

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D73/95**

**Salaries tax** – ‘property negotiator’ – guaranteed income on a prepaid nature – profits tax or salaries tax.

Panel: Andrew J Halkyard (chairman), Peter R Griffiths and Gerald Hin Tsun To.

Date of hearing: 4 August 1995.

Date of decision: 27 October 1995.

The taxpayer was a ‘property negotiator’. The income was guaranteed but was payable on a prepaid nature and was deductible. A business was later registered by the taxpayer. The taxpayer contented that his income should be subject to profits tax.

Held:

No single test determined whether a contract was one of service or for services and that ultimately 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. Looking at the totality of the facts, the taxpayer was not carrying on business on his own account.

**Appeal partly allowed.**

Cases referred to:

Cassidy v Ministry of Health [1951] 1 All ER 574

D19/78, IRBRD, vol 1, 323

Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631

Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374, [1990] 1 HKLR 764

Market Investigations v Minister of Social Security [1969] 2 QB 173

Hall v Lorimer [1994] 1 All ER 250

Yim Kwok Cheong for the Commissioner of Inland Revenue.

Taxpayer in person.

**Decision:**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The Taxpayer has appealed against a determination of the Commissioner of Inland Revenue relating to the salaries tax assessments for the years of assessment 1990/91 and 1992/93 and the additional salaries tax assessment for the year of assessment 1991/92 raised on him. The Taxpayer claims that his income should be subject to profits tax and not to salaries tax.

### **The facts**

1. In response to a newspaper advertisement, on 18 January 1989 the Taxpayer applied to a property firm ('the Firm') for the post of 'Property Negotiator'. In his letter the Taxpayer stated: 'I am looking for a career of good prospects'.
2. The application was successful and on 14 February 1989 an agreement was entered into between the Firm and the Taxpayer. The agreement provided:

'We are glad to inform you that you are accepted as a Property Agent of [the Firm] with effect from 21 February 1989. Your income for the first three months is \$5,000 non deductible with a travelling allowance of \$500.

From the fourth month onwards, you are entitled to a guaranteed income of \$5,000 plus \$500 travelling allowance. However, such guaranteed income is only payable on a prepaid nature and is deductible. For example, if in any month your income is less than \$5,000 [the Firm] will advance the deficit amount to you and deduct such amount from your future income when it is over \$5,000.

You are reminded that by the date of joining the [the Firm], you should not disclose any information of [the Firm] to any undesirable party.

Besides, all connection and referrals obtained by you will be treated as belonging to [the Firm]. For any queries, please consult your manger or [the Managing Partner of the Firm] directly.'

3. At all relevant times after 21 February 1989, the Firm maintained a 'Personal Record' for the Taxpayer which contained various items of information such as his marital status and position with the Firm, which was described as 'Negotiator'.
4. On 8 February 1991 the Taxpayer applied under the Business Registration Ordinance for registration of a business in the name of 'Company A'. The nature of the business was described in the application as 'General Trading and Agent'. The date of commencement was stated as 1 April 1990.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

5. The business of Company A ceased on 28 February 1993. The Taxpayer notified the Business Registration Office of this fact.
6. On 1 April 1993 the Firm assigned the Taxpayer to the post of Deputy Branch Manager in its Branch X. The notice of assignment, signed by the General Manager of the Firm, stated:

‘Your performance has been noticed and appreciated by the Management.

With effect from 1 April 1993, you are assigned by [the Firm] as Deputy Branch Manager of [our] Branch X. In addition to your monthly Advance Payment, a special allowance of \$6,000 (travelling allowance inclusive) will be granted to you.

... [The] duty of a Deputy Branch Manager is to assist your superior in overall daily operation and [you are] allowed to close deals yourself.

All other terms and conditions will remain unchanged and are in accordance with the Rules and Regulations of [the Firm].

We appreciate your past service with us and we look forward to even greater contribution from you in the future.’

The Taxpayer does not dispute that his income from this post is properly liable to salaries tax.

7. In an internal memorandum from the General Manager of the Firm dated 6 April 1993 issued to ‘All Management, Agents and Staff’ the assignment set out in fact 6 was described as a ‘personnel promotion’.
8. In his salaries tax returns for the years of assessment 1990/91, 1991/92 and 1992/93, the Taxpayer did not declare any details of employment income. In a letter dated 8 May 1991, which was submitted to the Inland Revenue Department with his salaries tax return for the year of assessment 1990/91, the Taxpayer stated:

‘I have already started my own business trading as Company A from 1 April 1990. Therefore, my salary income will be terminated from that day. My business registration number is [details provided].’

