

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D43/02**

**Salaries tax** – whether being employed personally or under service company.

Panel: Ronny Wong Fook Hum SC (chairman), Andy Lam Siu Wing and Dianthus Tong Lau Mui Sum.

Date of hearing: 21 May 2002.

Date of decision: 26 July 2002.

The appellant, a qualified accountant, was employed by Company A at all material times. She contended that she was not liable for salaries tax because she was not employed by Company A personally. She only rendered her services to Company A for Company C, a service company which was partly owned by her.

**Held:**

The Board found the appellant was employed by Company A personally. There was no document at all to support the contractual relationship between Company A and Company C.

**Appeal dismissed.**

Fung Ka Leung for the Commissioner of Inland Revenue.

Taxpayer in person.

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### Decision:

### Background

1. By a letter dated 29 November 1995 ('the November 95 Letter'), Company A summarized the terms of a contract which they offered to the Appellant as 'Contract Consultant' with their company. The Appellant was to be paid \$47,000 per month in arrears. Two handwritten amendments were made to the typed terms of the November 95 Letter. First, the period of engagement was changed from '11 December 95 – 10 April 96' to '5 December 95 – 4 April 96'. Secondly, an additional clause was inserted for assessment of additional payment in favour of the Appellant in March 1996 in the event of satisfactory performance and completion of the project within three months. The November 95 Letter was delivered to the Appellant by hand. She signed at the end of that letter signifying her agreement and acceptance of the terms and conditions embodied in that letter. The letter bore the name of Mr B, then assistant general manager of Company A. Mr B did not sign this letter. It was initialed by someone else on his behalf.
2. On dates outlined hereunder, Company A drew cheques in favour of the Appellant. The Appellant signed various receipts acknowledging those payments.

<b>Cheques drawn by Company A in favour of the Appellant</b>		<b>Receipts signed by the Appellant</b>
<b>Date of cheque</b>	<b>Amount \$</b>	
15-12-1995	42,164.40	22-12-1995
22-1-1996	47,500.00	25-1-1996
22-2-1996	47,500.00	
25-3-1996	47,500.00	27-3-1996
	184,664.40	

3. Apart from the payments summarized in paragraph 2 above, Company A further paid the Appellant a sum of \$36,419.7 on 3 April 1996 made up as follows:

<b>Nature of payment</b>	<b>Amount \$</b>
Salary	6,246.60
Leave pay (3.5 days)	7,673.10
Additional bonus	22,500.00
	36,419.70

4. In response to inquiries from the Revenue, Company A informed the Revenue by letter dated 14 April 1998 that the Appellant's duties for the period between 5 December 1995

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and 4 April 1996 'included implementing the procedures and controls for the Business Information Control Unit. She was also responsible for the integrity of standing data across our operational systems'. Company A further pointed out that the Appellant 'was required to perform the duties and responsibilities personally'.

5. The issue before us is whether the Appellant is assessable to salaries tax in respect of the above payments which she received from Company A.

### **Case of the Appellant**

6. The Appellant says she is not liable for salaries tax as the true contractual nexus was between Company A on the one part and Company C on the other part. Company C is a company incorporated in Hong Kong on 15 June 1993. According to its annual return made up to 15 June 1995, the Appellant and one Mr D each held two shares in Company C. The two of them were also directors of Company C. She said the sums in question were included as part of Company C's return for the year of assessment 1995/96 and that return had been accepted by the Revenue.

7. In her sworn testimony before us:

- (a) the Appellant pointed out that the November 95 Letter was not signed by Mr B. She had to start her assignment on an urgent basis and the November 95 Letter was merely temporary documentation to facilitate her commencement of work. She placed considerable emphasis on the fact that the November 95 Letter was undated. Apart from the identity of the parties, the November 95 Letter did not contain any other inaccuracy. Mr B returned to his office two weeks after she commenced her assignment. When she reminded Mr B of the need to issue a fresh letter of engagement, Mr B said the matter would be handled by Company A's personnel department;
- (b) the Appellant said that she did not have to submit any curriculum vitae in order to apply for the position of contract consultant. She did fill in a document bearing the caption 'Personnel Record'. Her name and her position as 'Contract Consultant' were included as part of this record. She named her mother as the person to contact in case of emergency;
- (c) the Appellant adverted to the leave provision in the November 95 Letter which stipulated that 'Leave must [sic] taken in accordance with the Company policy'. The Appellant said Company A did not have any leave policy. She did not have to fill in any leave form in order to secure the payment of \$7,673.1 on 3 April 1996 in respect of 3.5 days' leave;

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- (d) the Appellant said she did not refuse the payments made out in her favour as summarized in paragraphs 2 and 3 above as she was told that there would be delay in effecting any amendment. It was commercially sensible for her to accept the payments tendered;
- (e) the Appellant drew our attention to various errors allegedly committed by Company A in outlining the history of her employment to the Revenue. She referred to a return submitted by Company A in respect of her earnings for the period between 5 December 1995 and 28 February 1997. Company A asserted that the cessation of her employment was attributable to her 'resignation'. The Appellant challenged the accuracy of this assertion.

### **Our decision**

8. The Appellant is a highly intelligent person. We regret to say that she did not put her intelligence to good use. She had no hesitation whatsoever in deploying her intelligence for the purpose of putting forward a wholly fictitious case before us in order to avoid her fiscal responsibility.

9. There is not a single document passing between Company C and Company A evidencing the subsistence of a contractual relationship. No reason has been advanced as to why Company A would be prepared to enter into contractual relationship with Company C. The purpose of the November 95 Letter was to summarize the terms of the contract offered by Company A. The whole tenor of that letter was consistent with the employment of the Appellant personally as opposed to the engagement of a service company. The provisions in relation to 'Reporting lines' and 'Annual Leave' are inconsistent with any suggestion that Company A appointed a company as opposed to a person as its contract consultant. At no time did the Appellant challenge in writing the terms of the November 95 Letter and the receipts which she signed acknowledging the payments thereunder. She is a qualified accountant and the appointment was to work as 'Contract Consultant'. The importance of proper documentation could not possibly have escaped the attention of a person with her intelligence and background. She herself filled in the personnel record making express reference to the post of 'Contract Consultant'. Had the true contractual nexus been one subsisting between Company C and Company A, one would expect some reflection of that situation in this personnel record. As the Appellant is in dispute with the Revenue on her tax position in other tax years, we do not wish to say anything pertaining to the Appellant's position with Company A in those years. It suffices for us to say that in relation to the sums in question, we have no doubt that Company A was truthful in stating the payments were pursuant to a contract made with the Appellant personally and the Appellant was required to perform the duties and responsibilities under her contract personally.

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10. For these reasons, we dismiss the Appellant's appeal. We wish to record at the same time our strong disapproval of her behavior. It is totally unbecoming for a professional to put forward a pack of lies.