

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D65/93**

Salaries tax – whether an employee or self-employed – order to be made where tax already paid on same income as profits tax.

Panel: T J Gregory (chairman), Gordon Macwhinnie and E M I Packwood.

Date of hearing: 5 January 1994.

Date of decision: 22 March 1994

The taxpayer had been assessed to profits tax on certain income which he claimed belonged to a business operated by him. The Commissioner assessed the same income to salaries tax on the basis that it had been paid to the taxpayer by two employers by way of salary. The taxpayer argued that the true nature of his income was not salary.

Held:

The onus of proof is upon the taxpayer. There was documentary evidence that the taxpayer was an employee and not self-employed. The taxpayer had failed to discharge the onus of proof and accordingly his appeal was dismissed. However it was noted that the income in question had previously been assessed to profits tax. The Board held that income cannot be subjected to both salaries tax and profits tax and accordingly indicated to the Commissioner that the profits tax assessments should be discharge and the tax paid thereon should be applied towards the discharge of the salaries tax assessment or repaid to the taxpayer, as the case may be.

Appeal dismissed.

Case referred to:

Market Investigations Limited v Minister of Social Security [1968] 2 QB 173

J R Smith for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. THE SUBJECT MATTER OF THE APPEAL

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The Taxpayer appealed against the determination of the Deputy Commissioner, issued on 19 August 1993, ('the determination) in which he upheld assessments to salaries tax raised on the Taxpayer for each of the years of assessment 1989/90 and 1990/91 (the 'relevant years'). The Taxpayer's position was that the income in question was that of a firm owned by him whereby the income assessed to salaries tax was subject to profits tax. As he put it in his grounds of appeal:

'... I am an agent under a contract signed on behalf of my company and other companies, earning what I should get.'

### 2. PRELIMINARY QUESTION

In paragraph 1(4) of the determination the Deputy Commissioner stated that the Taxpayer had objected to the assessment for the year of assessment 1989/90 on the grounds that the income for that year had previously been assessed to profits tax. In answer to a question from the Board the representative of the Revenue confirmed that this was the case and added that the income for the year of assessment 1990/91 had been assessed to profits tax as well. He stated that this was because there was no communication or exchange of information between the profits and salaries taxes sections within the Inland Revenue Department. In circumstances in which a taxpayer had volunteered income for and paid profits tax prior to the [salaries tax] assessor determining that that income was subject to salaries tax and raising an assessment the taxpayer was advised by the [salaries tax] assessor to arrange with the [profits tax] assessor for the assessment to that tax to be discharged and the tax repaid. In answer to a question from the Board the Taxpayer stated that he had made no such application.

### 3. THE FACTS

The following facts were not in dispute.

#### 3.1 The Taxpayer's firm

The Taxpayer, for some years prior to and throughout the relevant years, was the sole proprietor of an unincorporated firm ('Firm A').

#### 3.2 Engagement by Firm B

3.2.1 For the year of assessment 1989/90 a Hong Kong firm ('Firm B') stated that the Taxpayer was employed by it as an account executive. In the 'Employer's Return of Remuneration and Pensions' dated 31 May 1990 Firm B stated that his employment was between 1 August 1989 and 31 March 1990.

3.2.2 For the year of assessment 1990/91 Firm B stated that the Taxpayer was employed by it as a vice president. In the 'Employer's Return of Remuneration

## INLAND REVENUE BOARD OF REVIEW DECISIONS

and Pensions' dated 31 May 1991 Firm B stated that his employment was between January 1991 and March 1991.

### 3.3 Agreement with Firm B

The only agreement produced at the hearing of the appeal was a letter dated 11 February 1991. On 11 February 1991 the Taxpayer, as opposed to Firm A, had counter-signed a letter addressed to him, as opposed to Firm A, by Firm B. This letter commenced:

‘We are pleased to appoint you as agent of [Firm B] with the title of Vice President on the following terms and conditions:

The terms and conditions are quoted or may be summarised as follows:

#### 3.3.1 Paragraph numbered 1 and headed ‘appointment’:

‘[Firm B] hereby appoints you to be our agent for selling our various services to potential customers and for supplying professional information and services to our customers in maintaining trading accounts with [Firm B].’

