Case No. D60/04

Salaries tax – secondment – whether a new contract of employment exists – whether all services rendered outside Hong Kong – sections 8(1A)(b),(c) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Stephen Lau Man Lung and Wong Kwai Huen.

Dates of hearing: 2 and 3 August 2004.
Date of decision: 30 November 2004.

Since 1994, the appellant had been employed as the 'Sales Director' by the Company A Group comprising Company A – Investment , Company A – Futures and Company A – Holding (except for his employment with Company A – Investment which ceased on 20 December 1994). All three companies were private companies incorporated in Hong Kong during the period of 1990/91 and shared the same business address at Address B.

In 1992, the Company A Group was looking for a business partner in China and managed to find Company I – Industrial. A Co-operation Agreement was subsequently concluded between Company A – Investment and Company I – Industrial on 18 February 1993. Under the Co-operation Agreement, Company A – Investment was engaged to be the business consultant of both Company I – Industrial and Company I – Futures (being a direct enterprise of Company I – Industrial) and it was also required to dispatch some staff members to Company I – Futures in order to assist in the expansion of its futures business and training of its staff.

In June 2001, the Revenue commenced investigation into the affairs of the appellant. On 10 July 2001, the appellant attended an interview with the Revenue in the company of an accountant of Company A – Holding. During the interview, it was alleged that the appellant had, *inter alia*, stated that he was employed by Company A Group during the period under review; and that since 1994/95 till 1996/97, he had also acted as consultant in future trading for Company I – Industrial whom his mother-in-law had relationship with and received a total of about $4 millions as remuneration from Company I – Industrial.

The gist of the interview was later reduced to writing in English and referred to as the English Note. By letter dated 5 September 2001, the Revenue invited the appellant to examine the English Note and comment on any error or inadequacy. However, the appellant had never replied to the Revenue to confirm the truth in the English Note nor supplied the various heads of information referred to in the English Note, as requested by the Revenue in subsequent letters (except that he did instruct his legal representative to confirm, in a letter dated 30 August 2002, with the Revenue

that he and his wife did not have any bank account, properties, quoted shares, investments and remittances other than those as disclosed during the initial interview).

On the contrary, the appellant took the initiative to instruct his legal representative to supply the Revenue with a copy of an Engagement Agreement which was allegedly made between Company I – Brokerage and the appellant in China, in a letter dated 15 December 2002 to the Revenue. According to the Engagement Agreement, the appellant was engaged by Company I – Brokerage as its Principal Consultant and was required to train its staff members; in return he would be paid consultancy commission (in cash in China) which was computed at 20% of the monthly net profit of Company I – Brokerage. By letter dated 22 May 2003, the Appellant (through his legal representative) also revealed to the Revenue that he had received salary income from China totalling $12,926,830 ('the sums in question') for the years of assessment 1994/95 to 1997/98.

On appeal, the main contentions of the appellant were that: he was seconded to a new employer Company I – Brokerage which was a company resident in China and that all the services which he had provided under the Engagement Agreement were provided outside Hong Kong; therefore the sums in question should not be assessed to salaries tax and should be excluded by virtue of section 8(1A)(b) and section 8(1A)(c) of the IRO respectively.

The issue before the Board was therefore whether the sums in question should be assessed to salaries tax.

Held:

1. The case advanced by the appellant before the Board was wholly contrary to the English Note. The Board had no hesitation in finding that the appellant did make the intimations to the Revenue as recorded in the English Note. By its letter dated 30 August 2002, the appellant's legal representative had already confirmed the accuracy of the English Note in a material respect. The appellant made no timely challenge of the underlying facts recorded in that Note. It was only at the hearings that the appellant sought refuge in his alleged difficulties with the English language. Besides the challenge against the accuracy of the English Note, the Board also found the appellant's denial of any knowledge of Company I – Futures irreconcilable with Company A's assertion (in letter dated 14 May 2002) that he was seconded to work in Company I – Futures since 1993. Hence, all in all, the Board did not find the appellant to be an honest witness.

2. As to the evidence of the first two witnesses called in support of the appellant's case, the Board found them both insufficient to dispel the weight which they placed on the English Note. As to the evidence of the last witness, although the Board found him an honest witness, his evidence however provided only limited assistance to the

appellant.

