INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D79/00

Salaries tax – employment – whether liable to salaries tax – whether taxpayer was carrying on business on her own account.

Panel: Anna Chow Suk Han (chairman), Berry Hse Fong Chung and William Zao Sing Tsun.

Date of hearing: 22 July 1999.
Date of decision: 30 October 2000.

The taxpayer worked as a manageress in three nightclubs, namely Club B, Club D and Club F. The taxpayer did not dispute the income from Club B and Club F. The taxpayer contended that out of the payment from Club D operated by Company E, a sum of $178,160 was distributed to Mr H and such payment was for the sole purpose of introducing the job to produce the income. Secondly, the taxpayer contended that her income from Club D should be assessed under profits tax and not salaries tax because she worked as self-employed or an independent contractor in her engagement with Club D and was not an employee of the club.

The questions for the Board to decide are whether the income accrued from Club D has been rightly assessed to salaries tax and whether the amount of income from Club D should deduct the said sum of $178,160.

Held:

1. Flexibility as to the working hours or the lack of regulations or dress code does not necessarily make a person not an employee. There are other factors which may be of importance such 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. The Board found that the taxpayer was not carrying on business on her own account but was employed by Mr H to perform the task of a PR manageress in Club D (Market Investigations v Minister of Social Security [1969] 2 QB 173 followed).

2. Having heard and observed the evidence as a whole, the Board found that the taxpayer had satisfied the Board on the balance of probabilities the

remuneration she derived from her employment with Mr H as a PR manageress in Club D was in the sum of $121,000 and not $292,160.

Appeal allowed.

Case referred to:

Market Investigations v Minister of Social Security [1969] 2 QB173

Chiu Kwok Kit for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Madam A (' the Taxpayer') against the salaries tax assessment for the year of assessment 1993/94 raised on her.

The background

2. During the year of assessment 1993/94, the Taxpayer worked as a manageress in three night clubs, namely Club B operated by Company C, Club D operated by Company E and Club F operated by Company G.

3. Company C submitted a notification under section 52(5) of the Inland Revenue Ordinance (' the IRO') about the cessation of the Taxpayer' s employment. Company E and Company G each submitted in respect of the Taxpayer an employer' s return for year of assessment 1993/94. The notification and employer' s returns showed the following particulars:

(a) Name of employer	:	Company C	Company E	Company G
(b) Capacity in which employed	:	Manageress	Manageress	Manageress
(c) Period of employment	:	1 April 1993 to 31 May 1993	1 May 1993 to 28 February 1994	1 May 1993 to 31 March 1994
(d) Income - salary	:	$13,121	$292,160	$47,097

4. The Taxpayer failed to submit a salaries tax return for the year of assessment 1993/94 within the stipulated time. Based on the income reported in the notification and employer' s returns mentioned above, the assessor on 20 March 1995 raised on the Taxpayer under section 59(3) of the IRO the following salaries tax assessment for the year of assessment 1993/94:

	$
Estimated assessable income ($13,121 + $292,160 + 42,097)	352,378
Tax payable	52,856

5. By a notice dated 25 August 1995, the Taxpayer objected to the assessment on the ground that the income was excessive to the extent of $178,160. The Taxpayer claimed that out of the payment from Club D, a sum of $178,160 was distributed to a Mr H. The Taxpayer did not dispute the income from Company C and Company G.

6. In the tax return for the year of assessment 1993/94 subsequently filed, the Taxpayer declared, inter alia, that she received from Club D an approximate sum of $114,000 for the period from May 1993 to February 1994 and that a sum of $178,160 from the night club was distributed to Mr H.

7. The Taxpayer' s late objection was accepted.

8. By a letter of 27 October 1995, the Taxpayer responded to the assessor' s enquiries as follows:

(a) A breakdown of remuneration received from Club D for the period from 1 May 1993 to 28 February 1994.

Income was around $290,000. Her actual income from Club D was $121,000, a breakdown of which is as follows:

		$
May 1993 to July 1993	$10,000 x 3	30,000
August 1993 to February 1994	$13,000 x 7	91,000
		121,000

(b) The date of receipt and the amount received on each occasion.

Club D paid cash cheques to her and the cheques were cashed by Mr H on each occasion. So, she had no record of each payment.

(c) The reasons and circumstances for the payment of the remuneration from Club D to Mr H.

Mr H was responsible for the supply of public relations ('PR') staff to be managed by her. As orally agreed, Mr H earned income (**拆鐘**) from the PR staff and she earned a monthly salary.

