed the order so he had to treat it as an error and he could not ask his discretionary client to carry the loss on the other ten contracts. He added the two together whereby he had twenty contracts which he could only liquidate at a large loss.
- 3.2.14 He was asked whether on that day of October 1987 he was paying regard to the company's credit controls before taking orders. He said that conditions were hectic, the phone was ringing constantly and he needed five hands. There was no policy governing the situation and, in any event, no policy can guarantee all types of situations.
- 3.2.15 He was asked if he had sued the clients. He stated that the ten contracts made for the discretionary client had wiped out the client's margin deposit and the client had no money. The client for the other ten contracts had denied that he had placed the order. Accepting that he was ultimately responsible he agreed

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with the company as to a method which would enable him to discharge the monies and support his family. The agreement was to pay and liquidate the amount over three years.

- 3.2.16 He was then asked to explain his 'clientele'. He explained that the company would give anything from five to twelve clients to each employed broker and the company could transfer them to another broker at will. This did not apply to him. He brought in his clients and he could take them away. He agreed that if the clients he introduced wished to stay with the company after he left they could do so.
- 3.2.17 When questioned about the termination provision in the contract, he stated that this only applied to normal staff and not to commission brokers. He also stated that payment in lieu did not apply to him as he did not get paid a salary. It was a mistake by the company when they got him to sign the contract for use when staff were employed.
- 3.2.18 He was then asked about the exclusive service provision in the contract, and stated that it only applied to salaried staff and prevented them from moonlighting. However, he did not work for any other entity.
- 3.2.19 He was then referred to correspondence addressed by the company to the Revenue and stated that the content of the letter of 28 April 1987 had been written by a personnel manager who had not endeavoured to find out the true facts. What had been written was correct for 98% of employees but not for him. If he had been asked he would have given the facts. The author of the letter resigned soon after writing the letter.
- 3.2.20 The witness repeated that unlike ordinary employees he did not work from nine until five but he worked when markets were open and he could work from wherever he was at the time. He carried a machine which gave him prices of precious metals, exchange rates and indices. Alternatively, if he was at a client's office he could check on their Reuters machine. He stated that he spent more time at two clients' offices than at his own as if he was with the client he could get the business the client might otherwise send to a competitor.
- 3.2.21 The witness was then questioned about the expenses included in the profit and loss accounts lodged with the relevant profits tax returns. He stated that the rental he paid was not, in fact, paid by monthly instalments; an individual, who owed him a lot of money had a tenancy of an office and the arrangement was that he would take part of this office and would not pay the individual but would off-set an agreed amount against the debt. The individual had left Hong Kong owing a lot of money.

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3.2.22 He was then questioned about the people named as runners in his claim for salaries and confirmed that of the six people named in the accounts for the year of assessment 1985/86 one was his mother-in-law, two were sisters-in-law and another was his domestic servant who went to the office to clean it up periodically. In the year of assessment 1986/87 the salaried individuals were his mother-in-law, his domestic maid and an unrelated party and 'runner's commission' was paid to two of his sisters-in-law and four unrelated parties. He stated that he had paid in cash and obtained receipts although he had not brought them with him. When questioned about the amount paid to the domestic servant he stated that the domestic servant was not a runner but the accountant had not wanted to open another category of account. Payments were based on business prospects: they would name prospects and he would follow them up and would remunerate based on the business secured. The figure was a fixed sum per annum and the amount paid was the maximum. In the second year some had not earned the maximum.

At the conclusion of cross-examination the Board pointed out to the Taxpayer that at that stage of proceedings it was the Taxpayer's word that he was not an employee against the documentary evidence. He was asked if he had or could call any independent evidence which would corroborate what he said was correct. After the overnight adjournment the Taxpayer stated that he was calling a witness.

3.3 The evidence of the witness

3.3.1 The witness, having been duly sworn, provided his name card and stated that:

3.3.1.1 He was a marketing manager with one of the company's subsidiaries.

3.3.1.2 He was asked about the company's office hours and stated that 'account executives' such as the Taxpayer, went to the office when the markets in which they deal with are open. The Taxpayer's hours were flexible and he did not have to work on Saturdays. He stated that his own hours were nine to five but he did not see the Taxpayer in the office very often. The information supplied to the Revenue in this respect was incorrect.

