

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D74/95**

**Salaries tax** – property agent – deductible advance payment – profits tax or salaries tax.

Panel: Robert Wei Wen Nam QC (chairman), Dianthus Tong Lau Mui Sum and Edwin Wong.

Date of hearing: 3 August 1995.

Date of decision: 3 November 1995.

The taxpayer registered herself as a sole proprietress and was a property agent. The income was described as ‘advance payment’ and was treated as deductible pre-payment. The agreement to work stipulated that any such income was payable to a sole-proprietor company named by the taxpayer. Employers return was filed naming the taxpayer as ‘employee’. The taxpayer contented that her income should be subject to profits tax.

Held:

Labels tending to show that the taxpayer was an employee or independent contractor are irrelevant unless the other factors do not show clearly to which category the person in question belongs. In the work of a property agent, it would be difficult to control the manner in which a property agent is to draw upon his or her experience or exercise his or her skill. The fact that the taxpayer was remunerated by commission was a neutral factor. On the whole, the taxpayer performed her services as an employee.

**Appeal dismissed.**

Cases referred to:

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

Lee Ting-sang v Chung Chi-keung and Another [1990] 1 HKLR 764

Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

Hobbs v Royal Arsenal Co-operative Society Ltd [1930] 23 BWCC 254

Yim Kwok Cheong for the Commissioner of Inland Revenue.

Taxpayer represented by her friend.

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### **Decision:**

### **Preliminaries**

1. This is an appeal by a Taxpayer (T) against the salaries tax assessment raised on her for the year of assessment 1992/93. She claims that her income derived from the company (the Company) she worked for should be assessed to profits tax instead of salaries tax.

2. At the hearing of this appeal the Taxpayer was absent but was represented by a Mr X. The statement of facts (together with appendices) contained in paragraph 1 of the determination of the Commissioner of Inland Revenue dated 30 January 1995 was agreed. Also agreed were the documents contained in a bundle of documents prepared by the Revenue for use at the hearing. No evidence was called.

### **Facts**

3. From the agreed documents we find the following facts.

3.1 On 9 November 1991 the Taxpayer registered herself as a sole proprietress trading as T and Co.

3.2 On 14 January 1992 she applied to the Company for the post of a property agent. The application was successful. On 14 February 1992 she agreed to work for the Company as a property agent on the terms and conditions set out in a letter dated 25 January 1992 from the Company to her. The letter reads:

‘Dear Miss (Taxpayer),

Re: Confirmation of Acceptance

We are glad to inform you that you are engaged as Property Agent by our Company in our residential division effective 13 February 1992 with the following terms & conditions:

1. Terms of Payment

(a) 1st to 3rd month – Guaranteed Payment

A monthly payment of \$6,000 with a monthly allowance of \$500 will be payable to you for the first three months and is non-deductible.

(b) 4th month onward – advance payment

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This will be treated as pre-payment by the Company and is deductible in the future. Justification of which is based on your monthly payment by the Company and your actual amount of income.

- (c) In respect of (b) above, please take notice that any income payable to you from the 4th month onward will be payable to a limited company or a sole-proprietor company named by you. At such time, this Confirmation of Acceptance will be non-effective.

### 2. Basic Rules & Regulations

Upon the date of joining this Company, you are reminded NOT to disclose any information to any desirable parties. All connections and referrals obtained by you will be treated as Company belongings. Failure of which will terminate this Confirmation of Acceptance immediately.

### 3. Notice of Disengagement

Being engaged as an agent, there will be no year-end double pay nor compensation given by the Company. Notice of termination between both parties can be exercised in written notice with immediate effect.

Please confirm the above terms by signing and returning the duplicate copy of this letter as acceptance.

Yours sincerely,  
[the Company]  
(signed)  
Associate Director

Confirmed & Accepted by  
  
(signed)  
Taxpayer  
Date 14-2-1992'

3.3 Apart from the rights and duties set out in the letter dated 25 January 1992 (see paragraph 3.2 above), the Taxpayer had other rights and duties as a property agent. The principal ones were as follows:

3.3.1 Her duties and responsibilities as a property agent were to represent the Company to sell and lease commercial (office/retail), industrial and residential properties to potential buyers in a specific area where she had thorough understanding of the environment, the market trend and the future development of that area, and to act and perform any duties to enhance the profitability of the business of the Company and within the Company Group.