9. In response to the further enquiries by the assessor, by a letter dated 27 January 1997 the Taxpayer provided the following particulars about her engagement with Club D as well as the role of Mr H:

(a) ' Forward a copy of your employment contract with Company E operating as Club D. If such document is not available, state the terms and conditions of the employment and forward copies of relevant correspondence setting out such terms and conditions.'

' No employment contracts with Company E operating as Club D.'

(b) ' State the exact capacity of your employment. Give a detailed description of your duties and responsibilities.'

' I was PR Manageress of the above companies. My duties were managed *(sic)* a term of PR girls who were introduced and controlled by Mr H.'

(c) ' State the basis on which your remuneration was determined.'

' My remuneration was divided into two parts, monthly salary and commission (**拆鐘**). The commission based *(sic)* on the income (**鐘錢**) of PR girls from the Club.'

(d) ' State the place of work and hours of work. Also state whether the working hours were determined by you or by your employer. Do you have to follow any working schedule or time-table set by the company?'

' The working place was within the area of the Club and the working hours were determined by the employer. However, I need not under *(sic)* the fixed working hours in the Club, in case all PR girls were out of the Club. My job was finished and duty off.'

(e) ' Whether you were required under the terms and conditions of the employment to hire Mr H in performing your duties. If so, were such expenses reimbursed by the employer? If not, explain the reason thereof.'

' Mr H responded the supplies of PR girls to me *(sic)* because the Club employed the female as PR Manageress only. So, Mr H could not receive the income (**拆鐘**) from PR girls directly and I was the middle agent between the employers and Mr H.'

(f) ' Was prior approval required to be sought from the employer if Mr H was to be hired? If so, state the designation of the approving officer.'

' The employer had a mutual understanding between the relationship of Mr H and me *(sic)*. The Director of Club D, Mr I had an understanding of this arrangement.'

(g) ' Give a breakdown showing details of income paid to Mr H including date of payment, amount received from you during the period 1 May 1993 to 28 February 1994.'

' As the employers paid to me by cash cheques and drawn by Mr H directly, I had no record for such breakdown.'

(h) ' Forward documentary evidence, for example, signed receipts from Mr H in support of your claim.'

' No written receipts from Mr H.'

10. After the assessor informed the Taxpayer that she had failed to satisfy section 12(1)(a) of the IRO to qualify for deduction of expenses, by a letter of 7 April 1997, the Taxpayer put forward the following contentions:

(a) ' The money paid to Mr H was not a domestic or private nature *(sic)*, it should consider as a business transactions *(sic)*, because Mr H introduced the club and girls to me in return of income *(sic)*.'

(b) ' All the money, except basis salary *(sic)*, was <u>entirely</u> paid to Mr H for the <u>sole purpose</u> of introducing the job to produce the income. As my point of view *(sic)*, the monies was *(sic)* <u>vital</u> to the employment as no assessable income could be produced without this relationship.'

(c) ' In the meantime, oral agreement is also an agreement, I do not accept this is not a concrete evidence. Moreover, the director of Club D, Mr I, had understanding in the performance of such duties.'

(d) ' As the employers paid to me by cash cheques, you could check against the payment date and confirm the balance was drawn by Mr H.'

11. Company E is untraceable and it filed its last annual return with the Companies Registry on 4 January 1996.

12. On 23 May 1996 Company E submitted 51 employer's returns for the year of assessment 1993/94. The number of returns for each post was as follows:

(a)	Manageress	6
(b)	Manager	2
(c)	General manager	1
(d)	PR	30
(e)	Waitress	6
(f)	Bar tender	2
(g)	Cashier	1
(h)	DJ	1
(i)	Ahma	1
	Total	51

13. On 1 May 1997, the assessor wrote to Mr H. Mr H by a letter dated 21 May 1997 denied that he had received anything called commission (**拆鐘**) or any commission from the Taxpayer and stated that he was an offsite manager of Club D and earned only $4,000 per month.

14. In her determination dated 5 January 1999, the Commissioner confirmed the salaries tax assessment for the year of assessment 1993/94 on the Taxpayer, because the Taxpayer had failed to adduce evidence to support that she had actually paid Mr H as claimed and that even if the Taxpayer had paid Mr H, she had failed to prove that the sum so paid was an outgoing or expense wholly, exclusively and necessarily incurred in the production of the Taxpayer's assessable income as required under section 12(1)(a) of the IRO.