3.3.1.3 He confirmed that from March of 1987 he was in the same office as the Taxpayer.

3.3.1.4 He was then referred to the memorandum dated 30 November 1987, the memorandum dealing a bad debt. He confirmed that the signatures, the persons named as 'senior executive directors', were the deputy to the chairman and the principal director in the company's bullion department.

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- 3.3.1.5 He was unable to confirm whether or not the Taxpayer was under a basic salary but confirmed that 'account executives' were normally on commission. As far as he knew they were allowed some entertainment expenses but no bonus.
- 3.3.1.6 He was unable to say that he knew that the Taxpayer employed people to help him to build up his clientele. However, he commented that the company would not object to people being hired by the Taxpayer if they did not use the company's office.
- 3.3.1.7 He confirmed the identity of the personnel manager.
- 3.3.2 The Revenue had no questions of the witness.
- 3.4 In reply to the Board the Taxpayer confirmed that the business registration he had taken out when employed by his previous employers had been terminated when he left their services. In between leaving that employment and joining the company he had been endeavouring to establish his own business; he had been in Philippines for one year looking for prospects and had then decided that it was better to link up with a big organisation. He confirmed that although he joined the company in September 1984 he did not take out any Business Registration Certificate until December 1985.

4. SUBMISSION OF THE REVENUE

The submission of the Revenue was in writing and can be summarised as follows:

4.1 The issue

This was whether certain income received by the Taxpayer during the years of assessment 1985/86 and 1986/87 were correctly subjected to salaries tax under part III of the Ordinance. The Taxpayer contends that the income should be assessable to profits tax whereas the Revenue, as the Commissioner had determined, contended that the income had been correctly subjected to salaries tax. The issue arose because the deductions allowable under the profits tax provisions can be more generous than the deductions allowable under the salaries tax provisions.

4.2 The legislation

The Board was then referred to the provisions relating to profits tax and the provisions relating to salaries tax. In terms of the legislation the issue was whether the Taxpayer's income was:

- 4.2.1 income from employment of profit, which is liable to salaries tax; or

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- 4.2.2 income from carrying on a trade, profession or business, which is liable to profits tax.
- 4.3 Test developed by the courts
- 4.3.1 The courts in both England and Australia on number of occasions have had to consider the difference between such categories which could be classified as follows:
- 4.3.1.1 employment as opposed to carrying on a business;
- 4.3.1.2 employment as opposed to operating as an independent contractor;
- 4.3.1.3 fulfilling a contract of service as opposed to a contract for services; and
- 4.3.1.4 employer as opposed to employee.
- 4.3.2 On many occasions the authorities relate to disputes other than taxation disputes but the courts had adopted the same reasoning in both.
- 4.3.3 In Hong Kong the practice of the Commissioner was to distinguish income from employment and income from carrying on a trade on the same bases as were applied by the courts.
- 4.3.4 It was submitted that three broad tests had emerged namely the control test, the integration or organisation test and the economic reality test.
- 4.3.5 The control test: the extent of the payer's control.
- 4.3.6 The Board was referred to Performing Rights Society Ltd v Mitchell & Booker (Palais de Danse) Limited [1924] 1 KB 762 at pages 766 and 769. The question in this case was whether the proprietor of a dance hall was liable for royalties on music performed by a band engaged to play whilst the dance hall was open. In that instance the learned Judge had come to the conclusion that the band was employed by the proprietors whereby the proprietors were liable for infringements of the copyright in the music played by the band.
- 4.3.7 That particular case had been decided more than fifty years ago and there had been considerable refinement in the intervening years. The correct approach could be illustrated by:
- 4.3.7.1 Morren v Swinton and Pendlebury Borough Council [1965] 2 All ER 349, a case concerning the Local Government Superannuation Act of 1937. The question was whether or not a resident engineer employed by the council to

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supervise certain works being performed under the direction of consulting engineers was an employee or not. The entirety of the judgment of Chief Justice Parker, which held that the resident engineer was an employee, was then read to the Board.

4.3.7.2 Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173, a case holding that a part-time interviewer of a company engaged in market research was an employee. The Board was referred to a passage commencing at page 183 and concluding at letter C on page 185.

