Case No. D74/90

Salaries tax – hostess – registration of business by wife of the taxpayer – whether the wife an employee or self-employed.

Panel: Robert Wei QC (chairman), David A Morris and Ronald J Mcaulay.

Date of hearing: 9 January 1991.
Date of decision: 8 March 1991.

The wife of the taxpayer was employed by a ballroom as a hostess leader and was paid a commission income. She decided to register a sole proprietorship business and claimed that the income which she received was subject to business profits tax and not subject to salaries tax. The money was received by her as income of her business and she gave receipts for the money as such. However the contracts which she had with the ballroom were in her own name and not the name of the business and the ballroom filed salaries tax returns in respect of her as an employee.

Held:

As a matter of law a business is not a separate legal entity and accordingly there was no legal basis for the taxpayer's claim. Furthermore the wife of the taxpayer had failed to establish that the relationship was that of an independent business as opposed to a master and servant relationship.

Appeal dismissed.

[Editor's note: The first part of this decision to the effect that an individual cannot carry on business and provide services is not fully understood and it is noted that the taxpayer was not professionally represented.]

Cases referred to:

Sadler v Whiteman [1910] 1 KB 868
Vagliano Anthracite Collieries [1910] 79 LJ Ch 769
R v Holden [1912] 1 KB 483
Income Tax Commissioners v Gibbs [1942] AC 402
Harrison v Willis Bros [1965] 3 All ER 753

Ng Kwok Yin for the Commissioner of Inland Revenue.

Taxpayer represented by his wife.

Decision:

1. In this case the Taxpayer appeals against the determination of the Deputy Commissioner of Inland Revenue revising the salaries tax assessment raised on his wife, Madam X, for the year of assessment 1986/87.

2. The only ground of appeal is that the commission income of $154,583 paid by a ballroom ('the ballroom') to Madam X during the year in question was received by her on behalf of Y, a company of which she was the sole proprietress, and that the income so received should be subject to profits tax in the name of Y.

3. The Taxpayer did not attend the hearing of this appeal, while Madam X appeared, conducted the appeal and gave evidence. No other witness was called. From her evidence and the documents referred to in the course of the hearing, some primary facts emerge as follows.

3.1 At all relevant times Madam X was a hostess leader by occupation and worked in the ballroom. Her job was to introduce hostesses to customers in return for a commission: a cut out of the ticket receipts arising from the introduction. The ballroom has been her place of work since September 1983.

3.2 She signed six consecutive yearly contracts with the ballroom covering a period of six years from September 1983 to September 1989. By each of these contracts it was agreed that the ballroom should employ Madam X as a hostess leader on a commission basis for the term of one year, subject to extension by agreement. The other terms and conditions are similar. The year of assessment 1986/87 straddles two consecutive contracts for the periods from September 1985 to September 1986 and from September 1986 to September 1987 respectively.

3.3 Commission was paid to Madam X by the week. Starting with early 1986 receipts were issued to the ballroom upon each payment bearing Madam X's signature as well as a rubber stamp impression of the name '[Y HK]' with the words 'entertainment services' underneath. The receipts covered the period from early 1986 to early 1987.

3.4 In July 1986 she applied under the Business Registration Regulations for the registration of a business carried on by herself as sole proprietress under the name of Y. 'The description and nature of business' was stated to be 'entertainment service agency' and the date of commencement was in early 1986.

3.5 The ballroom's 1986/87 employer's return filed in respect of Madam X disclosed the following:

Name of employer	[The ballroom named]
Capacity in which employed	Hostess leader
Period of employment	1-4-86 to 31-3-87
Commission income	$154,583

3.6 The ballroom did not enter into any contract in relation to Madam X's work with any party other than Madam X in her personal capacity.

4. Madam X's testimony Madam X began her evidence by asking why the income of Y was treated as her own income. When she signed the contract in September 1986 (see paragraph 3.2 above), she intended to work for the ballroom. About a month later, in early October 1986, she changed her mind and wished to work for her own company, Y. She stated that she registered Y because she wanted to have a company to help the ballroom to manage the hostesses. The reason why she did not get Y to sign the September 1986 contract was that she did not think it mattered. She told the manager of the ballroom in early October 1986 that she had changed her mind and that Y was working for the ballroom instead of herself. The manager said it did not matter. On pay day she would give the ballroom a receipt in the name of Y. When asked why she signed the two later contracts for the periods from September 1987 to September 1988 and from September 1988 to September 1989 in her personal capacity, she stated that the boss of the ballroom said it did not matter. When confronted with the employer's return dated 19 October 1987 and signed by the general manager of the ballroom, setting out Madam X as a hostess leader employed from April 1986 to March 1987, she stated that it was a mistake on the part of the ballroom, and referred us to a letter dated 12 November 1990 from the ballroom to the Commissioner of Inland Revenue which was attached to her notice of appeal. An English translation of the letter reads as follows:

> '[Madam X], a hostess leader of our company, is the representative of [Y]. Because the income of $154,583 for 1986/87 of [Y] derived from our company was acknowledged receipt by [Madam X] herself, the accounts department (of our company), by mistake, treated it as [Madam X's] personal income. I hereby confirm that the income of $154,583 all belonged to [Y], and [Madam X] only acknowledged receipt of the same on behalf of the company.'

