Case No. D62/03

Salaries tax – sections 9A, 61 and 61A of the Inland Revenue Ordinance ('IRO') – whether or not the carrying out of the services was in substance holding by him of an office or employment of profit.

Panel: Ronny Wong Fook Hum SC (chairman), Shirley Conway and Leung Hing Fung.

Date of hearing: 5 July 2003.
Date of decision: 10 October 2003.

The appellant held 9,900 shares in the Company and the remaining 100 shares were held by the appellant's father. The appellant and his father were the only directors of the Company. On 16 September 1992, Company A and the Company entered into an agreement to procure the appellant to render his services. Company B, the Company and the appellant entered into agreements on 20 March 1996 that the Company was exclusively entitled to the benefit of the appellant's service, that Company B was desirous of engaging the appellant to perform and that the Company agreed to make available the services of the appellant to appear and perform in Company B's programme.

Under these agreements, remuneration for services carried out by the appellant for Companies A and B was paid to the Company. In both of the said agreements with Company A and Company B, the appellant undertook to comply with the agreements and agreed to indemnify Company A and Company B against any loss or damages arising out of any breach of the said agreements by the Company.

The assessor raised salaries tax assessment on the appellant in respect of the income from Company A and Company B. The appellant objected and contended that he was not an employee of Company A nor Company B and the fees paid by Company A and Company B should be charged against the Company as profits tax.

The issues before the Board were whether the criteria specified by section 9A(3) were duly satisfied as to take the case out of section 9A(1) and whether the appellant has established under section 9A(4) that at all relevant times the carrying out of the services was not in substance the holding by him of an office or employment of profit with either Company A or Company B.

Held:

1. On review of the evidence, the Board was not satisfied that the provisions of section 9A(1) were inapplicable by virtue of the provisions in section 9A(3).

2. The Board was of the view that the picture painted by the details in this case was substantially different from those in Hall v Lorimer and in Cheng Yuen. In Cheng Yuen, Mr Cheng was not guaranteed any work by virtue of his agreement with the golf club and he was not obliged to attend for work. It was up to the playing member (a non party to the alleged agreement) to control whether service was needed and the payment. The nature of service provided in Hall, being film editing, again was substantially different from the nature of service in the present case. In Hall, the appellant customarily worked for 20 or more production companies and most of the contracts were of very short duration, ranging from one to ten days. In this case, both Companies A and B exercised stringent control over the services rendered by the appellant. Such control was wholly absent in both Hall v Lorimer and Cheng Yuen (Hall v Lorimer [1994] 1 All ER 250 and Cheng Yuen v The Royal Hong Kong Golf Club [1997] HKLRD 221 distinguished).

3. The Board was of the view that the present case bore similarities to the facts of D108/01, IRBRD, vol 16, 860. The Board likewise held that the appellant has failed to discharge his burden of proving that the carrying out of the services in favour of Companies A and B was not in substance the holding by him of an employment of profit with Companies A and B (D108/01, IRBRD, vol 16, 860 followed).

4. Since the appellant and the Revenue were id idem in relation to a 10% deduction as the relevant outgoings of the appellant, the Board dismissed the appeal and save for the agreed deduction the Board confirmed the assessments.

Appeal allowed in part.

Cases referred to:

Hall v Lorimer [1994] 1 All ER 250
Cheng Yuen v The Royal Hong Kong Golf Club [1997] HKLRD 221
D108/01, IRBRD, vol 16, 860

Cheung Mei Fan for the Commissioner of Inland Revenue.

Pius Li Kin Hong of Pius Consulting Limited for the taxpayer.

Decision:

Background

1. The Appellant appeals against the Commissioner's determination in upholding various salaries tax assessments on income said to have been derived from his services with Company A and Company B during the years of assessment 1995/96 and 1996/97. The Appellant claims that the relevant income should be charged as profits tax of the Company, which was a party to the agreements with Companies A and B through which the Appellant rendered his services.

2. At all material times, the Appellant held 9,900 shares in the Company and the remaining 100 shares were held by the Appellant's father ('Mr C'). The Appellant and his father were the only directors of the Company.