9. On various dates the Firm filed employer’s returns in respect of the Taxpayer for the years ended 31 March 1991, 1992 and 1993 showing, among other things, the following particulars:

**1990/91**

**1991/92**

**1992/93**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Capacity in which employed	-	Property Agent	-
Period of employment	1-4-90 to 31-3-91	1-4-91 to 31-3-92	1-4-92 to 31-3-93
	\$	\$	\$
Income: Consultancy	1,050	750	1,350
Commission	128,770	147,169	237,156
Travelling	<u>5,883</u>	<u>5,832</u>	<u>5,848</u>
	135,703	153,751	244,354
	=====	=====	=====

10. The assessor was of the opinion that the Taxpayer should be chargeable to salaries tax and raised salaries tax assessments on the Taxpayer for the years of assessment 1990/91, 1991/92 and 1992/93 on the basis of the income disclosed at fact 9.
11. The Taxpayer lodged valid objections to the assessments referred to in fact 10. He claimed that his income should be liable to profits tax instead of salaries tax.
12. In response to the assessor's enquiries, the Firm stated in a letter dated 21 November 1994:
  - (a) The Taxpayer was required to observe the Firm's policy and regulations.
  - (b) The duties and responsibilities of a property agent are to represent the Firm to sell and lease commercial (office/retail), industrial and residential properties to potential buyers and to perform any duties to enhance the profitability of the Firm and its associates.
  - (c) It is mutually understood that agent should report to work at appointed working hours according to the weekly roster. The Taxpayer worked for Branch X and was required to follow a working schedule set by the Firm.
  - (d) The Taxpayer was required to incur outgoings and expenses in the performance of the duties such as travelling allowance up to \$500 per month.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- (e) The Taxpayer was not required by the Firm to provide his own equipment, facilities or employ his own assistant in performing his duties.
  - (f) The Taxpayer could work for other organisations but not those in the same line of business. No prior approval was required to be sought from the Firm.
  - (g) The Taxpayer was not entitled to the full range of normal staff benefits. However, the Taxpayer was entitled to the following fringe benefits: seven days annual leave and 50% medical reimbursement for services provided by the Firm's authorised doctors.
  - (h) The Taxpayer was responsible to the Branch Manager of the Firm's Branch X. Approval was required to be sought from the Branch Manager if any leave was to be taken.
  - (i) The agreement with the Taxpayer could be terminated by written notice which could be exercised with immediate effect.
  - (j) The Taxpayer was required to bear all financial risk and suffer loss himself in the performance of his duties.
  - (k) Payment to the Taxpayer was made by way of a cheque made out in the Taxpayer's name.
13. On 22 December 1994 the Commissioner refused to allow the Taxpayer's objection to the assessments described at fact 10.
14. On 20 January 1995 the Taxpayer appealed to the Board of Review against the Commissioner's refusal to allow his objection. The Taxpayer claimed that he was not an employee of the Firm and that his income should be subject to profits tax and not to salaries tax. If this claim was rejected, the Taxpayer contended that his income should be reduced by various expenses which were wholly and exclusively and necessarily incurred in the production of his income.

### **The evidence of the Taxpayer**

During the course of the Board hearing the Taxpayer gave oral evidence. With the exception of the evidence relating to his claimed expenses (fact 32 below refers), the Taxpayer presented his evidence in a forthright and candid manner. On the basis of that testimony and documents produced by the Taxpayer to the Board, we find the following additional facts.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