3.3.2 She could not work for other organisations which were in the same line of business.

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- 3.3.3 To report for work at appointed working hours according to the weekly roster. Not to disclose any information to any desirable parties. All connections and referrals obtained by her would be treated as the Company's belongings. Failure of which would lead to immediate disengagement of both parties.
- 3.3.4 She was responsible to the Divisional Manager of the Kowloon residential division.
- 3.3.5 She was not required to provide her own equipment or facilities or employ her own assistant in performing the duties.
- 3.3.6 She was entitled to a travelling allowance of up to \$500 per month.
- 3.3.7 She was entitled to 7 days annual leave and 50% medical reimbursement through the Company doctors.
- 3.3.8 Approval was required before taking leave.
- 3.3.9 To be at the office promptly each morning. To notify the Branch Manager before 9:45 if a day off was required due to urgent personal or sickness reason.
- 3.3.10 To sign in upon arriving at the office in the morning and sign out when attending appointments with clients.
- 3.3.11 Lunch period was one hour only.
- 3.3.12 Company car was available for use chargeable at Company rates.
- 3.3.13 A Company identity card was provided which must be worn at the office throughout the day and at official seminars.
- 3.3.14 A name card would be issued after one month of service.
- 3.3.15 She was entitled to a pager or pager allowance or a mobile phone sponsorship fee.
- 3.3.16 She was required to work 6 days a week with alternate Saturday/Sunday off. Proper clothing for weekend also.
- 3.3.17 She was required to check and update her own area sales listings each day.
- 3.3.18 She was not allowed to contract other branches by herself but must approach her own branch manager, who would in turn contact the Central Filing Department for information.
- 3.3.19 She must update her branch record regularly.

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3.3.20 She must report to the Branch Manager when closing a deal; if the Branch Manager was out, a message must be left at the pager.

3.3.21 Basically, there was a 30% to 70% split of commission in each case. The Company was entitled to 70% of the sum while the agents got 30% of that sum. Each agent belonged to a territory team in a specific area. When a team member completed a deal, he/she would get  $\frac{2}{3}$  of the 30% commission, while the rest of the team shared the remaining  $\frac{1}{3}$ .

3.3.22 Agents and branch managers have the right and obligation to ensure that their clients pay promptly.

3.4 On 1 September 1992, the Taxpayer applied for 7 days annual leave from 17 September 1992 to 23 September 1992, using the Company's 'Agents' Holiday Application Form'. The application was granted.

3.5 On 1 October 1992, the Taxpayer was appointed as a senior negotiator with a special allowance of \$1,500 per month. The duty of a senior negotiator was to assist the agents in the absence of the managers. The letter of appointment further stated that 'all other terms and conditions will remain unchanged and are in accordance with the rules and regulations of the Company'.

3.6 By a letter dated 18 October 1992 addressed to the Taxpayer, the Company promoted her to the post of Acting Branch Manager of Branch Y with effect from 19 October 1992. The letter reads:

'Dear Miss (Taxpayer),

Re: Promotion

After reviewing your past performance and achievement, the Management is pleased to promote you as Acting Branch Manager of Branch Y with effect on 19 October 1992.

Since you are now an employee and not an agent of the Company, please note the following terms and conditions:

1. Salary

Your monthly salary will be \$11,000.

2. Annual Leave

You are entitled to have 10 days pay leave per annum. This leave can only be taken after twelve (12) months of employment including probationary period

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with the Company. However, advance holidays can already be taken after 6 months at management's discretion.

### 3. Bonus

At the end of each calendar year, the Company will pay to all permanent staff a bonus (if any) calculated on pro-rata basis.

### 4. Notice of Termination

1 month.

You are reminded that any payment to you from the Company should be kept private and confidential. Disclosure of which will lead to dismissal by the Management.

Please sign and return the duplicate of this letter to the undersigned as acceptance to the above mentioned terms and conditions.