3. On 16 September 1992, Company A and the Company entered into an agreement ('the Company A Agreement') which contained, *inter alia*, the following terms:

> '2. Nature of Engagement:-
>
> To procure [the Appellant] as artiste, to act, to perform and to play any role in any television serial drama programme as and when designated by [Company A] for a minimum of two (2) series of 20 one-hour episodes per series during the first 12 months of this Contract and for a minimum of three (3) series of 20 one-hour episodes per series during the next 24 months of this Contract.'
>
> '3. Anticipated Date/Dates:-
>
> For a period of thirty six (36) months commencing 1st December 1992.'
>
> '5. Fee to be paid by [Company A]:-
>
> [Company A] agrees to pay [the Company] for the abovesaid 20 one-hour episodes drama at the rate of HK$80,000.00 and HK$90,000.00 for the 1st and 2nd series during the 1st 12 months of this Contract and at the rate of HK$100,000.00, HK$110,000.00 and HK$120,000.00 for the 1st, 2nd and 3rd series during the next 24 months of this Contract with a package sum of HK$500,000.00 as talent fee to be paid as follows:-
>
> 1. 10% of the package sum to be paid after signing of this Contract;

2. 45% of each respective engagement to be paid upon commencement of the programme production; and

3. The balance of 45% of each respective engagement to be paid upon completion of the programme production.'

' 6. Special Stipulations:-

[Company A] provides insurance coverage (Employees' Compension) for [the Appellant] during his performing to [Company A's] assignment.'

4. In consideration of Company A's agreeing at the Appellant's request to enter into the Company A Agreement, the Appellant executed an undertaking in favour of Company A guaranteeing the due performance by the Company of all its obligations under the Company A Agreement. By the said undertaking, the Appellant further agreed to indemnify Company A against all and any loss or damage which it might sustain as a result of any breach by the Company of the Company A Agreement.

5. On 20 March 1996, Company B, the Company and the Appellant entered into an agreement (' the First Company B Agreement'). The First Company B Agreement stated that the Company was exclusively entitled to the benefit of the Appellant's service, that Company B was desirous of engaging the Appellant to perform and that the Company agreed to make available the services of the Appellant to appear and perform in Company B's programme subject to, *inter alia*, the following terms and conditions:

(a) ' This Agreement shall be for a period commencing 1st June, 1996 and ending 30th November, 1996, both days inclusive.' (clause 1 and schedule 3)

(b) The Company shall make available to Company B the services of the Appellant and ' [the Appellant] shall perform a minimum of Fifty (50) one-hour duration episodes in [Company B] serial drama tentatively titled "[XXX]" during the term of this Agreement.' (clause 2 and schedule 4)

(c) ' Total package talent fee of HK$875,000.- to be payable in the following manner, being:-

– Deposit HK$87,500.- payable upon [Company B's] receipt of the duplicate of this Agreement duly signed by [Company B] and [the Appellant];

– HK$262,500.- payable on or before 01/06/1996;

– HK$262,500.- payable on or before 31/08/1996;

– HK$262,500.- payable on or before 16/11/1996.' (schedule 5)

As a party to the First Company B Agreement, the Appellant gave various undertakings in favour of Company B including an undertaking to provide his services to the best of his ability and skill, faithfully and diligently, and with the best interest of Company B in mind and to observe all rules and regulations in force at Company B.

6. In consideration of Company B's entering into the First Company B Agreement at his request, the Appellant executed an undertaking in favour of Company B whereby he covenanted that he would use his best endeavours to ensure compliance by the Company with all the provisions of the First Company B Agreement. He further agreed to indemnify Company B against any loss or damage suffered by Company B arising out of any breach by the Company of its obligations under the First Company B Agreement.

7. Company B, the Company and the Appellant entered into a further agreement also dated 20 March 1996 ('the Second Company B Agreement'). The terms and conditions of the Second Company B Agreement were almost identical to those of the First Company B Agreement save for the contract period, the programme and the fees which were as follows:

(a) 'This Agreement shall be for a period of Twelve (12) months commencing 1st January, 1997 and ending 31st December, 1997, both days inclusive.' (schedule 3)

(b) '[The Appellant] shall perform in minimum Two (2) serial dramas each consisting of minimum Twenty (20) one-hour duration episodes within the term of this Agreement.' (schedule 4)

(c) 'The Fees of the Programmes shall be HK$800,000.- (i.e. HK$400,000.- for each of the aforesaid two dramas) and payable in the following manners:-

(i) HK$80,000.- being the deposit shall be paid within 7 days after the date of [Company B's] receipt of the counterpart of this Agreement duly executed by [the Company] and [the Appellant]; and

(ii) HK$720,000.- shall be paid by 12 equal monthly instalments each of HK$60,000.- ("the Monthly Sum") on the 1st day of each and every calendar month commencing from 1st January 1997.'

