Case No. D77/90

Salaries tax – claim by taxpayer that income business profits and not subject to salaries tax – whether taxpayer self-employed.

Panel: Howard F G Hobson (chairman), Stuart H Leckie and Jorgen B Schonfeldt.

Date of hearing: 26 February 1991.
Date of decision: 27 March 1991.

The taxpayer was an account executive for a company in the investment business. The company filed an employer's tax return in respect of the taxpayer. The taxpayer registered himself as carrying on business as an investment agent and he did not consider himself to be an employee. He was assessed to salaries tax on his remuneration and appealed to the Board of Review.

Held:

The facts of this appeal were almost identical to D54/90. Different Boards of Review should try to be consistent when deciding similar cases. The present case was identical to D54/90 in its material respects and accordingly D54/90 should be followed unless it appeared to be a wrong decision. On a review of the law it appeared that D54/90 was correct. On the facts before it the Board held that the taxpayer was self-employed and not subject to salaries tax.

Appeal allowed.

Cases referred to:

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
D19/78, IRBRD, vol 1, 323
D67/87, IRBRD, vol 3, 97
D68/89, IRBRD, vol 5, 56
D54/90, IRBRD, vol 5, 414
LEE Ting-sang v CHUNG Chi-keung and Another [1990] 1 HKLR 22
Federal Commissioner of Taxation v Barrett [1973] ATR 122
NG Pik-yuk v Wai Tai Knitwear Ltd [1988] 2 HKLR 110
Davies v Presbyterian Church of Wales [1986] 1 WLR 323

Iris Ng Yuk Chun for the Commissioner of Inland Revenue.

Philip Leung Chi Hung of Arthur W C Mo & Co for the taxpayer.

Decision:

The issue central to this appeal is whether the Taxpayer was self-employed, in which case his income would be assessable to profits tax with the concomitant advantage that his business expenses would be allowable deductions, or an employee liable to salaries tax which does not carry the same advantage. On objection the Deputy Commissioner of Inland Revenue ('DCIR') confirmed a 1988/89 salaries tax assessment.

1. The facts, as agreed or apparent from documents produced, so far as material, are as follows:

1.1 During the year of assessment 1 April 1988 to 31 March 1989 the Taxpayer was engaged by X Limited ('X Ltd') as an account executive pursuant to an agreement dated 1 March 1988 ('the March agreement'). X Ltd furnished a 1988/89 employer's return showing the Taxpayer received $189,258 as allowance and commission.

1.2 On 3 August 1989 the Taxpayer filed an application for registration of business describing his business as 'investment agent' and giving the commencement date as 1 March 1988.

1.3 In his 1988/89 salaries tax return, sent to him on 18 September 1989 and signed by him on 27 September 1989, the Taxpayer struck out the references to salary and instead typed 'please refer to profits tax section [file number mentioned]'.

1.4 On 10 November 1989, the assessor raised a salaries tax assessment based on the employer's return at paragraph 1.1 above.

1.5 The Taxpayer objected against the assessment in the following terms:

> '… the income as stated in the said assessment should be assessed under profits tax. For your information [the Taxpayer] has been trading in his own name as investment agent under profits tax [file number mentioned]. [The Taxpayer] is and has never been an employee of [X Ltd]. He is only an agent under an agency contract with [X Ltd].'

1.6 The profit and loss account of the alleged business for the year ended 31 March 1989 (which formed part of the Taxpayer's 1988/89 profits tax return) indicated that commission received in the amount of $189,258 formed the whole of the gross income of the Taxpayer's business.

2. Testimony

The Taxpayer's representative chose not to examine his client in chief. The Taxpayer was however affirmed and in examination by the Commissioner's representative the following points (not already covered in the foregoing facts) emerged.

(1) He was licensed as an investment advisor but was unsure if a licence fee was payable but if so he did not pay it.

(2) On joining X Ltd he did not receive any staff procedural manuals.

(3) He used a name card, bearing X Ltd's name, which showed him as an 'account executive'.

(4) X Ltd provided him with a desk, a telephone and access to their Reuters screen. However although X Ltd also provided him with a mobile phone and pager he paid for calls he made.