3. The Board also found that the appellant had made no reference to Company I – Brokerage or the Engagement Agreement during his interview with the Revenue on 10 July 2001. Had there been any truth with respect to the Engagement Agreement, the Board would have expected the appellant to make immediate reference to the same at the said interview. For these reasons, the Board rejected the appellant's case that he had a separate Engagement Agreement with Company I – Brokerage and that the sums in question were remuneration under that agreement.

4. After taking into account of all the circumstances of this case (including the investigation of the appellant by the Revenue, inquires made by the Revenue with Company A – Futures and the evidence given by the appellant and his witnesses at the hearings), the Board came to a conclusion that the appellant was sent by each of the Company A – Investment, Company A – Futures and Company A – Holdings to discharge the obligations of Company A – Investment under the Co-operation Agreement. Hence, the sums in question were income arising in or derived from Hong Kong from the appellant's aforesaid employments.

5. Finally, as there was no credible evidence that any tax had been paid in China in respect of the sums in question, the Board also rejected the appellant's suggestion that the said sums should be excluded on the basis of section 8(1A)(c).

Appeal dismissed.

Case referred to:

D55/91, IRBRD, vol 6, 424

Tse Yuk Yip for the Commissioner of Inland Revenue.
Lee Chi Shing of Messrs Andes Glacier & Co for the taxpayer.

Decision:

The Company A companies

1. Company A – Futures is a private company incorporated in Hong Kong on 29 August 1990. The principal activity of Company A – Futures was acting as broker for clients in

futures trading. Company A – Futures carried on its business at Address B. At all material times, Mr C and Mr D were directors of Company A – Futures.

2. Company A – Holdings was incorporated as a private company in Hong Kong on 19 March 1991. In its audited accounts for the year ended 31 March 1996, it was stated that:

> 'The principal activities of the company during the year were leveraged foreign exchange trading, however, all the business activities were ceased on August 29, 1995'.

At all material times, Mr C was a director of Company A – Holdings which also carried on business at Address B.

3. Company A – Investment was incorporated as a private company in Hong Kong on 14 May 1991. It carried on a business of leveraged foreign exchange and gold trading. At all relevant times, its business address was at Address B. According to its annual return made up to 31 December 1993, its two shareholders were Mr C and Mr D. Mr C, Mr D and the Appellant were members of Company A – Investment's board of directors. According to a subsequent return made up to 14 May 1995, Mr C and Mr D were the only members of its board. Mr C and Mr D remained director up to 23 June 1997.

The employment contracts with the Company A companies

4. According to an employer's return of Company A – Investment dated 26 April 1995, the Appellant was employed as 'Sales Director' of that company for the period between 1 April 1994 and 20 December 1994 earning a total of $229,001 by way of salary and commission.

5. By an undated employment latter from Company A – Futures to the Appellant, Company A – Futures offered to employ the Appellant as 'Sales Director' with effect as from 21 December 1994. The Appellant's working hours from Monday to Friday were from 8.30 a.m. to 5.30 p.m. and for Saturday from 8.30 a.m. to 1 p.m. The Appellant was 'required to carry out all duties assigned by the Company'. He was to be paid a salary of $12,000 and an allowance of $2,000. The Appellant accepted this offer on 20 February 1995.

6. By another undated letter from Company A – Futures to the Appellant, Company A – Futures informed the Appellant that his salary was revised to $16,000 with effect from 21 May 1995. His 'Allowance (Meal)' remained unchanged at $2,000.

7. By letter dated 16 May 1996 signed by the Chief Executive of '[Company A] Group', the Appellant was informed that with effect as from 21 April 1996, his salary and allowance were revised to $16,000 and $9,000 making a total of $25,000 per month.

8. By letter dated 1 April 1997, Company A – Futures informed the Appellant that his basic salary was revised to $40,000 per month inclusive of a housing allowance of $30,000 per month. Company A – Futures pointed out that 'All other terms of employment will be remaining unchanged'. By a further undated letter from Company A – Futures to the Appellant, Company A – Futures confirmed the revision to $40,000 with effect as from 1 August 1997.

9. By letter dated 1 April 2000, Company A – Holdings informed the Appellant that the terms of his employment had been revised with effect as from 1 April 2000. His salary was to be made up of bonus and was inclusive of a housing allowance not exceeding $30,000 per month.