15. The Taxpayer was given a publication by the Firm entitled 'Handbook'. Among other things, the Handbook set out the 'Daily Working Procedure' for the Firm's property agents. It stated that although the official office hour of the Firm starts at 9.30 am, the office is open at 9.00 am. The branch office at which he worked, Branch X, opened from 9.00 am to 6.00 pm. As a matter of practice, the Taxpayer's actual working hours were not strictly regulated. It was not necessary for him to report to the office at 9.00 am. However, if he did not need to see clients during normal office hours the Taxpayer would return to the office. The Taxpayer worked Saturdays but virtually never went to the office on Sundays. He admitted that he basically worked to a regular schedule.
16. The Handbook produced by the Taxpayer states that at the beginning of the working day all property agents should thoroughly acquaint themselves with property advertisements in certain leading newspapers. It also provides detailed instruction in handling telephone calls, attending clients and negotiation techniques.
17. The Taxpayer could book the Firm's car for business use, but it was charged out by the Firm at an hourly rate. The Taxpayer generally found it more convenient to use public transport when meeting clients.
18. The Firm's policy was to pay to all permanent staff a year end payment and a discretionary bonus. The Taxpayer was not entitled to, and did not receive, any such payments. The Handbook referred to at facts 15 and 16 makes no mention of staff benefits.
19. After the Taxpayer had obtained a Business Registration Certificate (fact 4 refers), payment of commission to the Taxpayer by the Firm was in the form of a cheque made out by the Firm showing the payee as 'Company A'. Prior to this time, the cheque was made out in the Taxpayer's name (compare fact 12(k)).
20. At all relevant times, the Taxpayer did not work for any other property agency.
21. The Taxpayer was issued by the Firm with a name card showing the name of the Firm, Branch X to which he was attached and the appellation 'Property Consultant'. The Firm also issued to the Taxpayer a badge which showed the department, described as 'Industrial', to which he was attached. The Taxpayer stated that he could not recall ever having worn this badge.
22. Limited personal leave, both paid and unpaid, was granted to the Taxpayer by the Firm. Paid leave meant that the guaranteed income and travelling expenses (fact 2 refers) were paid to the Taxpayer by the Firm in the usual manner. Prior to leave being taken, the normal procedure was for the Taxpayer to seek the approval of his Branch Manager, although the Taxpayer stated that there was no question that the leave would not be approved.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

23. Paid sick leave was also granted to the Taxpayer by the Firm, upon production of a medical certificate. There was, however, no evidence before us that the Taxpayer applied for any sick leave.
24. The Firm helped finance, at the option of the Taxpayer, the rental or purchase of a pager or a mobile phone. As the Taxpayer had his own pager, he opted for a mobile phone and the Firm paid him \$500.
25. As indicated at fact 9, the bulk of the Taxpayer's income from the Firm represented commission. This commission consisted of 'individual commission' and 'pooling commission'. Individual commission was payable when the Taxpayer completed a property transaction. Pooling commission is described at fact 26 below.
26. The Firm has established a number of small teams. The Taxpayer's team was responsible for industrial properties in the X area. Generally speaking, there were between 5 and 6 agents in the team to which the Taxpayer was assigned. When a team member completes a deal, the other members of the team are entitled to share part of the commission. This part is the so-called pooling commission and it represents one-third of the total commission payable by the Firm for a transaction after the Firm has taken its share and where, in appropriate cases, other agents are entitled to a share, such as an agent who initially obtains the listing by his or her own endeavours. The remaining two-thirds represents the individual commission described at fact 25 above. The Firm devised detailed rules relating to the payment and sharing of commission. The Taxpayer was thoroughly aware of these rules and the way they operated.
27. The Taxpayer produced before the Board a simple organization chart for the Firm. It showed that the group designated as 'agents', of which the Taxpayer was one, was placed under a co-ordinating department, styled 'Marketing Department'. The Taxpayer stated that this department ensured that there was co-operation between the agents. It also settled any complaints that could arise among the agents. Another department was also under the Marketing Department. This was not indicated on the organization chart but its function was to assist in completing transactions and in arranging advertisements. The Taxpayer stated that he relied heavily on support from the Marketing Department.
28. The Board asked the Taxpayer whether he was liable to suffer financial loss as a result of his activities for the Firm. The Taxpayer stated that he was so liable and gave the example that if a deposit for the purchase of property was paid to the wrong land owner, then he would have to make the correct payment out of his own pocket.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