(5) If, in the event of a margin call, his client failed to pay then he would be responsible to X Ltd for the loss. This was in accordance with clause 7 of the March agreement whereby the Taxpayer undertook to reimburse X Ltd in the event of losses. However he was 'quite careful' and took no further orders until the margin call was met: in fact no losses were incurred. The contract notes were issued by X Ltd which accounted to him for his commission.

(6) He kept some business expense vouchers for entertaining clients, but did not keep a record of these nor did the vouchers identify the clients for whom the expense had been incurred. As to one entertainment figure of $6,000 shown in his profits tax return, he acknowledged that it was an estimate only.

(7) He solicited mostly from friends and acquaintances though he also made some 'cold calls'. He did not keep proper records of his clients but had a name list; however as he no longer worked for X Ltd, he had no further need for it.

(8) His basic allowance from X Ltd was not a 'guaranteed' minimum. That is to say X Ltd was not bound to pay it if he did not work hard. Though he had not suffered deductions from his basic allowance he believed others who worked on the same terms had.

(9) He did not file a business registration application for such a long time because he was uncertain whether he would manage to 'survive' in the business. He never thought of himself as an employee.

(10) Though X Ltd said he was covered by a group insurance in fact that cover was not effective during the relevant year of assessment.

(11) X Ltd did not cover him against workmen's compensation.

(12) He kept only one bank account covering both his personal and business affairs.

3. Submissions

3.1 The submission of Taxpayer's representative was merely a reiteration of the grounds of appeal. He made no attempt to address the legal issues raised by the cases of which the Commissioner's representative had given him notice. He raised the novel argument that the Taxpayer was really the agent of the Taxpayer's own clients, consequently a conflict of interest arose from which it should be inferred that the Taxpayer could not be an employee of X Ltd. We see absolutely no merit in this proposition: in any event the same argument could be adopted to reject the contention that the Taxpayer was X Ltd's agent.

3.2 The Commissioner's representative handed up a written submission in which she referred to the following cases:

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

D19/78, IRBRD, vol 1, 323

D67/87, IRBRD, vol 3, 97

D68/89, IRBRD, vol 5, 56

D54/90, IRBRD, vol 5, 414

LEE Ting-sang v CHUNG Chi-keung and Another [1990] 1 HKLR 22

Federal Commissioner of Taxation v Barrett [1973] ATR 122

NG Pik-yuk v Wai Tai Knitwear Ltd [1988] 2 HKLR 110

The Commissioner's representative confirmed that X Ltd was also the 'employer' (using that expression in its loosest sense) in D54/90 and the report suggests that the contract between X Ltd and the taxpayer in that case is the same as the March agreement. We note that D54/90 was heard on 19 and 20 October 1990. The DCIR's determination in the appeal before us was dated 30 November 1990, the Taxpayer appealed against that determination on 8 December 1990. The D54/90 decision is dated 4 January 1991. It follows that the DCIR was unaware of the D54/90 result when the determination in this case was made.

We are not bound by the findings of another Board of Review but we believe that a decision on virtually the same facts must be respected not merely as a matter of courtesy but also to provide a reasonable degree of consistency for those who rely on Board decisions for guidance. Of course if there are clear cogent reasons which indicate the other Board erred or if that Board was not referred to case law adverse to its decision then a contrary decision is permissible and if it is reached the subsequent Board should set out clearly its reasons for the contrary view.

The Commissioner's representative in her written submissions sought to distinguish the circumstances in this appeal with those in D54/90. As her submission was prepared before the hearing we will ignore those submissions which were not borne out by the Taxpayer's testimony.

(1) The D54/90 taxpayer hired helpers whereas the Taxpayer did not. We note however that the March agreement enables the Taxpayer to appoint 'sub-agents' (subject to X Ltd's approval) and that the Taxpayer was responsible for 'the acts … omissions of all persons, firms or companies so appointed'. These words do not identify who shall bear the cost of such appointment but the facts related in D54/90 strongly suggest that the costs of engaging any sub-agents have to be paid out of the agent's pocket which would be a very strange feature of any employment contract. The fact that the Taxpayer did not invoke this right does not diminish the inference to be drawn from the existence of the right. The reference to 'firms and companies' disposes of the representative's argument that the provision concerned should be construed as a power to hire employees for X Ltd.