10. By letter dated 6 December 2000, Company A – Futures informed the Appellant that with effect from 1 December 2000, his salary as 'Sales Director' was revised to $46,000. Company A – Futures expressed its appreciation for the Appellant's 'valuable contribution to the Group'.

The returns filed by the Appellant

11. The Appellant declared the following income in his tax returns for the years of assessment 1994/95 to 2001/02:

Year of assessment	Name of employer			Period of employment		Position	Income			Total
	Company A – Investment	Company A – Futures	Company A – Holdings	From	To		Salary	Commission	Bonus	
1994/95	***			1-4-1994	31-3-1995	(Blank)				$143,791
		***		1-4-1994	31-3-1995	(Blank)				$166,226
										$310,017
1995/96		***		1-4-1995	31-3-1996	(Blank)	$308,000	$30,920		$338,920
1996/97		***		1-4-1996	31-3-1997	(Blank)	$293,000	$45,120		$338,120
1997/98		***		1-4-1997	31-3-1998	Sales Director	$222,677	$249,161	$70,070	$541,908
1998/99		***		1-4-1998	31-3-1999	Sales Director	$288,000	$231,467	$262,500	$781,967
1999/2000		***		1-4-1999	31-3-2000	Sales Director				$531,533
			***							$1,498,300
										$2,029,833
2000/01		***		1-4-2000	31-3-2001	Sales Director				$504,000
			***							$235,800
										$739,800
2001/02		***		1-4-2001	31-3-2002	Sales Director				$580,300
			***							$512,000
										$1,092,300

12. By letter dated 3 June 1998, the Appellant amended his 1997/98 return. He indicated that the bonus from Company A – Futures should be $1,396,370 instead of $70,070.

13. In his return for 2001/02, the Appellant further stated that he was provided with quarters by Company A – Futures. The quarters provided was Address E.

The return filed by Company A – Investment

14. Reference is made to paragraph 4 above. According to that return of Company A – Investment, the Appellant's employment with that company ceased on 20 December 1994.

Returns filed by Company A – Futures

15. On divers dates, Company A – Futures filed employer's return for the years 1994/95 to 2001/02 in respect of the Appellant showing the following particulars:

Period		Position	Particulars of income					Quarters provided		
From	To		Salary/ Wages	Commission	Bonus	Extra Bonus	Total	Rent paid to landlord by employer	Rent paid to landlord by employee	Rent refunded to employee
1-4-1994	31-3-1995	Sales Director	$42,000	$39,016			$81,016			
1-4-1995	31-3-1996	Sales Director	$208,000	$130,920			$338,920			
1-4-1996	31-3-1997	Sales Director	$293,000	$45,120			$338,120			
1-4-1997	31-3-1998	Sales Director	$222,677	$249,161	$70,070	$1,326,300	$1,868,208		$192,000	$192,000
1-4-1998	31-3-1999	Sales Director	$288,000	$231,467	$262,500		$781,967		$192,000	$192,000
1-4-1999	31-3-2000	Sales Director	$493,333	$38,200			$531,533			
1-4-2000	31-3-2001	Sales Director	$504,000							
1-4-2001	31-3-2002	Sales Director	$204,000	$376,300			$580,300	$348,000		

The address of the quarters provided to the Appellant was Address F.

Returns filed by Company A – Holdings

16. On divers dates, Company A – Holdings filed employer return for the years 1999/2000 and 2000/01 in respect of the Appellant showing the following particulars:

Period		Position	Particulars of income		Quarters provided
From	**To**		**Nature**	**Amount**	**Rent paid to landlord by employer**
1-4-1999	31-3-2000	Sales Director	Bonus	$1,498,300	$348,000
1-4-2000	31-3-2001	(Blank)	Bonus	$235,800	$348,000
1-4-2001	31-3-2002	(Blank)	Bonus	$512,000	

The address of the quarters provided to the Appellant was Address G.

The entities in China

17. We are concerned with three alleged entities in City H:

(a) Company I – Industrial

(b) Company I – Futures

(c) Company I - Brokerage

18. On 18 February 1993 Company I – Industrial entered into a written agreement ['the Co-operation Agreement'] with Company A – Investment. The Co-operative Agreement was signed by representatives of Company I – Industrial and Company A – Investment and chopped with the chops of both entities.