4.4 Integration or organisation test

The Board was referred to quotations by Cooke J in his judgment in Market Investigations Ltd v Minister of Social Security, refer paragraph 4.3.7.2 above, from:

4.4.1 The judgment from Lord Wright in Montreal v Montreal Locomotive Works Ltd [1947] 1 DLR 161, which appears at page 182 of the judgment, particularly the last sentence reading:

‘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.’

4.4.2 Denning L J in Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248 which also appears on page 182 of his judgment namely:

‘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.’

It was submitted that the thrust of the test was to see whether the services a person performs for another are integral to that other person’s business. If the services performed are part of the business of the other person this is a strong indication that the person engaged to do the work is doing so as an employee, that he is in employment.

4.4.3 This test had been applied in a previous case before the Board, D19/78, IRBRD, vol 1, 323, a case dealing with a stockbroker’s runner. The Board was referred to a passage commencing with the final paragraph on page 326 and concluding at the end of page 327.

4.5 Economic reality test

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It was submitted that this test focused not on whether the person was truly part and parcel of the organisation but whether he is genuinely independent of it so that it could be said that he is carrying on business for his own account. The Board was again referred to the judgment of Cooke J in the Market Investigations case, refer paragraph 4.3.7.2 above, and to United States of America v Silk [1946] 331 US 704. The points that Cooke J looked at were, it was submitted, some of the things which are inherent features of the situation where a person is carrying on business on his own account. This particular test had been applied in a Board decision, D67/87, IRBRD, vol 3, 97, a case involving a band musician. The Board was referred to paragraphs 5 to 9, both inclusive, in that decision.

4.6 An overview

The Board was then referred to an Australian case which it was submitted provided an excellent overview of the area, in particular in relation to the discussion on the 'exercise and control by the peer aspect'. This case, Federal Commissioner of Taxation v Barrett 4 ATR 122, which was concerned with whether or not salesman remunerated by commission were employees, was then read to the Board.

4.7 In the light of the authorities it was submitted that the factors which were relevant to the Board's consideration of the appeal were:

4.7.1 Was there an employment contract evidenced in writing?

It was submitted that the company said there was.

4.7.2 Does this contract relate to the person performing the work rather than a particular work to be executed?

The Taxpayer's evidence was that he was not obliged to work.

4.7.3 Is the person engaged to work on a continuing basis or rather for the performance of a specified task?

It was submitted that on the evidence the work was performed on a continuing basis.

4.7.4 Was any office equipment provided by the company for the Taxpayer's use?

The Taxpayer's evidence was that there was, and refer to the company's letter dated 28 April 1987.

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4.7.5 Was any floor space or telephone provided by the company for the Taxpayer's use?

The Taxpayer's evidence was that there was.

4.7.6 Was there any control by the company over the manner in which the Taxpayer's work was to be performed?

It was submitted that this was the case in the relevant sense. It was accepted by the Revenue that control was not total but then refer the Federal Commissioner for Taxation v Barrett case. In this context the relevant aspects were:

- (i) The Taxpayer had to keep an eye on the client's position and margins: he had said in evidence it was his obligation to call for increased margins when necessary.
- (ii) Liability for bad debts: it was submitted that the liability the Taxpayer had assumed were as a result of his failure to implement the company's credit control policies.

4.7.7 Was there any express or implied agreement that work was to be performed personally by the Taxpayer?

The Board was referred to the contract which called for the Taxpayer to provide his services exclusively for the company and not to moonlight.

4.7.8 What is the arrangement with respect to leave of absence from work?

The company, in the letter of 28 April 1987, stated that the Taxpayer was entitled to two weeks leave. That he said that he had not taken his leave was irrelevant.

4.7.9 Payment during leave of absence?

The Taxpayer's evidence was that he was paid monthly by cheque.

4.7.10 Who sent invoices to the client, the company or the Taxpayer?

The Taxpayer's evidence was that invoices were sent by the company.

4.7.11 Did clients believe they are placing orders with the company or with the Taxpayer?

It was submitted that clients would be under no illusions that they were dealing with the company; the Taxpayer's name card made this clear.

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4.7.12 What were the provisions relating to termination of the contract?