#### 3.3.2 Paragraph numbered 2 and headed ‘Commencement’:

‘This agreement shall be deemed to have commenced on the sixteenth day of January 1991 and shall continue in force until terminated as hereinafter provided.’

#### 3.3.3 Paragraph numbered 3 and headed ‘Duties and Covenants of Agent’:

‘You hereby undertake and agree with [Firm B] that you (and all of your employees, if applicable), will at all times during the continuance in force of this agreement observe and perform the terms and conditions set out herein and as from time to time set out by [Firm B] and in particular.’

##### 3.3.3.1 Sub-paragraph 3(a):

‘will use your best endeavour to promote and extend the business of [Firm B] in providing services to our customers and to sell the services of [Firm B] to all potential customers and work diligently to procure the opening of new trading accounts with [Firm B] and to obtain trading orders therefor;’

##### 3.3.3.2 Sub-paragraph 3(b):

## INLAND REVENUE BOARD OF REVIEW DECISIONS

‘will report duty during the hours 08:00 a.m. to 03:00 a.m. every day when [Firm B] is open for business. You are required to attend our office at specific hours as set out by [Firm B] from time to time and must keep in touch with our office when you are on duty outside our office premises so that you can be located immediately when so required by [Firm B];’

### 3.3.3.3 Sub-paragraph 3(c):

This imposed a duty on the Taxpayer to ensure the observance of Firm B’s policies, rules and regulations with respect to foreign currency and bullion trading and imposed an obligation upon him to indemnify Firm B against loss or damage suffered, arising or resulting from any violation thereof, an indemnity expressed to survive termination of the agreement.

### 3.3.3.4 Sub-paragraph 3(d):

This required the Taxpayer to act loyally and faithfully, to obey orders and instructions and as he reasonably considered to be most beneficial to Firm B’s interest,

### 3.3.3.5 Sub-paragraph(e):

This excluded the Taxpayer from being directly or indirectly engaged or interested as principal, agent or employee for any other brokerage houses or entities with business similar to those of Firm B.

### 3.3.3.6 Sub-paragraph 3(f):

This imposed an obligation upon the Taxpayer to keep completely secret all confidential information received or obtained in relation to the affairs of Firm B’s and its customers and obliged him not to use such information in any manner which could or might injure or cause direct or indirect loss to Firm B. These obligations were expressed to survive termination of the agreement.

### 3.3.3.7 Sub-paragraph 3(g):

Disputes between the Taxpayer and Firm B customers were to be reported and were not to be compromised without Firm B’s consent.

### 3.3.3.8 Sub-paragraph 3(h):

This prohibited any assignment, charge or making over of the agreement or any of the Taxpayer’s rights without the prior written consent of Firm B.

### 3.3.3.9 Sub-paragraph 3(i)

## INLAND REVENUE BOARD OF REVIEW DECISIONS

This required the Taxpayer to return Firm B's property on termination of the agreement.

3.3.4 Paragraph numbered 4 and headed 'Remuneration':

3.3.4.1 Sub-paragraph 4(a) reads:

During the continuance of this Agreement, [Firm B] shall pay you:

- i) Any allowance of \$10,000 per month; and
- ii) A commission in accordance with the commission scheme specified by [Firm B] from time to time.

3.3.4.2 Sub-paragraph 4(b) provided that the allowance and commission were to be payable monthly in arrears.

3.3.4.3 Sub-paragraph 4(c) reads:

In the event of 'default in payment' of any amount due from any customer whose order is procured by you, you are liable for indemnifying [Firm B] for any loss suffered by us in relation thereto, such amount to be deducted from the allowance and commission payable to you but without prejudice to our right to claim against you for any outstanding amount. For the avoidance of doubt, 'default of payment' refers to the failure of the customer in settling his/her/its outstanding balance in the trading account maintained with [Firm B].