(a) Clause 2 of the Co-operation Agreement referred to Company I – Futures as a direct enterprise of Company I – Industrial and the wish of Company I – Industrial to engage Company A – Investment as its business consultant.

(b) Clause 3 of the Co-operation Agreement provided that Company A – Investment was required to despatch four staff members versed in futures to act as principal consultant and business consultant of Company I – Futures. They were to assist in the expansion of its futures business and the training of its staff.

(c) Clause 4 of the Co-operation Agreement provided that 25% of the monthly commission received would be paid to Company A – Investment as its remuneration.

(d) Clause 5 of the Co-operation Agreement provided that the engagement was for an initial period of five years from 18 February 1993.

Investigation of the Appellant by the Revenue

19. In June 2001 the Revenue commenced investigation into the affairs of the Appellant. Accompanied by Mr J, accountant of Company A – Holdings, the Appellant attended an interview with the Revenue on 10 July 2001. According to the English note of that interview ['the English Note']:

(a) The Appellant stated that he was 'employed by [Company A] Group during the period under review'.

(b) He said that since 1994/95 he 'was paid with salary and commission. The commission was calculated based on the sales generated by him and his team members'.

(c) He stated that he 'had acted as consultant in future trading in [City H] since 1994/95 till 1996/97'. He 'only considered himself as an employee of [Company I – Industrial]'. He showed officers of the Revenue a staff badge issued by the People's Liberation Army. He told the Revenue that Company I – Industrial was a company under the control of the People's Liberation Army.

(d) He was asked about the trading name of Company I – Industrial in China. He said that the name of the building in which he worked 'showing and displaying as [Company I – Industrial] and he was not aware of its trading name'.

(e) The Appellant 'said he was responsible for setting up Sales Department in China. In the initial stage, he had to prepare training materials for staff in China. He had translated the training materials that currently used by [Company A] Group in Hong Kong from Chinese character to Simplified Chinese character. He also had to oversee the decoration progress in China. When Sales Department was in operation, he had to oversee the maintenance of clients' accounts and the reconciliation of clients' investment accounts'.

(f) The Appellant admitted that 'he had prepared all necessary materials, such as training materials and work procedures, in Hong Kong during the initial stage of setting up of Sales Department in China. Six months later, two other employees, namely [Mr K] and [Mr L], stationed in China to oversee the operation in China. At that time, [he] was the manager of Kowloon Branch of [Company A – Futures]...He spent half of his time working in China and half of it working in Hong Kong. When [Mr K] and [Mr L] encountered enquiries and problems in China while [he] was away, they would seek advice from [him] through I.D.D.'.

(g) '[He] was paid remuneration calculated in the range of 15% to 20% of the commission income received by [Company I – Industrial]. Gross commission ¥800 was received by [Company I – Industrial] for every contract executed on behalf of its clients. Both Mr K and Mr L did not entitle to any share of commission and only received employment income from [Company A] Group. Occasionally [he] would pay extra money to them as bonus. The total bonus claimed to have been paid to Mr K and Mr L amounted to about 10% of the commission received by [him]. The remuneration was paid to him by depositing money into the bank account of [Company M], a company beneficially owned by [him]. His remuneration was calculated every two months. [He] claimed that he received about $4M between the years from 1994/95 to 1996/97 from [Company I – Industrial]'.

(h) When asked about when the money was paid to him, the Appellant allegedly said that 'he only came to know the money was paid to him when he occasionally updating the bank passbook. He believed that the money was paid to him through black market money exchange. [He] claimed that a local manager in China named "Mr N" was responsible to remit the money to him. [Mr N] would inform him once the money had been deposited into his bank account'.

(i) The Appellant allegedly explained that his mother-in-law had 'relationship' with Company I – Industrial and due to such 'relationship' he managed to gain trust and earn income from Company I – Industrial.

(j) The Appellant was questioned extensively on the bank accounts which he operated in his own name and in the name of Company M. Various accounts in the Bank O and the Bank P were identified.

20. By letter dated 5 September 2001, the Revenue sent to the Appellant the English Note. The Revenue invited the Appellant to examine the English Note and comment on any error or inadequacy. This letter was in English and in Chinese.