Yours faithfully,  
(signed)  
Associate Director

Confirmed & Accepted by  
(signed)  
Taxpayer

3.7 On 1 November 1992 a new income scheme came into effect. The Taxpayer was informed by the Company in writing that her monthly income would be either a guaranteed income (non-deductible) of \$10,000 or 13% of commission received from her branch by the accounts department, whichever was the higher.

3.8 With effect from 19 January 1993, the Taxpayer was promoted to the post of Branch Manager of Branch Y. The Company's letter informing the Taxpayer of the promotion stated that 'All other terms and conditions remain unchanged and are in accordance with the Rules and Regulations of the Company. Duty of a Branch Manager is to be in charge of overall daily operation of the branch and to act as an assistant to the Senior Branch Manager or above.'

3.9 With effect from 1 March 1993, the Taxpayer was transferred as Marketing Manager of Kowloon/New Territories residential division on the following terms and conditions:

#### '1. Terms of Payment

A monthly guaranteed payment of \$10,000 will be payable to you, which is non-deductible.

#### 2. Annual Leave

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You are entitled to have 7 days leave per annum.

### 3. Notice of Disengagement

There will be no year-end double pay nor compensation given by the Company. Notice of termination between both parties can be exercised in written notice with immediate effect.'

3.10 On 4 March 1993, the Taxpayer applied for leave for one day falling on 6 March 1993 on the Company's 'Staff Holiday Application Form'. The application was granted.

3.11 The Taxpayer's income from the Company for the year of assessment 1992/93 was as follows:

	<b>Consultancy</b> \$	<b>Commission</b> \$	<b>Travelling</b> \$
April 92	-	10,064.65	500.00
May 92	-	8,011.05	500.00
June 92	-	5,585.80	500.00
July 92	-	8,872.30	500.00
August 92	-	5,117.15	500.00
September 92	-	5,746.20	1,383.40
October 92	4,613.00	575.00	1,161.00
November 92	10,000.00	-	-
December 92	10,000.00	80.00	-
January 93	10,000.00	2,403.00	-
February 93	10,000.00	-	-
March 93	<u>10,000.00</u>	<u>2,082.50</u>	<u>-</u>
Total:	54,613.00	48,537.75	5,044.40
	48,537.75		
	<u>5,044.40</u>		

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Grand Total: 108,195.15

3.12 The Taxpayer's income as from the 4th month onwards was paid to T & Co.

### **The Issue**

4. Towards the end of the hearing, Mr X conceded that during the second half of the accounting period, that is, from 1 October 1992 to 31 March 1993, the Taxpayer was an employee of the Company. Therefore, that part of her income which accrued during those months is chargeable to salaries tax. The issue of this appeal is narrowed down to whether the Taxpayer's income which accrued during the first 6 months, that is, from 1 April 1992 to 30 September 1992, is chargeable to salaries tax or profits tax.

### **The Contractual Relationship**

5. The Taxpayer's contractual relationship with the Company was first established by the letter dated 25 January 1992 from the Company to her (see paragraph 3.2 above). In her statement of the grounds of appeal, the Taxpayer asserted that an oral contract was made to cover the relationship as from the 4th month onwards. We are unable to accept that as there is no evidence in support. The letter contained provisions which clearly applied beyond the end of the 3rd month, for example, paragraph 1)b) and c).

6. The statement of the grounds of appeal relied on paragraph 1)c) of the letter dated 25 January 1992 for the proposition that, as from the 4th month onwards, T and Co, instead of the Taxpayer, was engaged by the Company. In our view, paragraph 1)c) was only a payment arrangement whereby the Taxpayer's pay as from the 4th month onwards was to be paid to T and Co; it is not evidence of a service contract between the Company and T and Co.