3.3.5 Paragraph numbered 5 and headed 'Termination':

3.3.5.1 Sub-paragraph 5(a) enabled either party to terminate on immediate written notice.

3.3.5.2 Sub-paragraph 5(b) enabled Firm B to terminate forthwith under circumstances normally considered appropriate for such action save for sub-paragraph (vi) which reads:

'be absent for 3 consecutive days without prior approval from [Firm B].'

3.3.6 The Taxpayer's counter signature of this letter constituted his acceptance of the appointment and his agreement to the terms and conditions set out therein.

3.4 Remuneration from Firm B

Employer's returns filed by Firm B provided the following information:

<u>Year of Assessment</u>	<u>1989/90</u>	<u>1990/91</u>
---------------------------	----------------	----------------

## INLAND REVENUE BOARD OF REVIEW DECISIONS

	\$	\$
Salary	33,000	-
Commission	52,850	32,240
Bonus	2,000	-
Allowance	<u>-</u>	<u>30,000</u>
Total	<u>87,850</u>	<u>62,240</u>

### 3.5 His employment by Firm C

3.5.1 During the whole of the year of assessment 1989/90 the Taxpayer was employed by an unincorporated entity (Firm C).

3.5.2 During the year of assessment 1990/91 the Taxpayer continued in the employment of Firm C in the same post. His employment was between April 1991 and December 1991.

### 3.6 Agreement with Firm C

3.6.1 A letter dated 11 April 1990 addressed to the Taxpayer, as opposed to Firm A, sets out the Taxpayer's employment conditions. This reads:

'We are pleased to appoint you as an marketing manager on behalf of [Firm C]. The date of commencement is 1 March 1990, with monthly allowance of \$7,000. The first three months of your employment shall be a probational period during which either party may terminate this agreement on immediate notice. After the probational period, this agreement may be terminated at any time be either party giving to the other one week's notice in writing of intention so to terminate it and by the company without prior notice or payment in lieu thereof upon serious misconduct or persistent unpunctuality, neglect of duty or breach of regulations made by the company or absence for a period exceeding in three consecutive days in any one year without the prior approval from the company.

The working hours will be stipulated by your department head and may be revised from time to time.'

3.6.2 An organisation chart produced by Firm C to the Revenue, in response to a request from the Revenue, showed the Taxpayer as being responsible to a general manager who, in turn, was responsible to a managing director.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

3.6.3 The Taxpayer's counter signature, as opposed to one 'For and on behalf of Firm A', of this letter constituted his acceptance of the appointment and his agreement to the terms and conditions set out therein.

3.6.4 The Taxpayer's engagement was terminated by letter dated 5 February 1991. In this letter he was requested to return 'all belongings, keys, name cards or other properties, as provided by the company to you during your service'.

### 3.7 Remuneration from Firm C

Employer's returns filed by Firm C provided the following information:

<u>Year of Assessment</u>	<u>1989/90</u>	<u>1990/91</u>
	\$	\$
Salary	-	73,800
Commission	3,051	70,083
Bonus	-	1,600
Allowance	<u>6,000</u>	<u>-</u>
Total	<u>9,051</u>	<u>145,483</u>

### 3.8 Emergency Service

During both of the relevant years the Taxpayer served as a member of the emergency service and was remunerated. However, the liability of this income to salaries tax was not in dispute.

### 3.9 Salaries Tax Returns

3.9.1 On 5 April 1991 the Taxpayer completed a salaries tax return for the year of assessment 1989/90 showing zero taxable income.

3.9.2 On 31 July 1991 the Taxpayer completed a salaries tax return for the year of assessment 1990/91 showing his income from the emergency service, \$14,834, as taxable income.

