

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D61/01**

**Salaries tax** – property agent – whether independent contractor carrying on his own business.

Panel: Ronny Wong Fook Hum SC (chairman), Arthur Chan Ka Pui and Michael Seto Chak Wah.

Date of hearing: 19 May 2001.

Date of decision: 1 August 2001.

At all material times, the taxpayer was employed as a property consultant with, inter alia, basic salary as well as commission. The taxpayer contended that he was an independent contractor instead of an employee. Thus he was only liable to profits tax but not salaries tax.

**Held:**

1. The Board found the taxpayer integrated himself into his employer's business. Same engagement letters were issued all along. The taxpayer was paid a basic salary and his promotion was performance orientated.
2. The Board found the taxpayer not carrying on work on his own account and thus not being an independent contractor (D73/95 considered and applied).

**Appeal dismissed.**

Case referred to:

D73/95, IRBRD, vol 11, 130

Chan Tak Hong for the Commissioner of Inland Revenue.

Taxpayer in person.

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### **Decision:**

1. By a letter of appointment dated 19 October 1992, Company A1 offered to the Taxpayer the post of 'property consultant' in their B Department for District C. A three months probationary period was applicable to this appointment. The appointment was subsequently formalised in an agreement between the parties dated 25 November 1992. The Taxpayer was entitled to remuneration at the rate of \$4,000 per month together with commission at varying rates.
2. On 17 March 1993, the Taxpayer registered a business in the name of Company D. He allegedly commenced business in this name on 16 March 1993 at his residential address in Housing Estate E.
3. By letter dated 7 April 1993, the Taxpayer was promoted by Company A1 to the position of senior property consultant with effect from 1 April 1993. His salary was adjusted from \$4,000 to \$5,000 per month. This promotion was formalised by an agreement dated 14 May 1993 between Company A1 and the Taxpayer 'trading as Company D'.
4. By letter dated 27 August 1993, the Taxpayer resigned from his position with Company A1 effective on the same day.
5. By letter dated 11 November 1993, Company A1 offered to the Taxpayer the post of senior property consultant in their B Department for District C with basic salary at \$5,000 per month and commission at varying rates. By letter dated 21 December 1993, Company A1 informed the Taxpayer of his promotion to the post of acting assistant sales manager of Housing Estate F Department with effect from 1 January 1994. His basic salary was increased to \$8,000 per month. Apart from commission at varying rates, the Taxpayer was further given an overriding commission on all transactions effected by three sales subordinates assigned to him.
6. By an agreement dated 25 January 1994 ('the 1994 Agreement') between the Taxpayer 'trading as Company D' and Company A1, Company A1 agreed to appoint the Taxpayer so designated as an assistant manager of Company A1 for a period of one year. The 1994 Agreement provides:
  - (a) By clause 2(a) that the assistant manager shall supervise and manage the sales team assigned to him by Company A1 to attain sales and profit targets and shall at all times keep the board of Company A1 informed of his conduct of the business or affairs of Company A1.
  - (b) By clause 4 that Company A1 shall pay the assistant manager the remuneration, benefits and commissions as set out in the schedule to that agreement. The

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remuneration included a monthly remuneration of \$8,000 and an overriding commission at varying rates.

- (c) By clause 5 that Company A1 shall reimburse the assistant manager out-of-pocket expenses reasonably incurred by him in or about the discharge of his duties under the agreement. This included a sum of \$1,400 per month by way of portable phone and a car allowance payable in arrears at the end of each month.

The 1994 Agreement was prepared by a firm of solicitors for execution by the parties.

7. By letters dated 5 February 1994 and 13 December 1994, Company A1 revised the commission package in favour of the Taxpayer. The February adjustment covered the Housing Estate F Department whilst the December adjustment extended to the District G Branch as well as the Housing Estate F Branch.

8. The Taxpayer was promoted by Company A1 to the position of district manager with effect from 1 January 1995. By letter dated 27 February 1995, his commission package was further revised. By letter dated 3 May 1995, the Taxpayer tendered his resignation as district manager 'effective from today' as he 'would like to try something new in a different environment'.