21. By letter dated 17 December 2001, the Revenue pressed the Appellant for his response to their earlier letter of 5 September 2001. This letter was also in English and in Chinese.

22. By a separate letter dated 17 December 2001, the Revenue sought additional information and documents from the Appellant. The Appellant was invited to confirm that no bank accounts other than those disclosed during the 10 July 2001 interview were maintained by him and/or his spouse.

23. On 10 October 2001, Messrs Andes Glacier & Co was instructed to act for the Appellant. By letter dated 30 August 2002, Messrs Andes Glacier & Co replied to the Revenue's letter of 17 December 2001. They informed the Revenue that 'Our client and his wife do not have any bank account, properties, quoted shares, investments and remittances other than those as disclosed during the initial interview'. This letter was copied to the Appellant.

24. By letter dated 17 September 2002, the Revenue reminded the Appellant that various heads of information referred to in the English Note had not been supplied. The Revenue also asked the Appellant for information in relation to the income which he received from Company I – Industrial.

25. By letter dated 15 December 2002, Messrs Andes Glacier & Co sent to the Revenue an engagement agreement dated 20 May 1993 ['the Engagement Agreement']. This Engagement Agreement was allegedly made between Company I – Brokerage and the Appellant. According to the Engagement Agreement, Company I – Brokerage was a company dealing in futures. By that agreement, Company I – Brokerage engaged the Appellant as its Principal Consultant to train staff members of Company I – Brokerage. The Appellant was to be paid consultancy commission. Such commission was to be computed at 20% of the monthly net profit of Company I – Brokerage. The commission was to be paid into bank account as designed by the Appellant. This Engagement Agreement was signed by the Appellant but not by Company I – Brokerage. It was however chopped with 2 chops, one bearing the name of Company I – Brokerage and the other bearing the name 'Mr Q'.

26. By letter dated 22 May 2003, Messrs Andes Glacier & Co submitted to the Revenue the following summary of the Appellant's 'salary income received from China':

	1994/95	**1995/96**	**1996/97**	**1997/98**
April	$71,010	$709,500		
May	$351,200	$1,034,000		$86,000
June	$1,244,960			$1,302,800
July	$362,500	$350,700		
August				$808,600
September	$107,800	$393,500		
October	$107,400			$1,300,500
November		$420,600	$350,700	
December				
January	$76,000	$2,092,230	$147,800	$1,436,130
February	$111,900			
March		$61,000		
Total	$2,432,770	$5,061,530	$498,500	$4,934,030

The appellant claimed that 'the salary payments (after deducting the Personal Income Tax of China) were remitted to Hong Kong or paid by cash in China'.

27. The issue before us is whether the sums referred to in paragraph 26 above should be assessed to salaries tax.

Inquiries made by the Revenue with Company A – Futures

28. On 11 April 2002, the Revenue instituted tax claim No 2513 of 2002 against Company A – Futures seeking various heads of information pertaining to the Appellant's employment with that company. By letter dated 14 May 2002, Company A – Futures informed the Revenue that:

(a) Company A – Futures and the Appellant entered into an employment contract in Hong Kong on 21 December 1994.

(b) The appellant was not required to work outside Hong Kong under his employment contract with Company A – Futures.

(c) From 1993, the Appellant was seconded to PRC to work in another company, Company I – Futures. Company A – Futures 'was not a related company to [Company I – Futures] and [the appellant] needed not perform any service for [Company A – Futures] during his secondment in PRC'.

(d) The remuneration paid by [Company I – Futures] to [the Appellant] was negotiated between the two parties concerned. [Company A – Futures] had no information on how the remuneration was calculated, the date, the amount and the mode of each payment, because [the Appellant] did not work for [Company A – Futures] in PRC'.

Contentions of the Appellant

29. The Appellant drew our attention to a decision of this Board in Case No D55/91, IRBRD, vol 6, 424. The Board in that case pointed out that:

> *'There is no definition of a secondment, but we think it is correct to say that it is a period of temporary employment at the end of which the employee returns to his general employment. Depending on the circumstances of the case, the secondment may be based on a contract of service made between the temporary employer and the employee with the consent of the general employer, or it may be simply a case of the general employer directing the employee to go and do some work for the temporary employer without*

involving the creation of a contract of service between the temporary employer and the employee'.