> ' If [Company B] requires [the Appellant] to perform more than 20 one-hour episodes in any of the said two dramas, [Company B] shall pay to [the Company] an additional fee of HK$20,000.- for each one-hour episode in excess. Such additional fee shall be calculated and payable upon completion of production of the Programmes.' (set out in subparagraph (b) above)

8. In consideration of Company B's agreeing at the Appellant's request to enter into the Second Company B Agreement, the Appellant executed an undertaking in favour of Company B which was identical to the undertaking furnished in respect of the First Company B Agreement.

9. The assessor raised the following salaries tax assessment on the Appellant:

	$
Income from Company A	202,500
Income from Company B	167,500
Assessable income	370,000
Less: Basic allowance	79,000
Net chargeable income	291,000
Tax payable thereon	50,500

10. Pius Consulting Limited (' the Tax Representative'), on behalf of the Appellant, objected against the salaries tax assessment for the year of assessment 1995/96 on the ground that ' the assessable income is not based on that reported on the tax return and is excessive'. The Tax Representative further stated that they ' have no idea about the assessable income of $370,000 stated on the demand note because all the income should have been reported and assessed under [the Company] which is exclusively entitled to the benefit of the service of [the Appellant]'. The Tax Representative further contended that ' this is a double count of the income that has already been assessed under profits tax'.

11. Following further exchange of correspondence, the assessor maintained the view that the sum of $202,500 reported by Company A was the Appellant's employment income but conceded that the sum of $167,500 reported by Company B should instead be assessed in the year of assessment 1996/97.

12. By a letter dated 23 July 1997, the assessor proposed to revise the salaries tax assessment for the year of assessment 1995/96 as follows:

	$
Income from Company A	202,500
Less: Basic allowance	79,000

Net chargeable income	123,500
Tax payable thereon	16,900

13. The Tax Representative did not accept the assessor' s proposal and maintained that there was no master and servant relationship between Company A and the Appellant.

14. In his tax return for the year of assessment 1996/97, the Appellant declared, *inter alia*, the following:

(a) Particulars of employment income

(i)	Name of employer	: The Company
(ii)	Capacity in which employed	: Director
(iii)	Period of employment	: 1 April 1996 to 31 March 1997
(iv)	Salary	: $85,000

(b) Quarters provided

(i)	Address	: [An address] (' the Property')
(ii)	Nature of quarters	: Flat
(iii)	Name of employer providing quarters	: The Company
(iv)	Period provided	: 1 April 1996 to 31 March 1997

The rent of the Property was stated to have been paid by the Company to the landlord.

15. The Property was owned by the Appellant and a Mr D between 1992 and 1997.

16. The assessor raised on the Appellant the following salaries tax assessment for the year of assessment 1996/97 for his income from Company B:

	$
Assessable income	1,232,500
Tax payable thereon (at standard rate)	184,875

17. Subsequently, the assessor raised on the Appellant the following additional salaries tax assessment for the year of assessment 1996/97 to include the income of $167,500 from Company B:

	$
Additional assessable income	167,500
Tax payable thereon (at standard rate)	25,125

18. The Tax Representative, on behalf of the Appellant, objected against the salaries tax assessment and the additional salaries tax assessment for the year of assessment 1996/97 on the ground that ' the fees received from [Company B] should be assessed under profits tax instead of salaries tax.'

19. According to information furnished by Company A, Company A paid the Company $202,500 pursuant to the Company A Agreement.

20. According to information furnished by Company B all payments for services rendered under the First and Second Company B Agreements were made by cheques payable to the Company.

21. In its profits tax returns for the years of assessment 1995/96 and 1996/97, the Company declared the nature of its business as ' Entertainment Service' and ' Servicing - Artistic Service' respectively.