This was spelt out in the contract.

4.7.13 What was the liability for bad debts?

It is stated in the contract that this liability existed ‘... as a result of violation by you of any credit control policy procedures specified by the company...’

4.7.14 Was the contract for exclusive services or could the Taxpayer compete with the company?

It was submitted that the contract negated this.

4.7.15 Potential benefits?

The contract provided for a housing loan and a car loan. The fact that the Taxpayer had not used them was neutral.

4.7.16 Staff benefits?

There was a ‘centralised retirement scheme’, to which the Taxpayer had contributed, and there was the ‘group personal accident insurance plan’, which the Taxpayer said he had not used.

4.7.17 Name card?

It was submitted that this quite clearly held the Taxpayer out as a vice-president of member companies which were part of the company’s group.

4.7.18 Was there any extrinsic evidence that the Taxpayer actually carried on a business?

It was submitted the Taxpayer had not adduced any evidence.

4.8 The Taxpayer’s notice of appeal

The Board was requested to examine the notice of appeal, particularly paragraphs 1 and 2 in the light of section 66(3) of the Ordinance. It was pointed out that the grounds of appeal opened with the words ‘I was employed’ and there was no specific ground which referred to the deduction of expenses from the salaries tax assessment. Section 66(3) stated that the Taxpayer could not rely on any grounds other than those stated in his grounds of appeal without the

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consent of the Board. No application had been made to add to the grounds of appeal.

4.9 The issue

The issue was the correct basis upon which the Taxpayer was taxed. It was submitted that it was clear beyond doubt that the Taxpayer was employed by the company during the relevant period and the Taxpayer was not carrying on his own trade, profession or business in Hong Kong during these two years.

4.10 Deductibility of expenses

The Revenue then referred the Board to the provisions of section 12(1) with respect to the deductibility of expenses under the salaries tax provisions of the Inland Revenue Ordinance. The Revenue stressed the use of the words ‘wholly, exclusively and necessarily’ and also referred the Board to section 68(4) of the onus of proof. The Board was then referred to the decision of this Board in case D25/87 and thereafter to Commissioner of Inland Revenue v Humphrey 1 HKTC 451 and an extract from Blair-Kerr J at page 466. The Board was also referred to Lomax v Newton 34 TC 558 and part of the judgment appearing from page 476, a case referred in a Board of Review Case No D25/87.

The Board was then asked to consider the various claims made, namely for runner’s commission, for motor car expenses and for entertainment and the Board was asked whether it was satisfied that this expenditure was ‘wholly, exclusively and necessarily incurred in the production of the assessable income’.

5. REPLY FROM THE TAXPAYER

5.1 The Taxpayer stated that the question that the Board had to consider was whether the Taxpayer was employed or self-employed. He was not concerned with the case law as to expenses as that related to deductions from salaries tax and was not relevant to the issue.

5.2 The Taxpayer then proceeded to point out the differences between an employee and self-employed person which he said he was. The distinctions he referred to was that he was on no fixed guaranteed monthly salary, the company did not control his actions or supervise or direct his work, a feature of the cases quoted by the Revenue. He stated that he was obliged to hire his own helpers and took complete risk for bad debts. He kept a separate office and only used the company’s office for the purposes of following up on the transactions he was involved in to be satisfied that they were properly processed. He was not

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obliged to report his whereabouts and there was no requirement for him to be in his office and there were no conditions as to who his clients could be.

5.3 The Taxpayer then responded to the submission of the Revenue recorded in paragraph 4.7 above. His submissions were:

5.3.1 Was there an employment contract in writing?

It was submitted that this was a standard contract for the company's staff and all the terms and conditions are for normal staff. As it had always been his practice to sign a letter of confirmation to record the commissions he was to receive he signed the document assuming it was of a similar nature.

5.3.2 Does this contract relate to the person performing the work rather than a particular work to be executed?

The Taxpayer submitted that his contract was to do particular work as it was his duty to obtain his own clients and merely place their business through the company.

5.3.3 Is the person engaged to work on a continuing basis or rather for the performance of a specified task?

It was submitted that he had put all his client's business through the company and it would be difficult for him to do otherwise because of tracing transactions.