9. By letter dated 29 February 1996, Company A2 offered the Taxpayer the position of 'investment manager' with basic salary at \$15,000 per month with 15% commission on all transactions effected by him. He was transferred from Company A2 to Company A1 on 1 June 1996. The Taxpayer resigned from this position by letter dated 31 July 1996.

10. For the years of assessment 1993/94 to 1995/96, Company A1 and Company A2 made the following payments in favour of the Taxpayer:

<b>Payer</b>	<b>1993/94</b>	<b>1994/95</b>	<b>1995/96</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>
Company A1	1,895,536	1,365,577	272,908
Company A2	-	-	15,000

11. The issue for our determination is whether the Taxpayer is chargeable to salaries or profits tax in respect of the sums paid to him by Company A1. The Revenue contends that the Taxpayer was at all material times an employee of Company A1. The Taxpayer contends otherwise. He says that he carried on a business in the name of Company D. The payments from Company A1 were income of Company D. He is therefore chargeable to profits tax and not to salaries tax.

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12. According to the profits tax computation of Company D, its profit and loss positions in the relevant years were as follows:

<b>Year of assessment</b>	<b>Income</b>	<b>Expenses</b>	<b>Net profit for the year</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>
1993/94	1,834,687	1,181,851	652,836
1994/95	1,091,376	733,891	357,485
1995/96	222,502	53,270	169,232

We did not examine in depth the various items of expenditure allegedly incurred by Company D. A cursory perusal of the relevant items suggests a very blurred line of demarcation between personal expenditure and expenditure for Company D.

### **Correspondence between Company A1 and the Revenue**

13. In its letter dated 8 January 1999, Company A1 informed the Revenue that:

- (a) The Taxpayer was transferred to their District H Branch on 1 January 1994.
- (b) The Taxpayer's remuneration was paid on a service fee plus a commission calculated at a progressive rate on the agency fee income introduced and received by Company A1. The method used in calculating his remuneration is the same as for other employees within the group. In addition, the Taxpayer was entitled to receive commission calculated at a flat rate on the agency fee received for the Housing Estate F project from October 1993 to December 1993.
- (c) 'Working place has been provided to him during the period. However, he might be required to perform outdoor work in discharging his duties' .
- (d) The Taxpayer 'was required to attend work at regular hours and observe company's rules and regulations which are stated on the letter of appointment and service agreement...'
- (e) 'General office equipment and facilities have been provided to him in the performance of his duties. However, he might be required to employ his own assistant in discharging his duties' .
- (f) 'He was entitled to our company's fringe benefits including annual leave, sick leave, medical, travelling allowance, mobile allowance and medical claim' .

### **Evidence of the Taxpayer**

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14. He does not dispute the fact that he was an employee of Company A1 for the period between 19 October 1992 and 27 August 1993. His case is that the nature of his engagement varied substantially when he returned to Company A1 in October 1993 in the following circumstances.

15. According to the Taxpayer, in October 1993 he had a chance meeting in Housing Estate F with Mr I of Company J who developed that complex. He succeeded in persuading Mr I to entrust him with the sale of about 40 units in Block 10 of Housing Estate F. Mr I further agreed to make available a shop with Housing Estate F as the sales office for those units.

16. The Taxpayer immediately contacted Mr K of Company A1 after securing this mandate from Mr I. It was agreed between Mr K and the Taxpayer that they would co-operate in exploiting this business opportunity. Company A1 would contract with Company J and the sales office in Housing Estate F would bear Company A1's name. The Taxpayer would arrange for his own sales team. Company J provided him with office equipments and a car park at the Housing Estate F sales office.

17. The Taxpayer was successful in marketing units in Block 10. Mr I extended his mandate to units in Blocks 9, 11 and 12. Sales however slowed down after the first quarter of 1994.

18. He did not have any superior at the Housing Estate F sales office. He merely reported to directors of Company A1.

19. In respect of each sale, Company A1 would receive commission at the rate of 1% of the sale price. The Taxpayer was paid:

- (a) Overriding commission: This was commission earned by the Taxpayer in his capacity as sales manager from transaction effected by his own sales staff.
- (b) In packet commission: This was commission calculated at 8% of the agency fee received by Company A1 from the Housing Estate F project.
- (c) Self-earned commission: This was commission earned by the Taxpayer from transactions effected by him.