22. The Company closed its accounts on 31 March annually. After making statutory and other adjustments, the Company declared assessable profits of $135,856 and $628,961 for the years of assessment 1995/96 and 1996/97 respectively.

23. The Company had filed the following employer' s returns for the years ended 31 March 1996 and 1997:

(a) Year ended 31 March 1996

	Name of employee	**Position**	**Amount**
			$
(i)	Mr C	Director	78,000
(ii)	Ms E	Clerk	71,500

(b) Year ended 31 March 1997

	Name of employee	**Position**	**Amount**	**Quarters provided**
			$	
(i)	The Appellant	Director	85,000	Yes
(ii)	Mr C	Director	78,000	Nil
(iii)	Ms E	Clerk	71,500	NIl

Ms E is the Appellant' s mother, wife of Mr C, who was born in 1936.

The grounds of appeal

24. The Revenue invoked sections 9A, 61 and 61A of the IRO to support its assessments against the Appellant.

25. The Appellant contends that:

(a) he was not an employee of Company A nor Company B and the fees paid by Companies A and B during the years of assessment 1995/96 and 1996/97 should be charged against the Company as profits tax but not as salaries tax against him;

(b) section 9A is not applicable as the specific criteria provided in section 9A(3) are met;

(c) section 61 is not applicable as the business transactions between the Company and Companies A and B are not fictitious nor artificial.

26. The Appellant initially disputed the applicability of section 61A o the basis that the determination was issued by the Acting Deputy Commissioner but not the Deputy Commissioner. This contention was withdrawn at the hearing before us.

Evidence adduced by the Appellant

27. The Appellant did not attend the hearing before us. The Tax Representative called Miss F as his witness. Miss F was a talent manager working for Company A from 1984 to 1994 and was the management agent for the Appellant from 1996 to about the end of 1998.

28. Miss F informed us that different types of contract were used by the television stations to regulate its relationship with various artistes. She proceeded to describe to us the rights and obligations of the Appellant under his contract with Companies A and B. The Tax Representative informed us that the purpose of calling Miss F was to explain and confirm the statement of facts already agreed between the parties. It was not his intention to introduce new facts via the evidence of Miss F. The evidence of Miss F is therefore of little assistance.

Our decision

29. The Revenue relies on sections 9A, 61 and 61A of the IRO. We agree with the submission of the Tax Representative that this case turns in essence on section 9A.

30. There is no dispute between the parties that the conditions laid down in section 9A(1) leading to prima facie liability to salaries tax are satisfied. Companies A and B carried and still carry on a 'business'. They respectively entered into the Company A Agreement and the First and Second Company B Agreements. Under these agreements remuneration for services carried out by the Appellant for Companies A and B was paid to the Company. At all material times, the Company was controlled by the Appellant. The issues before us are whether the criteria specified by section 9A(3) are duly satisfied as to take the case out of section 9A(1) and whether the Appellant has established under section 9A(4) that at all relevant times the carrying out of the services was not in substance the holding by him of an office or employment of profit with either Company A or Company B.

31. In relation to the criteria specified by section 9A(3):

(a) Section 9A(3)(a):

(i) Under clause 6 of the Company A Agreement, Company A agreed to provide 'insurance coverage (Employees' Compensation) for [the Appellant] during his performing to [Company A's] assignments'.

(ii) Save for this provision, the Company A Agreement and the First and Second Company B Agreements did not provide for any remuneration for any of the services rendered by the Appellant to include annual leave, passage allowance, sick leave, pension entitlements, medical payments or accommodation.

(b) Section 9A(3)(b):

(i) Under clause 2 of the Company A Agreement, the engagement of the Company was to 'procure [the Appellant] as artiste, to act, to perform and to play any role in any television serial drama programme as and when designated by [Company A]'. Clause 9(xiii) of that agreement provided 'That the Artiste shall not appear on or be employed by any other Hong Kong television station during the terms of this Agreement'.

(ii) Under the First and Second Company B Agreements, the services envisaged were to appear and perform in Company B's programmes. During the terms of the agreements, 'the Artiste shall not ... render services for or appear on any other commercial television ... stations or television production organisations which have any registered office or place of business in Hong Kong or Macau'.