7. The statement of the grounds of appeal referred to an analysis of income for the year of assessment 1992/93 purportedly prepared by the Company. It was headed in this fashion:

‘[The Company]

[T and Co]

Annual Income

For the period from April 1992 to March 1993’

8. On the other hand, we note that in the employers return filed by the Company for the year ended 31 March 1993, the Taxpayer's name was entered in the column headed ‘Name of Employee’, while the name of T and Co was entered in the column headed ‘Co



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Name'; there were columns for entering different heads of income. Reading the analysis of income and the employers return together, we think that the analysis is merely a breakdown of the annual income accrued to the Taxpayer the employee but paid to T and Co pursuant to paragraph 1)c) of the letter dated 25 January 1992. The statement of the grounds of appeal contended that the employers return was a mistake whereby the Taxpayer was wrongly treated as the Company's staff. We do not agree.

### **Employee or Independent Contractor**

9. The assessment in question was raised on the basis that the Taxpayer was an employee of the Company, while the Taxpayer's case was that she was an independent contractor and that her income should be assessed to profits tax and not salaries tax. This being the Taxpayer's appeal, the onus is on her to prove her case.

10. The principles governing the determination of the question of whether a person is an employee working under a contract of service or an independent contractor working under a contract for services were adumbrated by Cooke J in Market Investigations v Minister of Social Security [1969] 2 QB 173 at page 184, and were approved by the Privy Council in Lee Ting-sang v Chung Chi-keung and Another [1990] 1 HKLR 764. Cooke J said:

*'This 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 that 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.'*

### **Labelling Factors**

11. Various labels were applied to the Taxpayer in the agreed documents. (1) the letters written by the Company to the Taxpayer from 25 January 1992 onwards were all addressed to the Taxpayer in her personal capacity, while in the letters the label 'agent' was used. (2) In the employers return filed by the Company for the year ended 31 March 1993

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(already referred to in paragraph 8 above), the Taxpayer was stated to be an employee having the job-title of 'Manager', while all the other 22 persons mentioned in the return were also stated to be employees carrying the job-title of 'Divisional Manager', 'Manager' or 'Property Agent' as the case may be. (3) In the undated analysis of annual income for the year of assessment 1992/93 purportedly prepared by the Company (already referred to in paragraphs 7 and 8 above), the name of 'T and Co' was used. (4) In a letter dated 2 September 1994 from the Company in answer to the assessor's inquiries, the contract was stated to be between the Company and the Taxpayer, trading as T and Co, while the Taxpayer's rights and duties were described as those of 'the Co' (meaning, we think, 'T and Co'), the property agent or the agent. (5) In a letter dated 18 July 1995 from the Company in answer to the assessor's inquiries, the Company stated:

'The Taxpayer was verbally advised at the initial employment interview that she was bound by the Company Policy etc and also at subsequent staff meetings at which she attended...'

12. In so far as the labels tend to show that the Taxpayer was an employee or independent contractor, they are labelling factors, and, as such, are in our view irrelevant. They will only become relevant if the other factors do not show clearly to which category the person in question belongs. In Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 at page 512, Mackenna J had this to say:

*'It may be stated here that whether the relationship between the parties to the contract is that of master and servant is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relationship is that of master and servant it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.'*

13. As will be seen below, the outcome of our deliberations on the other factors renders it unnecessary to give further consideration to the labelling factors. However, supposing for argument's sake that the other factors were so evenly balanced that the question of whether the Taxpayer was an employee or an independent contractor remained unresolved, we would have reached the conclusion that, on the whole, the labelling factors were in favour of the Taxpayer being an employee working under a contract of service.

### **Factors Relating to Control**

14. The Taxpayer was required to report for work at appointed working hours according to the weekly roster, to seek approval before taking leave, to provide doctor's certificate when applying for sick leave, to sign in upon arriving at the office in the morning and sign out for attending appointments with clients, and lunch break was limited to one hour only. She was required to wear a Company identity card at the office throughout the

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day and at official seminars, to work 6 days a week with alternate Saturday/Sunday off, and to wear proper clothing for weekends also. She was not allowed to contact other Branches by herself but must do so through her Branch Manager and must report to the Branch Manager when closing a deal. In our view, those factors imposed substantial control on the Taxpayer's performance of her duties and were consistent with the existence of a contract of service. True, there was no control over the exact manner in which she was to perform her duties. There were, for instance, no rules laid down as to the steps to be taken in bringing an intending vendor and an intending purchaser together to conclude a deal. In our view, that was only to be expected. In work of this nature, experience and skill have their role to play; it would be difficult, if not impossible, to control the manner in which a property agent is to draw upon his or her experience or exercise his or her skill. We take the view that the Taxpayer's position was akin to that of a professional who was an employee.