20. He left Company A1 as Company A1 wanted to integrate him as part of its set-up. He was holding the position of senior property consultant when he left.

21. The Taxpayer called Madam L to give evidence in support of his case. Madam L told us that:

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- (a) The Taxpayer was the first estate agent who marketed units in Housing Estate F.
- (b) The Taxpayer himself took on one Madam M to assist him in his marketing activities. Madam M was a former employee of Company A1 and it was uncommon for Company A1 to re-engage its former employees.
- (c) She approached the Taxpayer on all matters relating to sale of units in Housing Estate F.

### **The applicable test**

22. The fiscal position of estate agents was considered by this Board in D73/95, IRBRD, vol 11, 130. The following propositions can be deduced from the decision in that case:

- (a) No single test determined whether a contract was one of service or for services and ultimately this was a question of fact. Generally, however, courts in Hong Kong have adopted the so-called ‘work on own account’ test to determine whether a worker was an employee or an independent contractor.
- (b) The fundamental test to be applied is this: ‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account?’
- (c) No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.
- (d) Control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor.
- (e) The factors which may be of importance are:
  - (i) whether the man performing the services provides his own equipment;
  - (ii) whether he hires his own helpers;
  - (iii) what degree of financial risk he takes;
  - (iv) what degree of responsibility for investment and management he has; and

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- (v) whether and how far he has an opportunity of profiting from sound management in the performance of his task.

23. In D73/95, the taxpayer craved in aid the following factors in support of his contention that he was an independent contractor as distinct from an employee. These included:

- (a) purchase of his own equipment;
- (b) employment of a part-time assistant;
- (c) bearing financial risk in the sense that he spent considerable sums of money on items such as his pager, travelling and salary to his assistant without any reimbursement;
- (d) degree of responsibility in the sense that he had to decide whether to purchase equipment and employ an assistant;
- (e) the opportunity to benefit from sound management in the sense that he would not earn any money if he did not work as well as the possibility of losing money if he paid a deposit to the wrong party; and
- (f) the absence of benefits from the firm which are normally provided by employers to employees.

The Board took these factors into consideration but was of the view that the totality of the evidence before them indicates that the taxpayer was completely integrated into the business of the firm that engaged him.

### **Our decision**

24. We accept the Taxpayer's evidence that:

- (a) he successfully procured a mandate from Mr I for sale of units in Housing Estate F;
- (b) Company J provided a sales office in Housing Estate F and the requisite equipments in that office;
- (c) he engaged Madam M to assist him in marketing the units in Housing Estate F; and
- (d) he had overall supervision of the Housing Estate F sales office and he reported only to the directors of Company A1.

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25. We further find that:

- (a) it was the intention of the parties that the sales office in Housing Estate F be held out as part of Company A1 network;
- (b) the Taxpayer was given a title by Company A1 and he marketed the Housing Estate F units within the Company A1 network; and
- (c) the Taxpayer was paid a basic salary by Company A1.

26. The facts in the present case are similar to those in D73/95. The present case differs from D73/95 in that the work of the Taxpayer at the material times was tied specifically to the Housing Estate F complex and there is evidence that the Taxpayer engaged his own sales team. We are not persuaded that these two factors compel us to reach a conclusion different from that arrived at by the Board in D73/95. The Taxpayer did not see fit to market the Housing Estate F units himself. He brought in Company A1 and was contented to allow himself to be integrated into Company A1's business. The engagement letters of 11 November 1993 and 21 December 1993 do not differ from the earlier engagement letters. He was paid a basic salary and his promotion was performance orientated. We find these factors wholly inconsistent with the picture of an independent contractor carrying on work on his own account. We are not satisfied that the Taxpayer had duly discharged the onus of proof resting upon him.

27. For these reasons, we dismiss the Taxpayer's appeal and confirm the assessments.