30. On the basis of that authority, the Appellant contends as follows:

(a) He was seconded to a new employer Company I – Brokerage which is a company resident in China.

(b) The Engagement Agreement was 'negotiated, enforceable and concluded in China'.

(c) His salary was paid in cash in China.

(d) All the services under the Engagement Agreement were performed in China and no services was rendered in Hong Kong.

(e) The sums in question should also be excluded from salaries tax by virtue of section 8(1A)(c) of the Inland Revenue Ordinance ['IRO'].

Contentions of the Revenue

31. The Revenue contends as follows:

(a) What has to be decided is whether the income arose in or derived from Hong Kong from a source of employment or not.

(b) If during the relevant years of assessment, the location of a person's employment is in Hong Kong, he is liable to salaries tax on the whole of the income from his employment under section 8(1)(a) of the IRO although he is required to perform some of his duties outside Hong Kong in connection with his employment.

(c) If, however, a person's location of employment is outside Hong Kong, he would not be liable to salaries tax in Hong Kong on the whole of his income but only liable to tax on income derived from services rendered in Hong Kong under section 8(1A)(a) of the IRO.

(d) At all relevant times the Appellant was under the employment of the Company A Group and the locality of such employment was in Hong Kong.

(e) There is no credible evidence to support the Appellant's claim that there existed a separate and distinct employment between the Appellant and Company I – Brokerage.

(f) The sums in question were derived from Hong Kong from the Appellant's employment with the Company A Group.

(g) According to the Commissioner's determination, the Company A Group was made up of Company A – Investment, Company A – Futures and Company A – Holdings.

The hearing before us

32. At the inception of the hearing before us, the Appellant submitted a copy of a business licence in respect of Company I – Brokerage ['the Business Licence']. Mr Lee of Messrs Andes Glacier & Co admitted that this Business Licence was in his possession for about a week prior to the commencement of hearing before us. This Business Licence is obviously an important document. Mr Lee gave us no explanation as to why advance notice was not given to the Revenue. We deprecate such conduct. The Revenue was deprived of an opportunity of properly investigating this important document. We take this into account when considering what weight to be attached to the Business Licence.

33. The Business Licence was dated 17 October 1994. It gave a date for the registration of the commencement of business of Company I – Brokerage. Apart from the year 1993, the rest of that date was covered by the chop of the issuing authority. According to the Business Licence, a Mr Q was the legal representative of Company I – Futures.

The testimony adduced on behalf of the Appellant

34. Apart from the Appellant, Mr R, Mr S and Mr T gave evidence in support of the Appellant case.

35. The Appellant told us that Mr C of Company A introduced him to Mr Q in March/April 1993. He had two to three discussions with Mr Q. Drafts of the Engagement Agreement were sent to him in Hong Kong. Mr C of the Company A Group gave him permission to conclude that arrangement. After taking up his position in China, he ceased to be a director of Company A – Investment in order to avoid any conflict. His main duties in China were in recruitment, training and promotion of futures business. Company I – Brokerage was his employer. He was evasive in relation to his remuneration from Company I – Brokerage. According to his written statement, Company I – Brokerage was prepared to pay him 20% of its commission income as his salary. The Appellant sought to explain that this meant Company I – Brokerage's net income/net profit. He said he did not participate in Company A's futures business in China.

Although he did notice Company I – Futures, he did not pay any attention and had no knowledge of that entity. He said he has a poor command of the English language. He was educated up to Form V and managed to secure a bare pass in English after several attempts. He did read the English Note and did consult his tax representative on its contents. He did not sign and return the English Note to the Revenue as he did not fully understand the same. In relation to Messrs Andes Glacier & Co's letter to the Revenue dated 30 August 2002, he said whilst he could understand each of the words 'other than those as disclosed during the initial interview', he had difficulties in understanding the whole phrase. He said the bulk of the payments from Company I – Brokerage to him was in cash and there were only occasional deposits into his account in China. He did not disclose this account in China as he was not asked by the Revenue. In relation to cheques drawn by Company M in favour of Mr K dated 12 August 1996 for $30,000 and dated 21 December 1996 for $78,100, he surmised that the same were reimbursements for sums expanded by Mr K on his behalf in buying gifts or arranging trips for staff members of Company I – Brokerage. The Appellant admitted that he did not pay attention to payment of tax in China.