(iii) During the years of assessment in question, the Company obtained other income from film production companies. The Revenue sought to rely on the distinction between television companies on the one hand and film production companies on the other hand to support their contention that the services carried out were not 'the same or similar'. We are not persuaded that the one follows from the other. We also do not find force in the Appellant's submission that 'As the agreement required the services to be carried out personally by [the Appellant] ... he also carried out the same or similar services to other persons ...'. We have not been told the nature of services rendered to the television stations and the production companies. We are therefore not prepared to go further than to hold that there is no clear evidence before us as to whether the Appellant rendered the same or similar services to persons other than Companies A and B.

(iv) We accept the submission of the Revenue that the Appellant's reliance on an agreement dated 24 May 1996 between a video production company and an entertainment company is misplaced. Under that agreement, the Appellant was required to perform in a television film during the period between 30 April 1996 and 30 May 1996. That period was outside the Company A and the two Company B Agreements.

(c) Section 9A(3)(c):

(i) The Revenue submitted that the Appellant was subjected to stringent controls by Companies A and B. Our attention was drawn to provisions in the Company A and the two Company B Agreements relating to outside engagements, the obligation to observe rules and regulations and the obligation of the Appellant to keep the stations informed of his whereabouts. The Appellant argued that these restrictions are understandable as television programme is a teamwork and the Appellant could reject to play any character assigned by Company A or Company B.

(ii) This is an important factor in the context of this case. We do not accept the submissions of the Appellant that he had a complete discretion in relation to his role. Under the Company A Agreement, the Appellant had to 'play any role ... as and when designed by [Company A]'. Under the First Company B Agreement, the Appellant had to perform in a specific Company B serial drama. Under the Second Company B Agreement, 'if for any reason [the Appellant] is unable to perform in the

Programmes ... within the Term of Agreement, [Company B] shall have the right to extend the Term of Agreement ...' .

(iii) Reading the Company A Agreement and the two Company B Agreements as a whole, we are of the view that the performance by the Appellant of services under those agreements was subject to tight control or supervision by Companies A and B. This is demonstrated by the log report maintained by Company A and the application by the Appellant for holiday leave from Company A. Such control is commonly exercised by an employer in relation to the performance of his employee' s duties.

(d) Section 9A(3)(d):

(i) The Appellant was not paid on a weekly or fortnightly or monthly basis under the Company A and the First Company B Agreement.

(ii) After payment of the initial deposit of $80,000, the Appellant was paid on a monthly basis in respect of the balance of $720,000 due under the Second Company B Agreement.

(iii) There is no evidence before us to indicate whether such remuneration was calculated on a basis commonly used under a contract of employment.

(e) Section 9A(3)(e):

(i) The Tax Representative submits that this condition is satisfied because ' [the Appellant] had no right to terminate the service by providing the relevant notice ... to [Company A]/[Company B]' . We are of the view that this submission is misconceived.

(ii) Under section 9A(3)(e), we have to consider whether ' the relevant person' does have the right to cause the services to cease in a manner or for a reason commonly provided for in relation to the dismissal of an employee under a contract of employment. The ' relevant person' is Company A or Company B. Whether the ' relevant individual' (in this case the Appellant) has such a right is not an issue under section 9A(3)(e).

(iii) We are of the view that clause 9(vii) of the Company A Agreement and clause 10 of the two Company B Agreements are provisions commonly

provided for in relation to the dismissal of an employee under a contract of employment.

(f) Section 9A(3)(f):

(i) By letter addressed to the United States Consulate General dated 2 May 1994, Company A certified that the Appellant 'is under sub-contract of employment' with them. On 13 December 1995, Company A filed a notification pursuant to section 52(5) of the IRO naming the Appellant as the employee employed as 'artiste - series'.

(ii) By a return dated 13 May 1996, Company B declared the Appellant to be its employee.

(iii) The Appellant accepts that 'from the eyes of TV viewers, [the Appellant] would be regarded as part and parcel of [Company A]/[Company B]'. The Appellant however contends that this 'does not preclude him from being under a contract for service'. We are of the view that this submission fails to differentiate the considerations under section 9A(3) and section 9A(4). For the purpose of section 9A(3), the sole question is whether the Appellant was so held out to be an employee of Companies A and B. Given the concession of the Appellant, it is difficult to see how he was not so held out.