## 4. THE CASE FOR THE TAXPAYER

The Taxpayer appeared in person. His case may be summarised as follows:

4.1 Evidence-in-chief:

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- 4.1.1 He had signed 'Agent's Agreements' to work with both Firm B and Firm C but he could not remember the dates. When handed copies of the letters from Firm B, refer paragraph 3.3 above, and Firm C, refer paragraph 3.6 above, he confirmed that those letters were the agreements he was referring to. He acknowledged that they had been addressed to him personally.
- 4.1.2 He stated that Firm A was a firm and was owned by him. It carried on any legitimate business including insurance and foreign exchange business. It had been established well before the relevant years.
- 4.1.3 The reasons why the letters from Firm B and Firm C did not appoint him as an employee but appointed Firm A as an agent were:
- 4.1.3.1 Neither appointment provided for payment of a basic salary.
- 4.1.3.2 None of the protection afforded to an employee under the labour legislation was afforded by these agreements. As an employee he would have been entitled to labour insurance.
- 4.1.3.3 There was no entitlement to annual leave.
- 4.1.3.4 Termination was exclusively by verbal notification from either party. He was not obliged to give 7 or 30 days' notice nor pay cash in lieu. He did not even have to notify the employer if he wished to terminate.
- 4.1.3.5 His working hours were flexible.
- 4.1.3.6 He was not obliged to attend the office.
- 4.1.3.7 There was no probationary period.
- 4.1.3.8 If a loss incurred on a client's investment he was liable.
- 4.1.3.9 His engagement was to secure clients and thereby earn commissions. The allowance was not fixed but was based on the volume of business. He stated that at the end of the first month if the agent had not secured any business he would not be paid any money, a circumstance which could occur.
- 4.1.4 For the foregoing reasons the Board should find that he was not an employee but that Firm A was an agent.
- 4.2 Cross-examination:
- The representative of the Revenue advised the Board that he did not wish to cross-examine the Taxpayer.



## INLAND REVENUE BOARD OF REVIEW DECISIONS

### 4.3 Questions from the Board:

In reply to questions from the Board the Taxpayer stated:

- 4.3.1 That in prior years Firm A had been assessed on income from it's business and business similar to that creating the income which was the subject matter of the appeal. That income arose out of agreements similar to those with Firm B and Firm C.
- 4.3.2 Firm A had been assessed to profits tax and he, personally, had not been assessed to salaries tax.
- 4.3.3 That he had last read the letters from Firm B and Firm C when he had signed them.
- 4.3.4 Having been referred to the three month probation period specified in the letter from Firm C he stated that that was what the letter stated. However, the practice is never to read these agreements either before or after they were signed; that was because they were only 'forms'.
- 4.3.5 When asked about the 'allowance' he confirmed that he was entitled to receive the stated allowance plus any commissions earned. He added that he was also responsible for losses.
- 4.3.6 He did not agree that the paragraph in the letter from Firm B specifying office hours, after paragraph 3.3.3.2 above, applied. The hours stated were the hours when business was transacted. However, he could go to the office at any time, provided he had business to take to the office.
- 4.3.7 He did not accept that paragraph 4(b)(vi) in the letter from Firm B, refer paragraph 3.3.4.2 above, had any application. He stated that people in the industry could be absent from the office and that the provision was impracticable.
- 4.3.8 Whilst he did not go so far as to suggest that the Board could safely ignore anything written in the Firm B and Firm C letters, he did state that the actual situation was very different from what was stated in those letters.

### 4.4 Consequential questions:

The representative for the Revenue referred the Taxpayer to paragraph 1(7)(2) of the determination, being a quotation from a letter written by Firm C to the assessor, outlining the Taxpayer's duties, and the passage reading:

'... leadership of his direct team.'

## INLAND REVENUE BOARD OF REVIEW DECISIONS

He stated that he recruited individuals to bring more business to Firm C. The cost was covered by the allowance paid to him by Firm C.