5.3.4 Was any office equipment provided by the company for the Taxpayer's use?

The Taxpayer submitted these were provided as a convenience only.

5.3.5 Was any floor space or telephone provided by the company for the Taxpayer's use?

The Taxpayer again submitted these were supplied as a convenience.

5.3.6 Was there any control by the company over the manner in which the Taxpayer's work was to be performed?

The Taxpayer stated that on his evidence the Board would be able to find that no control was exercised over him and that scrutinising his client's position and margins etc was part of the normal procedures that he adopted to manage his accounts.

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5.3.7 Was there any express or implied agreement that work was to be performed personally by the Taxpayer?

The Taxpayer submitted that this was not the case as he could give instructions and directions to his helpers and they were able to and could trade on his instructions.

5.3.8 What is the arrangement with respect to leave of absence from work?

The Taxpayer submitted that there was no arrangement as to leave of absence from work.

5.3.9 Payment during leave of absence?

The Taxpayer stated that he received no such payments.

5.3.10 Who sent invoices to the client, the company or the Taxpayer?

The Taxpayer stated that this was done by the company as he was not a licensed principal dealer.

5.3.11 Did clients believe they are placing orders with the company or with the Taxpayer?

He stated that his business was to obtain discretionary work and when he exercised his discretion on behalf of his customers the orders were placed through the company.

5.3.12 What were the provisions relating to termination of the contract?

The Taxpayer said that it was normal practice for either party to terminate the association at will.

5.3.13 What was the liability for bad debts?

The Taxpayer stated that the company's salaried staff had a liability up to 15%. In his own case it was 100% whether the loss was as a result of adverse market factors or dishonest clients.

5.3.14 Was the contract for exclusive services or could the Taxpayer compete with the company?

The Taxpayer submitted he had the right to compete with the company, the company employing salaried brokers seeking the same potential clients.

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5.3.15 Potential benefits?

The Taxpayer stated that he had not taken either a housing or car loan during his employment with the company and had no intention to take them in the future.

5.3.16 Staff benefits?

The Taxpayer stated that the company would not take any risk by not covering those areas but such was negative.

5.3.17 Name card?

He stated that the title was to impress his prospective customers which benefited both himself and the company.

5.3.18 Was there any extrinsic evidence that the Taxpayer actually carried on a business?

The Taxpayer had stated that the evidence was that he kept his own office and equipment, hired his own helpers, took the full financial risks and received profits from his clients from sound commercial management.

The Taxpayer then referred the Board to the Oxford English Dictionary for the interpretation of the word 'employed', as used in his notice of appeal. He pointed out that one definition referred to giving work to usually for payment. He submitted that this did not rule out unusual cases. The Taxpayer also stated that his case could not be considered on the basis of prior Board decisions involving employees.

5.4 Concluding statement:

The Taxpayer then proceeded to reiterate several points previously made in his evidence.

6. REASONS FOR THE DECISION

6.1 The question for the Board to determine is one of fact or mixed fact and law: on the evidence before it was the Taxpayer an employee or was he an independent agent who was provided with certain facilities by a third party which enabled him to work in exchange for which he shared the commissions he earned from those for whom he worked.

6.2 The Board accepts the Taxpayer's evidence that he had worked for other companies in the past and when with those employers he had extracted a

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Business Registration Certificate and had been taxed on the basis of being a self-employed person.

- 6.3 The Board is satisfied that the contract between the Taxpayer and the company is an employment contract. If the arrangement between the Taxpayer and the company was as alleged by the Taxpayer an entirely different document would have been produced.
- 6.4 That the Taxpayer regarded himself as an employee is supported by the fact that, and contrary to his former practice, he did not extract a Business Registration Certificate. That the company did not regard him as an employee could have been established by evidence by an officer of the company. However, no such witness was called. Further, that the company regarded the Taxpayer as an employee is supported by the fact that the company filed a return of remuneration and pensions for the Taxpayer for each of the relevant years of assessment and there was no evidence from the company that this was an error or mistake.
- 6.5 The onus of proof is on the Taxpayer to satisfy the Board that he had been incorrectly assessed. The Taxpayer has failed to discharge this onus.

7. DETERMINATION

For the reasons given the Board dismisses this appeal.