29. The Board also asked the Taxpayer what would happen if, after the initial 3 month period (fact 2 refers), he consistently earned less than the guaranteed amount of \$5,000. The Taxpayer responded that it was possible that anyone in this position would be terminated by the Firm, but he appeared to have no personal experience of such action being taken by the Firm.
30. Apart from providing him with a name card, badge and contribution towards the expenses of a mobile phone, the Firm provided the Taxpayer with office accommodation, a desk, stationery, and a telephone. Secretarial assistance was also available, at no cost to the Taxpayer.
31. The guaranteed monthly income of \$5,000 described at fact 2 was increased by the Firm in January 1992 to \$7,500.
32. In support of his claim that he should have been subject to profits tax instead of salaries tax, the Taxpayer produced a basic profit and loss account for the year ended 31 March 1991. When questioned by the Board on various expenses contained in the account, such as rent and rates, interest, stationery and printing and salary, the Taxpayer's answers were hardly satisfactory. For instance, the Taxpayer conjectured that the interest expenses might have been related to instalments for his mobile phone (but he could give no other details) and virtually no details at all were given in relation to the recipient or recipients of the salary.
33. A subsidiary, and unrelated, dispute arising on appeal concerned whether amounts of \$60,012 and \$58,251, which the assessor had included in the salaries tax assessments for the years of assessment 1991/92 and 1992/93, were actually earned by the Taxpayer. As this was purely a factual dispute capable of independent resolution, the Board ruled that this matter be adjourned and reconsidered by the parties in light of further enquiries which had already commenced. The Commissioner has subsequently informed the Board that he now accepts that these sums should be excluded from the Taxpayer's salaries tax assessments.

### **The Taxpayer's contentions**

During the Board hearing, the main thrust of the Taxpayer's argument was that essentially he had a 'co-operation agreement' with the Firm and that he should thus be liable to profits tax rather than salaries tax. Although the Taxpayer did not refer to his notice of appeal during the hearing, it is appropriate for us to set out the additional arguments, as distinct from claims which were not the subject of evidence, contained therein:

1. The Taxpayer contended that the Firm did not control him in any significant way.



## INLAND REVENUE BOARD OF REVIEW DECISIONS

2. The Taxpayer listed various considerations supporting the conclusion that he was an independent contractor as distinct from an employee. These were:
  - (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 being reimbursed by the Firm;
  - (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 (compare fact 28); and
  - (f) the absence of benefits from the Firm which are normally provided by employers to employees.

On the basis of these arguments, the Taxpayer contended that he performed services for the Firm as a person in business on his own account.

3. The Taxpayer does not dispute that his income from his current post, that is, Deputy Manager of the Firm's Branch X, is properly liable to salaries tax (fact 6 refers). The Taxpayer distinguished the facts of this appeal from those relevant to his current post in the following way. He stated that when he became Deputy Branch Manager:
  - (a) he was paid a basic salary;
  - (b) he had to keep regular hours and open and lock up the office;
  - (c) he had to attend management meetings regularly; and
  - (d) he had slightly better medical benefits.

Apart from these distinctions, the Taxpayer acknowledged that there was little difference in the terms and conditions between the two posts.

### **The Commissioner's contentions**

On the basis of the evidence before the Board, the Commissioner argued that the Taxpayer was totally integrated into the Firm's business. To support this claim, the

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Commissioner relied upon factors such as evidence of the personal record (fact 3), name card and badge (fact 21), the Taxpayer's 'promotion' to Deputy Branch Manager (fact 6) and dissemination to staff within the Firm of that promotion (fact 7).

The Commissioner then proceeded to argue that various restrictions placed by the Firm upon the Taxpayer in relation to matters such as working schedule and leave requirements (facts 15 and 22) show a level of control by the Firm which are wholly consistent with the existence of an employment relationship. In this regard, the Commissioner relied generally upon the contents of the Handbook (facts 15 and 16) to show that the Firm exercised a substantial degree of control over property agents such as the Taxpayer in relation to concluding property transactions.

In the Commissioner's view, the payment to the Taxpayer by the Firm of a guaranteed monthly income and travelling allowance (fact 2), the subsequent increase in the level of that guaranteed monthly income (fact 31) and the provision of various employee-type benefits to the Taxpayer such as leave pay and medical reimbursement (fact 12(g)) also indicated the existence of an employment relationship.