### 5. THE CASE FOR THE REVENUE

The case for the Revenue was in written form and may be summarised as follows:

- 5.1 The issue was whether certain income received by the Taxpayer in the relevant years should be assessed to profits tax or salaries tax. The Taxpayer's submission was that this income was subject to profits tax, as it was income earned under contracts for services and not income earned as an employee under contracts of service. The Commissioner's view was that the income arose from contracts of service whereby it was liable to salaries tax.
- 5.2 Having reviewed sections 8 and 14 of the Inland Revenue Ordinance the representative referred the Board to Market Investigations Limited v Minister of Social Security [1968] 2 QB 173. He read the headnote and then the passage commencing at 183D and concluding at 185C in which the distinctions between a contract for services and a contract of service are considered.
- 5.3 The representative then summarised the facts, emphasising the duties of the Taxpayer, and addressed matters he considered pertinent to the Board's decision, namely:
  - 5.3.1 He was not permitted to work for other similar organisations, refer sub-paragraph 3.3.3.5 above.
  - 5.3.2 Firm B required him to attend the office and report his whereabouts when out of the office, refer sub-paragraph 3.3.3.2 above.
  - 5.3.3 Firm C stated that working hours were as stipulated from time to time, refer sub-paragraph 3.6.1 above.
  - 5.3.4 Firm B required him to comply strictly with its rules and regulations but would not exercise full control over him, refer sub-paragraph 3.3.3.3 above.
- 5.4 The representative then addressed those factors which he considered the Board should accept as establishing the employer/employee relationship, namely:
  - 5.4.1 Control:
    - 5.4.1.1 The restriction on working for others;
    - 5.4.1.2 Strict compliance with rules and regulations;

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- 5.4.1.3 Stipulated working hours;
- 5.4.1.4 The need for leave to be approved; and
- 5.4.1.5 The requirement to attend lectures.
- 5.4.2 Integration:
  - 5.4.2.1 The requirement to report for duty each day Firm B was open for business and to report his whereabouts when out of the office;
  - 5.4.2.2 The requirement to conform to office hours as stipulated by his departmental head at Firm C;
  - 5.4.2.3 His leadership of his direct team; and
  - 5.4.2.4 His position in Firm C's organisation chart.
- 5.4.3 Economic reality:
  - 5.4.3.1 The restriction on outside employment does not enhance the picture of independence;
  - 5.4.3.2 He was not required to risk his own capital, provide equipment or employ assistants, all of which are factors in the business of an independent contractor;
  - 5.4.3.3 Firm B required him to attend lectures to acquire information to be passed on to its customers. It was submitted that in those circumstances if a loss was sustained it would, in the absence of any wrongdoing on the part of the Taxpayer, be the liability of Firm B, as opposed to the Taxpayer. If the Taxpayer were an independent contractor he would be liable.
  - 5.4.3.4 His liability to make up losses was no different to that assumed by an employee bank teller or Inland Revenue Department shroff, both of whom were liable to be required to make good till shortages.
  - 5.4.3.5 His risk was not a general entrepreneurial risk but a risk arising only if he did not undertake his duties with due care and precision. Examples were cited to the Board.
- 5.4.4 The representative concluded that the agreements were contracts of service and the absence of any right to fringe benefits did not detract from that proposition.
- 5.4.5 The Board was asked to dismiss the appeal.

## 6. REPLY OF THE TAXPAYER

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The Board should not equate his position to that of an agent. They were employees with office hours et cetera. They were called 'agents' to facilitate the securing of clients/customers. In the industry concerned many receive an allowance, as he did, and receive commission, as he did, because they bring business to the employer. So far as he was concerned, any business he brought to Firm B and Firm C was his own business.