36. Mr R was the Finance Manager of Company I – Brokerage. He commenced work with Company I – Industrial in March 1993. Company I – Brokerage was a subsidiary of Company I – Industrial. Company I – Brokerage commenced business in about October 1993. Company I – Industrial, Company I – Brokerage and Company I – Futures had their offices in the same building with Company I – Industrial on the 8th floor, Company I – Futures on the 4th floor and Company I – Brokerage on the 2nd floor. He witnessed the signing of the Engagement Agreement in the office of Mr Q. Mr Q left the company in 1997. The Appellant did not have any basic salary. Mr R was however very confused as to the Appellant's entitlements. According to his written statement, the Appellant was to be paid 20% of the commission received by Company I – Brokerage. He amplified that in the course of his evidence to 20% of the net receipt of the company and then 20% of the net profit of the company. He said the Appellant was paid either in cash or by deposits of RMB into his account in City H. He said Company I – Brokerage paid tax to the authority in China. His evidence is unclear as to whether such payment was in respect of Company I – Brokerage's own liability or in respect of the liability of the Appellant. He cannot recall whether the Appellant was shown the certificate of payment which was retained by Company I – Brokerage. Company I – Brokerage ceased business in 1998. All its documents were taken over by the People's Liberation Army. A copy of the Business Licence was however retained by Company I – Industrial.

37. Mr S told us in his written statement that he was a former staff member of the Company A Group. He accepted as accurate the employer's returns of Company A – Futures for the years 1995/96 and 1996/97 which described him as the 'Section Manager' and the 'Deputy Sales Manager' of the Company A – Futures. He said he was sent with three others including one Mr U to work in Company I – Futures in City H. Company A provided them with quarters in City H. He admitted that he heard of Company I – Brokerage. Company I – Brokerage dealt with futures in China whilst Company I – Futures handled futures in the international market. Joint social functions including trips overseas were hosted by Company I – Brokerage and Company I –

Futures to reward members of their staff. Cheques drawn by Company M in his favour were reimbursements for costs incurred in those functions.

38. Mr T described himself to be 'the director of [Company A] group' in an affirmation submitted to this Board. He said he was only in charge of marketing matters. Company A was looking for a business partner in 1992 and managed to locate Company I – Industrial. His company entered into the Co-operation Agreement with Company I – Industrial and he sent four experienced sale persons to City H. The four were Mr S, Mr U, Mr V and Mr K. No employee permit was issued by Company I to these members of Company A staff. Apart from these sales persons, he could not identify the person sent by Company A to provide training to Company I. He did not participate and had no personal knowledge of the arrangement between the Appellant and the companies in China. He said Company A did not pay the Appellant anything in respect of his work in China.

Our decision

39. The case advanced by the Appellant before us is wholly contrary to the English Note. What we find significant is that whilst the Appellant now seeks to challenge the English Note as not depicting the true facts, the Appellant made no attempt to deny that the English Note is an accurate record of what transpired at his meeting with the Revenue on 10 July 2001. We have no hesitation whatsoever in finding that the Appellant did make the intimations to the Revenue as recorded in the English Note. The Appellant made no timely challenge of the underlying facts recorded in that note. By its letter dated 30 August 2002, Messrs Andes Glacier & Co confirmed its accuracy in a material respect. The Appellant sought refuge in his alleged difficulties with the English language. He secured a pass in English after several attempts. The English correspondence of Messrs Andes Glacier & Co were all copied to him. His written statement before this Board is in English. We are of the view that his standard of English is much better than he is willing to admit and his alleged ignorance is no more than a convenient excuse to explain the English Note. On this and other issues, we do not find the Appellant to be an honest witness. His denial of any knowledge of Company I – Futures cannot be reconciled with Company A – Futures' assertion in letter dated 14 May 2002 that he was seconded to work in Company I – Futures since 1993. He put forward new but contradictory explanations on the payments made by Company M in favour of Mr S and Mr K. We do not find any of these credible in the light of his stance at the 10 July 2001 interview.