(2) In D54/90 the taxpayer had to purchase his own pager. We note that the D54/90 decision states that the taxpayer 'used his own pager and mobile telephone for which he incurred capital outlay and running expenses which were not reimbursed': we do not think that statement justifies the inference that the taxpayer 'had to' purchase. It is quite conceivable that he already had his own when he joined or that he chose to buy his own. We do not think this distinction material, particularly as the Taxpayer, like the taxpayer in D54/90, had to bear the running costs.

As indicated, we do not believe that these differences represent adequate grounds for drawing inferences different from those drawn by the Board in D54/90. Moreover unlike D54/90 there was testimony that the Taxpayer was not covered by workmen's compensation: also the Taxpayer did register under the Business Registration Ordinance – though the D54/90 report is silent on the subject, it is quite possible that the taxpayer was also registered.

We next have to decide if the other authorities referred to indicate that the Board in D54/90 got it wrong. The report of that decision shows that the Board was referred

to two of the same cases drawn to our attention, namely Market Investigations and NG Pik-yuk. We have examined these common authorities and can find nothing in them to suggest that the D54/90 Board erred in their interpretation of the ratio decidendi.

As to the remainder, D19/78 turns on its own facts, no agreement similar to the March agreement existed and the taxpayer there had for tax years before and after the year in question submitted salaries tax assessments. In D67/87 the taxpayer was a band musician and though he maintained he was self-employed he had not registered under the Business Registration Ordinance. The facts are in other respects also materially different from the facts of D54/90 and the instant case. Though D68/89 was also concerned with an accounts executive, the taxpayer had for some years submitted to salaries tax and though no change took place in the terms of his engagement (which was not based on any contract similar to the March agreement) nor was a new engagement contract struck, he claimed that his status had changed to that of a self-employed contractor. That circumstance does not exist here.

LEE Ting-sang is a Privy Council case concerned with whether a mason was an employee within the meaning of the Employment Ordinance. Though the facts of that case are quite different from those before us two useful points are made. First (but not new) the emphasis on financial risk, the mason ran none but by virtue of the indemnity in clause 7 of the March agreement the Taxpayer did. Secondly the question of whether an engagement is a contract of employment or for services is a question of fact with the exception that 'if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law' (page 768 citing Davies v Presbyterian Church of Wales [1986] 1 WLR 323). If the case before us had turned solely on the construction of the March agreement, which is a fairly carefully, comprehensively drafted contract not merely a casual letter of appointment, we would have had no hesitation in holding the engagement to be one for services because most of the provisions are much more consistent with that type of engagement. In addition to those provisions referred to in D54/90, the following are compatible with a contract for services: the Taxpayer was entitled to sub-contract, the 'agency' could be determined if execution is levied on the Taxpayer's goods, reference to the 'agent's employees, representatives or sub-agents', and the Taxpayer's indemnity for their acts or defaults and the statement in clause 17 that 'nothing in the agreement shall constitute … a partnership … constitute the agent as acting for the principal for any purpose other than the purpose listed herein …'. Moreover clause 18 provides 'this agreement will under no circumstances be construed as creating between the parties the relationship of employer and employee'. In the light of the comment concerning the Davies case mentioned above we do not think clause 18 is simply a labelling factor, we think it is a binding contractual commitment on the part of both parties of particularly presumptive, though not conclusive, value. The March agreement was terminable by either party by seven days' notice, whilst that of itself is not inconsistent with an employment contract we think it would be rare to encounter it in an employment contract as all embracing as the March agreement.

In NG Pik-yuk the sub-contracting 'labelling' appeared in the employer's records (and may have been done unilaterally) which is a very different situation from an ab initio contract of appointment.

In Federal Commissioner of Taxation v Barrett the facts bear a closer analogy to the Taxpayer's work profile than any of the other cases but even then distinguishing features are to be found in the fact that the non-contributory superannuation scheme of the respondent (the taxpayer which was the employer) extended to the salesmen thereby recognizing the relative permanency of their employment, and the absence of any contract such as the March agreement.

We can find nothing in these cases to lead us to conclude that the inferences drawn by the Board in D54/90 were wrong. We accordingly find that the Taxpayer was self-employed and adopt the reasons set out in D54/90 though for our part, because of the comments in LEE Ting-sang (not cited in D54/90) on the Davies case, we would lay greater stress on the March agreement.

The appeal is allowed and the salaries tax assessment is annulled.