Case No. D78/94

Salaries tax – whether taxpayer an employee or self-employed.

Panel: William Turnbull (chairman), John C Broadley and Erwin A Hardy.

Date of hearing: 12 January 1995.
Date of decision: 28 March 1995

The taxpayer has been assessed to salaries tax on the income which she received from a night club. She submitted that she operated her own business and was not an employee. At the hearing of the appeal the taxpayer gave evidence which was accepted by the Board.

Held:

The Board was satisfied on the evidence given that the taxpayer was running her own business and was not an employee of the night club. Accordingly the appeal was allowed and the assessment was annulled.

Appeal allowed.

Cases referred to:

Fall v Hitchen 49 TC 433
Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Bank Voor Handel En Scheepvaart NV v Slatford and another [1953] 1 QB 248
US v Silk (an American case)
Lee Ting-sang v Chung Chi-keung and another [1990] 2 WLR 1173
Ng Pik-yuk v Ywai Tai Knitwear Ltd [1988] 2 HKLR 109
D74/90, IRBRD, vol 5, 506

Mei Yin for the Commissioner of Inland Revenue.
Taxpayer represented by her husband.

Decision:

This is an appeal by a taxpayer against an assessment to salaries tax for the year of assessment 1991/92. The facts of the case are as follows:

1. A new night club started business in our about 1980. The person who was setting up the night club knew the Taxpayer. The night club did not have a public relations manageress and invited the Taxpayer to take up this post. During the period from 1980 to 1983 the Taxpayer was employed by the night club as its public relations manageress.

2. Whilst working as public relations manageress one of the duties of the Taxpayer was to assist the night club in managing lady attendants. As a result of her work the Taxpayer came to know a number of the lady attendants. The Taxpayer decided to give up her employment with the night club and set up her own business.

3. In 1984 the Taxpayer set up her own business originally to introduce lady attendants to the night club and subsequently also to carry on trading. The business registration was dated 31 October 1983 and the business was then described as 'entertainment'.

4. The business of the Taxpayer had its own office premises from which it carried on all of its business. The trading business comprised the buying and selling of goods and merchandise. This trading business was accepted by the Commissioner as being a genuine business and accordingly is not the subject matter of this appeal.

5. During the period from 1984 to 1992 the Taxpayer carried on an active service business providing services to the night club. The services were in the form of finding suitable ladies to work at the night club, introduce them to the night club and thereafter provide a follow up service if any problem arose between the night club and any of the lady attendants which had been introduced by the Taxpayer. The Taxpayer used her own office premises to meet potential ladies who might be suitable to be introduced to the night club.

6. The Taxpayer was not required to work at the night club, did not have any working hours with the night club and would only go to the night club either to introduce new lady attendants or if there was a problem. Many of the lady attendants came from overseas.

7. The lady attendants were employed by the night club and not by the Taxpayer.

8. The Taxpayer was not under any obligation to provide services only to the night club but she did so of her own wish. She considered it would have been too complicated for her to have provided similar services to other night clubs and also she would not have been able to devote sufficient time to the other part of the business. The nigh club paid a commission to the Taxpayer for the services which she provided.

9. It was sometimes necessary for the Taxpayer to lend money to the lady attendants who would look to her for loans and not to their employer. If a financial problem arose with one of the lady attendants which the Taxpayer had introduced to the night club it might be necessary for her to make a financial payment.

10. In 1992 the Taxpayer discontinued the service part of her business because it became difficult to find lady attendants from overseas and introduce them to the night club. The Taxpayer continued to run the trading part of her business.

11. In respect of the year of assessment 1991/92 the night club filed with the Commissioner of Inland Revenue an employer's tax return in respect of the Taxpayer in which the night club stated that commission or fees of $128,012 had been paid to the Taxpayer as an employee. The Taxpayer filed a salaries tax return in respect of the same year of assessment in which she stated that she was not employed.

12. The assessor did not accept that the Taxpayer was not employed and raised a salaries tax assessment on the Taxpayer in respect of the income of $128,012 with tax payable thereon of $12,353.

13. By letter dated 30 November 1992 the Taxpayer's representative objected to this assessment and informed the Commissioner that she had not been employed during the year of assessment in question. The letter referred the Commissioner to the profits tax file of the Taxpayer. The profits tax return for the same year of assessment which was filed by the Taxpayer stated that the commission income of $128,012 was commission income belonging to her business.