40. The Appellant made no reference to Company I – Brokerage or the Engagement Agreement during his interview on 10 July 2001. He showed officers of the Revenue his staff badge with Company I – Industrial but failed to identify the trading name of that company. Had there been any truth with respect to the Engagement Agreement, we would have expected the Appellant to make immediate reference to the same at the interview. There are other weighty factors which cast doubt on the authenticity of the Engagement Agreement. The Appellant indicated at the 10 July 2001 interview that his mother-in-law's 'relationship' with Company I – Industrial was the reason why he managed to earn income from that company. This is at odds with

his new case that he was introduced to Mr Q by Mr C. We have not lost sight of the evidence of Mr R. We view his evidence on the execution of the Engagement Agreement with suspicion bearing in mind his failure to identify precisely the Appellant's entitlement under that Agreement. His evidence is insufficient to dispel the weight which we place on the English Note.

41. We are also not impressed by Mr S as a witness. The cheques in his favour were substantial amounts. Had he incurred like amounts on behalf of the Appellant on gifts and trips, we would have expected some primary documents from him to support that contention. We find the intimations given by the Appellant at the 10 July 2001 meeting as representing the truth. Mr S was not entitled to any commission and the cheques from Company M were extra money to him as bonus.

42. We find Mr T to be an honest witness. His answers were not contrived but were spontaneous. His evidence however provides only limited assistance to the Appellant. First, we do not know the precise status of Mr T. He was obviously not a director of Company A – Investment. Secondly, his primary interest was in marketing and he had little involvement with the companies in China. Thirdly, the four staff members which he sent were all in marketing. He could not identify the staff member sent to carry out training duties. Fourthly, he admitted that he had no personal knowledge of the arrangement between the Appellant and Company I.

43. For these reasons, we reject the Appellant's case that he had a separate Engagement Agreement with Company I – Brokerage and that the sums in question were remuneration under that agreement.

44. We are however concerned with one aspect of the Revenue's case. The Revenue had presented its case on the basis that the Appellant was employed by the Company A Group. The Company A Group is not a legal entity. On the evidence before us, the Appellant's employment was with Company A – Investment, Company A – Futures and Company A – Holdings. His employment with Company A – Investment ceased on 20 December 1994 and he left the Board of Company A – Investment by 14 May 1995. The Co-operation Agreement was made between Company A – Investment and Company I – Industrial. Company A – Futures and Company A – Holdings were not parties to that agreement. This casts doubt on whether the sums in question were derived from Hong Kong from the Appellant's employment with Company A – Futures and Company A – Holdings.

45. Our concerns referred to in paragraph 44 above were dispelled by the following factors. First, the Appellant himself told the Revenue at the 10 July 2001 interview that the sums in question stemmed from the Sales Department which he set up in China. We have no doubt that his initial entry into China was the result of his employment with Company A – Investment. Secondly, the Appellant further said at the 10 July 2001 interview that he was paid by Company I – Industrial and he made no distinction between the years from 1994/95 to 1996/97. Thirdly, reference to the notion of the Company A Group can also be found in the Appellant's evidence. Mr T described

himself as a director of the Company A Group. Revision of the Appellant's employment terms on 16 May 1996 was made on behalf of the Company A Group. Company A – Futures expressed gratitude on 6 December 2000 for the Appellant's contribution to the Group. Fourthly, Company A – Futures said in its letter dated 14 May 2002 that the Appellant was seconded to Company I – Futures. Fifthly, Mr S was also an employee of Company A – Futures at the material times. It is the Appellant's case that he was sent to discharge the obligations of Company A – Investment under the Co-operation Agreement. Given the admissions of the Appellant at the 10 July 2001 interview, we find no material distinction between the Appellant's position and that of Mr S on this issue. For these reasons we conclude that the Appellant was sent by each of Company A – Investment, Company A – Futures and Company A – Holdings to discharge the obligations of Company A – Investment under the Co-operation Agreement. The sums in question were income arising in or derived from Hong Kong from the Appellant's aforesaid employments.

46. We reject the Appellant's suggestion that the sums in question should be excluded on the basis of section 8(1A)(c). There is no credible evidence that any tax was paid in China in respect of those sums.

47. For these reasons, we dismiss the Appellant's appeal and confirm the assessments.