### **Economic Reality and Other Factors**

15. The Taxpayer was not allowed to work for other organisations in the same line of business. It was a 'basic rule' of the Company not to disclose any information to outsiders. All connections and referrals obtained by the Taxpayer was to be treated as the Company's property. Any failure in this regard would lead to immediate disengagement. She was paid a travelling allowance of \$500 per month and was entitled to 7 days annual leave and a 50% discount of medical fees paid to Company doctors. She could use a Company car upon one day's notice at Company rates. She was entitled to a pager or a pager allowance or a mobile phone sponsorship fee. These factors, like those mentioned in the preceding paragraph, are in our view pointers to the Taxpayer being an employee working under a contract of service.

16. Now we come to the specific matters mentioned by Cooke J in relation to the question of whether a person is in business on his own account. For a start, the Company did not require the Taxpayer to provide her own equipment or facilities or employ her own assistant to help perform her duties. The statement of the grounds of appeal asserted that the Taxpayer's sole proprietorship firm 'had to provide equipment and facilities in performing tasks such as mobile phone, pager, motor vehicle and general office equipment. On the other hand, an assistant was employed to handle my company business.' Those assertions came to nothing because there was no evidence to support them.

17. As an agent, the Taxpayer had the right and obligation to ensure that her clients pay promptly but there was no provision for any financial liability in case of delay or default in payment. As an agent, she had no responsibility for investment or management. On the other hand, it is arguable that she had an opportunity of profiting from sound management in the performance of her duties because the way she managed her work might have a bearing on the amount of her commission income. That may well be, and will be weighed with all the other factors.

18. The fact that the Taxpayer was remunerated by commission was in our view a neutral factor. It is established that an employee may be remunerated by commission (Hobbs v Royal Arsenal Co-operative Society Ltd [1930] 23 BWCC 254). Furthermore,

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income subject to salaries tax includes commission (see section 9(1)(a) of the Inland Revenue Ordinance).

19. The Company's letter dated 25 January 1992 provided that '... there will be no year-end double any nor compensation given by the Company. Notice of termination between both parties can be exercised in written notice with immediate effect.' Both the no-compensation and the instant-termination terms were arguably inconsistent with the existence of an employer-and-employee relationship because they seemed to run contrary in the one case to the provisions of the Employees Compensation Ordinance relating to compensation for injury (see section 5 et seq thereof) and in the other to the provisions of the Employment Ordinance relating to the termination of contract by notice or payment in lieu (see sections 6 and 7 thereof). These terms were repeated in the Company's letter dated 28 February 1993 transferring the Taxpayer to the post of Marketing Manager as from 1 March 1993 (see paragraph 3.9 above), but we are no longer concerned with that letter in view of Mr X's concession that during the second half of the year of assessment 1992/93, the Taxpayer was an employee of the Company. We are concerned with these terms in so far as they applied or purported to apply to the first half of that year. No point was taken by either party over these terms, but we shall assume that they were inconsistent with existence of an employer-and-employee relationship, and that if such a relationship existed between the Company and the Taxpayer during the first half of the year, the terms in question would be invalidated by the law (see section 31 of the Employees Compensation Ordinance and section 70 of the Employment Ordinance). However, these considerations have to be balanced against the many factors mentioned above which point overwhelmingly in the other direction.

20. On the whole, we see the picture of the Taxpayer performing her services as an employee of the Company and not as a person in business on her own account.

### **Conclusion**

21. It follows that the Taxpayer's income for the first half of the year of assessment 1992/93 is chargeable to salaries tax. As she has made a concession through Mr X with regard to the second half of that year, her income for the whole of that year is chargeable to salaries tax. This appeal is dismissed and the assessment in question as revised by the Commissioner of Inland Revenue is hereby confirmed.