14. The matter was referred to the Commissioner for his determination. By a determination dated 15 February 1994 the Commissioner rejected the claim put forward by the Taxpayer that she was self-employed running her own business and upheld the assessment to salaries tax in respect of the sum of $128,012.

15. By letter dated 14 March 1994, the Taxpayer gave notice of appeal to the Board of Review against the determination of the Commissioner.

At the time and date fixed for the hearing of the appeal the Taxpayer appeared in person and was also represented by her husband. They explained their case to the Board and the Taxpayer gave evidence and offered herself for cross examination by the representative for the Commissioner.

The Taxpayer and her husband explained the facts of the case to the Board and said that since 1984 when the Taxpayer set up her own business she had not been an employee of the night club. They both said that they considered the commission paid by the night club to be part of the income of the business of the Taxpayer and pointed out that the money had been paid to the Taxpayer in the name of her business and not to her personally.

The representative for the Commissioner cross examined the Taxpayer with regard to the facts of the case and submitted that the commission had been paid to the Taxpayer by way of salary and not as a service fee to a business for services provided. She drew our attention to the distinction between a contract of service and a contract for services and took us through the relevant law. She cited to us the following cases:

Fall v Hitchen 49 TC 433
Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Bank Voor Handel En Scheepvaart NV v Slatford and another [1953] 1 QB 248
US v Silk (an American case)
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We are much indebted to the representative for the Commissioner both for the extensive research which she had made into the law and for asking the Taxpayer in cross examination material questions which greatly assisted us in reaching our decision.

We found the Taxpayer to be a truthful witness who gave evidence and answered questions in an open and frank manner. We entirely accept the evidence which she gave. We also has before us three letters written by the night club, two in reply to questions raised by the Commissioner and one submitted by the Taxpayer. The representative for the Commissioner placed considerable weight on the first of these three letters and it is significant that she did not refer to the other two letters. No one was called to give evidence from the night club and the writers of the three letters did not appear to give evidence or to be cross examined. We place very little weight upon the contents of these three letters which are clearly in contradiction to each other. The Taxpayer in her grounds of appeal had claimed that the first letter from the night club referred to the period when she was an employee in 1980-1983. As the writer of the first letter did not appear before us to give evidence we are not able to find as a fact one way or the other. The second letter addressed to the Inland Revenue Department by the night club would appear to suggest that the Taxpayer was not an employee of the night club but again is not conclusive for the same reason. The third letter is likewise inconclusive and though filed by the Taxpayer as part of her grounds of appeal was addressed to the Commissioner of Inland Revenue. As stated above we placed very little, if any, reliance upon the contents of these three letters.

Having heard the evidence of the Taxpayer this is a simple and straight forward case. In setting out the facts above we have decided the case in favour of the Taxpayer. From the evidence which she gave and which we accept it is clear that she was originally employed by the night club but ceased employment and set up her own business to provide different services to the night club to those which she had previously performed. The nature of the services provided to the night club were similar to those which any employment agency would provide to an exclusive customer. The Taxpayer at her own expense would find suitable persons to be introduced to the night club to work for the night club. She did this from her own business premises and acted independently of the night club. She would introduce prospective employees to the night club but it would be for the night club to decide whether or not they would employ the person so introduced. The Taxpayer having introduced the employee to the night club would then assist if any problems arose between an employee who had been introduced and the night club. For the services provided a commission was paid.

It would appear to us that there may have been some confusion in the mind of the assessor and the Commissioner with regard to the services performed by the Taxpayer. In his determination the Commissioner referred to a number of facts from which he concluded that the Taxpayer was an employee. However we have found as fact that much of what the Commissioner used as the basis for his determination was incorrect. For example the Taxpayer was not obliged to work for only one nigh club and she was not provided with the location and facilities to perform her duties. She provided her own ‘tools and equipment’ (the Commissioner’s words) and managed her own operation and risked her

own capital. She did this in the form of having her own office from where she operated her business and provided capital in the form of loans etc.

For the reasons given we find that the Taxpayer was not employed by the night club and that the sum of $128,012 paid to her by the night club was part of the income of her business and not subject to salaries tax. Accordingly we order that the salaries tax assessment for the year of assessment 1991/92 dated 23 November 1992 showing net chargeable income of $87,012 with tax payable thereon of $12,353 be annulled.