### 7. REASONS FOR THE DECISION

- 7.1 Whether the Taxpayer was an employee of Firm B and/or Firm C is a question of fact.
- 7.2 Section 68(4) of the Ordinance places the onus of proof on the taxpayer. Accordingly, it was for the Taxpayer to satisfy the Board that he was not an employee but an independent contractor.
- 7.3 His first difficulty was that he had entered into written agreements with both companies, refer paragraphs 3.3 and 3.6 above which were inconsistent with;
  - 7.3.1 His ground of appeal; and
  - 7.3.2 The general tenor of those agreements.
- 7.4 This difficulty was compounded by the fact that both Firm B and Firm C regarded him as an employee, hence the filing by them of the Returns of Remuneration previously mentioned in this decision, refer paragraphs 3.4 and 3.7 above.
- 7.5 The Board is satisfied that the offer made by each Firm B and Firm C by their respective letters were offers of employment made to the Taxpayer, as opposed to offers of an appointment of Firm A as an agent, and that even if the Taxpayer was of the belief that the offers were offers of an agency to Firm A his counter-signature by way of acceptance was not qualified in any way to reflect that belief. The Board notes that the Taxpayer had stated that Firm A had been in existence for several years prior to the relevant years whereby the Board is entitled to accept that the Taxpayer was well aware of the distinctions between accepting a personal appointment and accepting an appointment on behalf of Firm A.
- 7.6 In effect the Taxpayer asked the Board to ignore the letters from Firm B and Firm C. He stated that they were merely forms which did not reflect the true relationship. The Board is unable to accept this. If every taxpayer were to be allowed to successfully submit that documents were meaningless, save, perhaps, as to how services were to be remunerated, the only result could be chaos. The Taxpayer could have sought a witness from each Firm B and Firm

## INLAND REVENUE BOARD OF REVIEW DECISIONS

C to support his submission but no such witness was called. In light of their respective Returns of Remuneration it is not surprising that no such witnesses were called.

