Case No. D72/88

Salaries tax– contract for services – remuneration paid over to a company – whether income was that of the taxpayer or of the company – s 8(1) of the Inland Revenue Ordinance.

Panel: H F G Hobson (chairman), Chen Yuan Chu and Vincent Lo Wing Sang.

Date of hearing: 8 December 1988.
Date of decision: 8 March 1989.

The taxpayer, a doctor, operated with his partners through a company. The arrangement between the doctors was that all income from the taxpayer's contract work outside the company's surgery should belong to the company.

The taxpayer was personally engaged under a contract with a clinic. The clinic paid him remuneration described as 'salary' which the taxpayer paid into the company's bank account. The clinic treated the doctor, not the company, as its employee. There was no contract between the company and the clinic.

From some years, the taxpayer had included the amount of this remuneration in his salaries tax return. The company included this amount in its own accounts but, for tax purposes, deducted this amount on the ground that it had been included in the taxpayer's salaries tax return.

For the year of assessment in which he left the company, the taxpayer did not include this remuneration in his salaries tax return. Instead, the company included the amount of the remuneration in its own taxable income.

The IRD nevertheless assessed the remuneration to salaries tax in the hands of the taxpayer. The taxpayer appealed.

Held:

The income was that of the taxpayer and not of the company.

(a) This position had been conceded for prior years in both the taxpayer's and the company's returns, and there was nothing to suggest that this position had been altered with respect to the year in dispute.

(b) The fact that the taxpayer had paid the remuneration over to the company, and that the company had included the remuneration in its accounts, was not sufficient to establish that the remuneration was that of the company.

Appeal dismissed.

Wong Yui Keung for the Commissioner of Inland Revenue.
Victor T Y Lim of F S Li & Co for the taxpayer.

Decision:

In 1978 the Taxpayer and his then partner ('the doctors') formed a limited liability company ('the company') of which the doctors were directors and shareholders. The company had its own surgery where the doctors conducted consultations ('in-house consultations'), the fees for which were received by the company. The partners also took on engagements with various hospitals and clinics. In particular, the Taxpayer was engaged ('the engagement') by contract to a clinic ('the centre') for 3 years from 1 January 1981 to 31 December 1983. (As appears later in this decision, the Taxpayer remained with the centre until at least 31 March 1984).

The centre paid the Taxpayer the contractual remuneration ('the remuneration') for the engagement and filed appropriate employers' returns, including the return for the year of assessment 1983/84 ('the year concerned'). The Taxpayer himself filed salaries tax returns in which he disclosed the salary he received from the company and, save for the year concerned, also the remuneration. Although the company's accounts included both the fees from in-house consultations and the remuneration in its tax computations, the remuneration was deducted (except for the year concerned) as having been already included in the Taxpayer's salaries tax return.

For the year concerned, the Taxpayer excluded from his salaries tax return nine months (ending 31 December 1983) of the remuneration. Similarly, the company (contrary to its previous policy) did not deduct the remuneration from its profits tax return. The assessors nevertheless treated the Taxpayer as liable to salaries tax on the said remuneration. That treatment was upheld by the Commissioner on appeal.

The question for our consideration was whether the remuneration for the year concerned was the Taxpayer's own salary or income of the company.

The Taxpayer did not give evidence and the facts as found by the Commissioner were accepted by the Taxpayer's representative. The only additional information offered by the Taxpayer's representative was that the Taxpayer had faithfully paid the remuneration when received into a savings account belonging to the company. As this information was not challenged by the Commissioner's representative, we accept it as a

matter of fact. The Taxpayer's representative quite properly advised us that a letter dated 1 April 1983 had been signed for the purpose of the appeal and had been back-dated to reflect a mutual 'gentlemen's agreement' of the doctors that all income connected with contract work of the Taxpayer outside the company's surgery should belong to the company.

The Commissioner's representative referred us to certain statutory provisions and case-law but we do not consider they need repeating here.

For the following reasons, we find as a fact that the remuneration of the Taxpayer from the engagement for the year concerned was his own salary.

1. The company was neither a party to, nor was it mentioned in, the contract by which the engagement was effected.

2. The remuneration is described in that contract as 'salary' (plus monthly bonus).

3. The centre treated the Taxpayer, not the company, as its employee.

4. Except for the year concerned, (a) the Taxpayer had conceded in his returns that he was employed by the centre and (b) the company itself mirrored that concession in its own returns.

5. The Taxpayer personally received the remuneration and signed receipts for it.

6. We can find nothing to suggest that the Taxpayer or the company's position vis-a-vis the remuneration changed for the year concerned. Indeed, there is evidence in the Taxpayer's own salaries return that, notwithstanding that he left the company on 31 December 1983, he continued to work for the centre (a fact acknowledged by the Taxpayer's representative) from 1 January 1984 at least to 31 March 1984 (representing the balance of the 12 months following the 9 months referred to above).

7. There was no contract between the company and the Taxpayer.

8. The fact that the remuneration was turned over to the company and that the same was included in the company's accounts (but not for tax purposes – except for the year concerned) is insufficient of itself to displace the foregoing reasons.

According this appeal is dismissed and the assessment concerned is hereby confirmed.