The Commissioner also contended that as the Taxpayer was not required by the Firm to provide his own equipment, facilities or employ his own assistant in performing his duties (fact 12(e)), he was not carrying on business on his own account. To support this contention, the Commissioner relied upon additional factors such as the payment by the Firm to the Taxpayer of the guaranteed monthly income and travelling allowance (fact 2), the provision by the Firm of a car (fact 17), desk, secretarial assistance, stationery (fact 30) and an allowance of \$500 to help finance the purchase of a mobile phone (fact 24). In this regard, the Commissioner also referred to the detailed rules established by the Firm which regulated the payment of commission to all agents (fact 26). In the Commissioner's view, this showed that the Taxpayer could only conclude a property transaction through the co-ordination of the Firm and to a certain extent the efforts of other agents. In these circumstances, the Commissioner argued that not only did this support the integration argument set out above, it also shows that the Taxpayer was not carrying on business on his own account.

The Commissioner contended that the obtaining by the Taxpayer of a Business Registration Certificate and remuneration paid by the Firm in the business name are not determinative of the issue before us. In any event, the Commissioner noted that the Business Registration application was signed nearly two years after the Taxpayer had commenced work for the Firm (fact 4) and that it was inconceivable that the Taxpayer intended to enter into an agreement with the Firm as a self employed business person rather than as an employee.

In conclusion, the Commissioner submitted that the Taxpayer had failed to discharge the onus of proof that the assessments appealed against were incorrect or excessive.

### **The relevant law**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Income from employment is liable to salaries tax; profits from a trade, profession or business are liable to profits tax (Inland Revenue Ordinance, sections 8 and 14).

An employment exists where there is a contract of service as opposed to a contract for services (Cassidy v Ministry of Health [1951] 1 All ER 574 and D19/78, IRBRD, vol 1, 323). In Chan Kwok-kin v Mok Kwan-hing [1991] 1 HKLR 631 the Court of Appeal decided that no single test determined whether a contract was one of service or for services and that 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. This was approved by the Privy Council in Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764 per Lord Griffiths:

*'Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J at pages 184 and 185 in Market Investigations v Minister of Social Security [1969] 2 QB 173:*

*"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?"*

*If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No", then the contract is a contract of service. 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. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and the factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

A number of useful general statements of principle also emerge from the English Court of Appeal decision Hall v Lorimer [1994] 1 All ER 250. This case accepted that the test to be generally applied in determining whether an employment exists is that laid down in Market Investigations v Minister of Social Security [1969] 2 QB 173 quoted above. The court then went on to state:

*'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.*

## INLAND REVENUE BOARD OF REVIEW DECISIONS

*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.’ ([1994] 1 All ER 250 per Nolan LJ at 256).*

### **Reasons for decision**

*The relevance and extent of control.* We appreciate that in distinguishing between a contract of service and a contract for services control is no longer regarded as the sole determining factor, although it will nearly always have to be considered (see Market Investigations v Minister of Social Security [1969] 2 QB 173 per Cooke J at 184).

In this regard, we do not accept the Commissioner’s argument that the restrictions placed by the Firm upon the Taxpayer in relation to matters such as working schedule and leave requirements (facts 15 and 22) show a level of control by the Firm which is unequivocally consistent with the existence of an employment relationship. The evidence in relation to these matters, which we have accepted as fact, is that the Taxpayer’s working hours were not strictly regulated (fact 15) and that his leave application was a mere formality (fact 22). Moreover, there is no evidence before us that the contents of the Handbook (facts 15 and 16) show that the Firm actually imposed control over the manner in which the Taxpayer carried out his work. We agree with the Commissioner that some elements of control may be inferred from the contents of the Handbook, but of itself this is insufficient in degree or extent to justify the conclusion that the Taxpayer must be an employee of the Firm.

*The economic reality.* Case law of the highest authority indicates that in distinguishing a contract of service from a contract of services the fundamental test is to ask whether:

*‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account? [If not] then the contract is a contract of service.’ (see Lee Ting-sang v Chung Chi-keung [1990] 2 AC 374; [1990] 1 HKLR 764)*

In this regard, we appreciate the dangers of simply focusing upon the factors which have been considered in previous cases. We remind ourselves of the warning expressed in Hall v Lorimer [1994] 1 All ER 250 that application of this test must not become a mechanical exercise in just ticking a check list. Nonetheless, as both parties

## INLAND REVENUE BOARD OF REVIEW DECISIONS

relied upon the factors referred to with approval in Lee Ting-sang v Chung Chi-keung, we have decided to address them as follows:

- (1) The Taxpayer did provide some of his own equipment (fact 24) although the Firm did not require him to do so (fact 12(e)). Other equipment and support facilities were provided to the Taxpayer by the Firm such as a car (fact 17), desk, secretarial assistance, stationery (fact 30) and an allowance of \$500 to help finance the purchase of a mobile phone (fact 24). We find this factor, of itself, to be inconclusive.
- (2) Did the Taxpayer hire his own helpers? The Taxpayer's evidence in this regard was so sketchy (fact 32) that we cannot find his contention that he employed assistants proved to our satisfaction.
- (3) The Taxpayer does assume a degree of financial risk in the sense that if he pays a deposit to the wrong party he must make good the loss (fact 28). A bank teller is in a similar position. We find that, of itself, this factor does not justify the conclusion that the Taxpayer ventured his capital in undertaking a business venture.
- (4) We accept that given the nature of his remuneration from the Firm, *that is*, it is predominantly performance based, the Taxpayer did have an opportunity of profiting from sound management in the performance of his task. This is common to all those who earn commission.
- (5) Although the Taxpayer was not entitled to, and did not receive, the same employment benefits payable to other members of the Firm's staff (fact 12(g)), he was paid a monthly income, which was increased by the Firm, and a monthly travelling allowance (facts 2 and 31). He was also entitled to leave pay and to reimbursement of certain medical expenditure (fact 12(g)). This factor selectively supports the contentions of both parties and again is, of itself, inconclusive.

On the basis of this initial analysis, there is no clear answer to the present dispute although we are of the view that more indicia of employment are present than not. But when we step back, as we must, and look at the totality of the facts before us, we do not hesitate to conclude that the Taxpayer was not carrying on business on his own account.

The facts show clearly that the Taxpayer was completely integrated into the Firm's business. The whole process of applying for a 'career' post (fact 1), the various indicia of employment attaching to that post and the subsequent 'promotion' (fact 7), all show the reality of this case. It would be, in our view, artificial in the extreme for us to accept the Taxpayer's arguments which lead to the following result: that from 21 February 1989 to 31 March 1990 he was an employee (the date of commencement of his business being 1 April 1990; fact 4), that from 1 April 1990 to 31 March 1993 he carried on business on his own account without there being any change in his work status, and that from 1 April

## INLAND REVENUE BOARD OF REVIEW DECISIONS

1993 he reverted to the position of an employee after accepting a 'promotion' to Deputy Branch Manager. We are fortified in this conclusion by the fact that after this promotion the Taxpayer correctly accepts that he is an employee of the Firm (fact 6). Yet, in our view, except for increased remuneration and the responsibility of certain managerial functions, the position of Deputy Branch Manager is essentially subject to the same terms and conditions as those previously applying to the Taxpayer.

This is not a case such as the paradigm of insurance or commodity brokers working on their own account who simply sink or swim depending upon their individual ability. Instead, the facts show that the Taxpayer was part of a team, the members of which relied upon one another for support and income production. In turn, the team relied heavily upon the infrastructure provided by the Firm, with particular support being provided by the Marketing Department. The clients are the Firm's clients and in dealing with them he represents the Firm, not himself. His commission is shared with his co-workers. The whole picture, in our view, is one of the Taxpayer being employed by the Firm rather than being in business on his own account.

If common sense has any part to play in deciding this case, and it should, we ask ourselves whether the passenger on the Shaukiwan tram would conclude on the basis of all the evidence before us that the Taxpayer was an employee of the Firm. We have no hesitation in saying yes.

For all the above reasons, we conclude that the Taxpayer's income from the Firm arose from an employment and was thus properly subject to salaries tax.

Although the Taxpayer did not press the point before the Board, in light of fact 32 we also dismiss the Taxpayer's alternative ground of appeal relating to his claim to deduct various items of expenditure. We do not accept his very general claims for the year of assessment 1990/91 as being proved to our satisfaction. For the remaining years of assessment, there was simply no evidence before us of the extent, if any, of the Taxpayer's deductible expenditure.

For the reasons explained at fact 33, the Commissioner now accepts that the Taxpayer's salaries tax assessments for the years of assessment 1991/92 and 1992/93 wrongly included amounts of \$60,012 and \$58,251 respectively. The Taxpayer's appeal is therefore partly allowed and these amounts must be excluded from assessment. In all other respects the Taxpayer's appeal is dismissed.