In cross-examination, she stated that she could not produce any vouchers in support of the items of expenditure contained in the profit and loss account of Y for the year 1986/87: she had lost all the vouchers during a removal. Her working hours were irregular; business hours were from 8 pm to 3:45 am. She worked on the premises of the ballroom. The hostesses in her group were the employees of the ballroom and were paid by the ballroom. Her duty was to introduce hostesses to customers, and a commission on the tickets was payable upon each introduction. Introduction to customers took place in the

ballroom. She would invite hostesses out for a drink or take them home after work when they got drunk; on such occasions she would incur taxi fares.

5. Madam X's case is that during the year 1986/87 Y worked for the ballroom by providing the services of a hostess leader in return for reward on a commission basis while she was employed by Y to perform these services for the ballroom. In our view, this contention is unsupportable both in law and in fact.

6. The law As Farwell LJ said in Sadler v Whiteman [1910] 1 KB 868 at 889:

> ' In English law a firm, as such, has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order 48A it may be used for the sake of suing and being sued … It is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name or style of the firm.'

These principles have been followed in later cases such as: Vagliano Anthracite Collieries [1910] 79 LJ Ch 769 and R v Holden [1912] 1 KB 483 and cited with approval in Income Tax Commissioners v Gibbs [1942] AC 402 and Harrison v Willis Bros [1965] 3 All ER 753. Farewell LJ's exposition was concerned of course with the name of a partnership firm, but in our view it is equally applicable, mutatis mutandis, to a sole proprietorship firm. Thus, in the present case, Y is 'a mere expression, not a legal entity': a mere name of the business carried on by Madam X, the sole proprietress. It cannot be a party to any contract or contractual arrangements whereby it undertakes to work or provide services for the ballroom. Such a contract would either be null and void or only take effect as if it were a contract between the ballroom and Madam X herself. This appeal therefore fails in limine for lack of a valid legal basis.

7. The facts Since evidence was given and submissions made on the facts, we will state our views on them, even though, on the view we take of the law, it is strictly not necessary to do so.

We do not think that it has been established that the ballroom intended or purported to enter into any contract with Y for the latter to provide the services of a hostess leader. Madam X registered Y in mid-July 1986, giving early 1986 as the commencement of the business, and rubber stamped the name of Y in addition to signing her name on all the commission receipts from early 1986 onwards. We find that Madam X registered Y in order that it might render services to the ballroom and earn the commission in place of herself, and that was why the receipts were rubber stamped with the name of Y. However, we are not satisfied that the ballroom agreed to engage Y in place of Madam X. In September 1986 when she signed the contract for the period from September 1986 to September 1987, she stated that she had intended to work for the ballroom in her personal capacity: this notwithstanding that she had been rubber stamping Y's name on the receipts since early 1986. Then she said she informed the manager of the ballroom early in October 1986 that Y

was working for the ballroom in her place; the manager said that it did not matter. The ballroom made no contract with Y to replace the September 1986 contract made with Madam X, and went on making contracts with Madam X in her personal capacity for the next two years.

In the meantime the ballroom filed it s1986/87 employer's return in respect of Madam X's employment as a hostess leader for the period from April 1986 to March 1987. Madam X said the employer's return was a mistake on the part of the ballroom and referred to the letter dated 14 November 1990 addressed by the ballroom to the Commissioner of Inland Revenue. The letter seeks to put the blame on the accounts department of the ballroom for treating the commission as Madam X's income and to attribute the mistake to the fact that Madam X had been acknowledging receipts of the commission herself. That explanation is unconvincing: it leaves unexplained (1) the fact that the receipts were also rubber stamped with the name of Y; (2) the fact that the ballroom made no contract with Y to replace Madam X's contract and made contracts with Madam X for the two subsequent years; and (3) the fact that the employer's return was made by the general manager of the ballroom, and not by the accounts department. The writer of the letter was not called.

In the circumstances we are unable to accept the explanation offered by the letter; taking the view that we should act on the contracts and the employer's return, we find that the ballroom's contracts were made with Madam X and not purportedly with Y. We should also mention the items of expenditure in the profit and loss account of Y. There is no formal claim for deduction in respect of the items. In any event, since no evidence was given as to how the amounts were arrived at, and no vouchers were produced as proof, none of the items was in our view established.

8. This appeal is dismissed and the 1986/87 salaries tax assessment, as revised, is hereby confirmed.