(g) On the basis of our review outlined in this paragraph, we are not satisfied that the provisions of section 9A(1) are inapplicable by virtue of the provisions in section 9A(3).

32. The Appellant invoked section 9A(4) and attempted to show that his carrying out of the services was not in substance the holding of an office or employment of profit with either Company A or Company B.

33. Both parties referred us to the case of Hall v Lorimer [1994] 1 All ER 250. The taxpayer in that case was trained as a vision mixer skilled in editing job. All his work was carried out at studios owned or hired by a television production company and he would stay there until his work was completed. He did not provide any equipment. He neither contributed to the cost of production nor did he share in the profit and loss made by the production company. The issue before the Court was whether the contracts from which the taxpayer derived his earnings were contracts of services. The Court of Appeal upheld the finding of the Special Commissioner that the activities of the taxpayer bore the hallmarks of a man who was in business of his own account and that his profits had been earned under contracts for services. At page 256h, Lord Justice Nolan cited with approval the following statement made by Mummery J in the court below:

> ' *"In order to decide whether a person carries on a business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case."*'

34. The Appellant further relied on Cheng Yuen v The Royal Hong Kong Golf Club [1997] HKLRD 221 in order to show that the rendering of services by the Appellant to Companies A and B was not pursuant to any contract of employment. Mr Cheng was a caddie with the golf club. The issue before the Court of Appeal was whether he was an employee of the golf club. There was no written contract between Mr Cheng and the golf club. Mr Cheng merely filled out an application which was accepted. He was then assigned a number, allocated a locker, provided with a uniform and shown his duties by a member of the golf club's staff. He would work if called upon but there was no guarantee that there would be work for him. The Court of Appeal held that Mr Cheng was not an employee of the golf club.

35. We are of the view that the picture painted by the details in this case is substantially different from those in Hall v Lorimer and in Cheng Yuen. In Cheng Yuen, Mr Cheng was not guaranteed any work by virtue of his agreement with the golf club and he was not obliged to attend for work. It was up to the playing member (a non party to the alleged agreement) to control whether service was needed and the payment. The nature of service provided in Hall, being film editing, again is substantially different from the nature of service in the present case. In Hall, the appellant customarily worked for 20 or more production companies and most of the contracts were of very short duration, ranging from one to ten days. Both Companies A and B exercised stringent control over the services rendered by the Appellant. Such control was wholly absent in both Hall v Lorimer and Cheng Yuen.

36. We are of the view that the present case bears similarities to the facts in D108/01, IRBRD, vol 16, 860. In that case, the appellant was an actor. He and his mother were the only directors and shareholders of a private company referred to in the decision as 'ServiceCo'. ServiceCo made agreements with a television broadcasting company on terms akin to those prevailing in this case. Under the agreements, remuneration for services carried out by the appellant was paid to ServiceCo. The Board observed at page 868 of its decision that:

> *'... The Appellant reported to work on days and times and at places as instructed by the [television broadcasting company]. Neither ServiceCo nor the Appellant was required to incur any expense for any equipment or helper. The Appellant followed the directions of the [television broadcasting company's] production executives. The Appellant left at the end of a session and waited for the [television broadcasting company's] payment at the end of a series, at the agreed contractual rate. Neither ServiceCo nor the Appellant assumed any financial risk. Neither ServiceCo nor the Appellant would profit from sound management of their work.'*

The Board held that the appellant in that case failed to discharge the burden of proving that the carrying out of the services was not in substance the holding by him of an employment of profit with the television broadcasting company.

37. The present case is indistinguishable from D108/01. We likewise hold that the Appellant has failed to discharge his burden of proving that his carrying out of services in favour of Companies A and B was not in substance the holding by him of an employment of profit with Companies A and B.

38. Given our decision on the basis of section 9A, it is unnecessary for us to express any view on the applicability of section 61 and section 61A.

39. The Appellant and the Revenue are ad idem in relation to a 10% deduction as the relevant outgoings of the Appellant.

40. For these reasons, we dismiss the appeal and save for the agreed deduction as referred to in paragraph 39 above we confirm the assessments.