- 7.7 The Taxpayer put forward nine specific reasons why the Board would be able to find that he was not an employee of either Firm B or Firm C, refer paragraph 4.1.3 above.
- 7.8 When considering the relationship created by a document the Board is obliged to consider its terms and conditions and in so doing it is obliged:
- 7.8.1 To ignore any description or categorisation thereof by the parties. Calling what is an agency agreement an employment agreement or a credit sale agreement a hire purchase agreement does not change the nature of the agreement.
- 7.8.2 To examine the document to determine the relationship created by its terms, and notwithstanding that those creating the document achieved a relationship they did not intend; the law provides a remedy if both parties agree that their common objective was not achieved by the document they created.
- 7.8.3 Having read through both letters the Board is satisfied that none of the nine reasons submitted by the Taxpayer support his submission that, when countersigned by him, the letters created a contract for services as opposed to a contract of service.
- 7.9 The use by Firm B of the words ‘agent’ and ‘Vice President’ in the preamble to the letter of 11 February 1991, refer sub-paragraph 3.3 above, create an immediate conflict. (The use of the word ‘agent’ in the heading to paragraph 3 is not considered by the Board to affect the position.) The normal interpretation of the former is to be expected in a contract for services whilst the latter is to be expected in a contract of service. Which of those types of contract was intended may only be determined by reference to duties spelled out in the document. Are the duties consistent with a contract for services or a contract of service or are they so inconclusive as to dictate extrinsic evidence of the intended relationship? The Board considers the following provisions to be relevant to this question.
- 7.9.1 Paragraph 3(a), refer sub-paragraph 3.3.3.1 above, is inconclusive. It is consistent with either a contract for services or a contract of service.
- 7.9.2 Whilst the first sentence of paragraph 3(b), refer sub-paragraph 3.3.3.2 above, is ambiguous, the Board recognises that the procurement of business may require personal visits to existing and potential clients, something which could be consistent with a contract for services, the second sentence permits the employer to dictate attendance at its office, something which is inconsistent with a contract for services.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- 7.9.3 Paragraph 3(c), refer sub-paragraph 3.3.3.3 above, is more consistent with a contract of service in that it removes any scope for the ‘agent’ to impose on ‘his customer’ any more or less onerous conditions than those stipulated by ‘[Firm B]’.
- 7.9.4 Paragraph 3(d), refer sub-paragraph 3.3.3.4 above, is only consistent with a contract of service.
- 7.9.5 Paragraph 3(e), refer sub-paragraph 3.3.3.5 above, is only consistent with a contract of service.
- 7.10 One of the Taxpayer’s nine reasons does call for specific comment and this relates to his liability to indemnify Firm B. This could arise under two circumstances:
- 7.10.1 Under sub-paragraph 3(c) of the letter, refer sub-paragraph 3.3.3.3 above. The Board notes that this liability to indemnify was expressed to arise if loss or damage were to be suffered by reason of the Taxpayer failing to observe Firm B’s rules and regulations with respect to foreign currency and bullion trading. The Board accepts the Revenue’s submission that this does not create the agreement between Firm B and the Taxpayer a contract for services as it is not an unusual feature of the type of employment accepted by the Taxpayer when he counter-signed the letter from Firm B.
- 7.10.2 Under sub-paragraph 4(a) of the letter, refer sub-paragraph 3.3.4 above. The Board notes that this liability to indemnify was expressed to arise if a customer procured by the Taxpayer ‘default[ed] in payment’, namely failed to settle balances due to Firm B on the customer’s trading account. The Board does not accept that this provision in any way detracts from the Revenue’s submission, refer preceding sub-paragraph. The Taxpayer was to be remunerated in part by commissions on business introduced and, obviously, a provision of this nature focuses the employee’s mind on his need to introduce only those customers who would be good for their commitments, particularly if the trading was to be undertaken on unsecured margin accounts.
- 7.11 The factors referred to in paragraph 7.9 do not arise with respect to the agreement between the Taxpayer and Firm C. His appointment was as ‘Marketing Manager’ and the remaining provisions are exclusively consistent with a contract of service as opposed to a contract for services.
- 7.12 The Board is well aware of the fact that in Hong Kong there are many employers who engage individuals to promote their business and whose primary remuneration is by way of commission. The Board is also aware of the fact that many of these employees are required to spend much of their time out of their respective employer’s offices contacting and meeting prospective

## INLAND REVENUE BOARD OF REVIEW DECISIONS

and/or existing clients and that these individuals engage others to 'find' potential clients, hence the inclusion of, first, the reference to 'your employees, if applicable' in the preamble to paragraph 3 of the letter, refer sub-paragraph 3.3.3 above, and, secondly, the reference to the procuring 'of new trading accounts' in sub-paragraph 3(a) of the letter, refer sub-paragraph 3.3.3.1 above. The absence of a basic salary, or a minimum salary, and a minimal requirement to attend the office do not constitute these individuals independent agents; they are employees.

- 7.13 The Board finds that the general tenor of the agreement between the Taxpayer and Firm B, whilst imposing duties such as those outlined in the preceding paragraph, and the specific terms of the agreement between him and Firm C are employer/employee agreements or, as the Revenue submitted, contracts of service and not contracts for services.

### 8. DECISION

- 8.1 For the reasons given, the Taxpayer has failed to discharge the onus imposed on him by section 68(4) of the Ordinance and, accordingly, this appeal fails and is dismissed.
- 8.2 Nevertheless, the Board has been informed that the income the subject matter of this appeal has previously been assessed to profits tax, refer paragraph 2 above. As, quite clearly, this income cannot be subject to both salaries tax and profits tax the Board expresses the view that it is the duty of the Commissioner to direct that those assessments to profits tax be discharged and the tax paid pursuant thereto, if any, be applied towards the discharge of the assessments appealed or, if already discharged, repaid to the Taxpayer at the earliest opportunity.