15. The Taxpayer appealed to the Board of Review against the determination of the Commissioner.

The Taxpayer' s contentions

16. In her grounds of appeal submitted to this Board, the Taxpayer contended that:

(a) During the relevant period she acted as a bailee for Mr H in respect of his income from Club D. She did not receive an income of $292,160 from the Club. She received cash cheques from the club, which she delivered to Mr H. The cheques were eventually cashed by Mr H and she only received from Mr H a total sum of $121,000 in cash being $10,000 for the first three months (from May 1993 to July 1993) and $13,000 for the remaining seven months (from August 1993 to February 1994). The difference of $171,160 [$292,160 - $121,000] should not and cannot be treated as her income or expenses. It was wrong that the Commissioner should invoke section 12(1)(a) of the IRO.

(b) She worked as a self-employed person or an independent contractor in her engagement with Club D. She was not an employee of the club. Accordingly, her income from Company E should be assessed under profits tax and not salaries tax.

The Respondent' s contentions

17. Bearing in mind the legal principles relating to the issue of employment versus self-employment, the Respondent contended that on the facts and evidence of this case, the Taxpayer was at the material times an employee of Company E and was not an independent contractor carrying on business on her own account.

18. As to the Taxpayer' s claim that she only received a sum of $121,000 from Mr H and not $292,160 from Company E in respect of her employment with Club D, the Respondent contended that there was no evidence to support this claim and on a balance of probabilities, the claim should be rejected.

The issue

19. Thus, the questions for the Board to decide are:

(a) whether the income accrued to the Taxpayer during her engagement with Club D has been rightly assessed to salaries tax; and

(b) whether the amount of income referred to in (a) above was $292,160 or $121,000.

The hearing

20. At the hearing, the Taxpayer appeared in person and was also represented by a Mr J. The Taxpayer gave evidence and offered herself for cross-examination by Miss Cheung Lai-chun for the Respondent.

21. The Taxpayer explained to the Board that she was not under the employment of Club D. She worked with Mr H as a team. In April 1993 Mr H approached her and asked her whether she would be interested to work with him in Club D. She started working in Club D in May 1993 as a PR manageress. Her main duty was to lead a team of PR ladies to entertain guests. Every month Club D would give her a cash cheque which she passed to Mr H. Mr H would first cash the cheque and then pay her out of the sum withdrawn. She was paid $10,000 per month for the first three months and $13,000 per month from the fourth month. She was not an employee of Club D. She need not wear any uniform and had no fixed working hours. The tax assessment was based on the amount paid to her by Club D. That amount was actually received by Mr H.

22. In the cross-examination, the Taxpayer gave evidence to the following effect:

(a) By becoming a manageress of Club D, she did not have to fill in an application form nor to produce her identity card. She did not have to report to anyone in the club. There were no fixed working hours for her. The club did not impose rules and regulations on her. She could take leave without a replacement. In her absence, Mr H would take over, failing which Mr I would stand in. Mr H visited the club from time to time and usually stayed for a little while. She performed her duties within the premises of the club. Her duties were to supervise her team of PR girls and to entertain their guests. She worked within the opening hours of the club. She confirmed that she bore no financial risks in the performance of her duties as the club' s manageress. She had name cards bearing the title ' PR Manager' and the name of ' Club D' . Mr I was responsible for the overall supervision of the club. She did not have to report to Mr I but if she took leave from the club, she would simply inform him. If she wanted to take leave, she would inform Mr H. If she wanted a raise, she would go to Mr H.

(b) The PR girls were introduced to the club by Mr H and her. There were no interviews of the girls by the club. The club had no right to transfer PR girls to or out of her team. The club perhaps had the right to reject or to fire the girls of her team but that had never happened. The girls were not her staff. She mainly entertained her own guests but the club could assign guests to her team. The other team in the club entertained Japanese guests while her team the local guests. She agreed that the business of her team formed part of the business of the club.

(c) She received a cash cheque from the club each month. She acknowledged receipt of the cheques in her own name. The cash cheques were not meant to be issued to her. She did not cash the cheques because she had an agreement with Mr H before she started work that she would hand him the cash cheques and he would give her $10,000 per month and he would take care of the payments to the PR girls. Mr H also promised to pay her more if her performance was good. She had nonetheless never been paid more. The club did not pay her direct because that was the agreement between her and Mr H. She did not know how the amounts on the cash cheques were arrived at. She acknowledged receipts of the cheques but not the cash they represented. She was only responsible for receiving the cheques and handing them to Mr H. Once she did not receive the cash cheque because Mr H was at the club on a pay-day and he collected it. The amounts on the cheques also included the commission for the PR girls in their team. The club did not pay those PR girls direct because the commissions for those girls were calculated differently from those of the other PR girls in the club. She had no idea how their commissions were calculated. It was an agreement between Mr H and the girls. She did not have to keep a record for the purpose of computing the commission. Mr I was responsible for keeping the records of the chargeable hours of the PR girls. The records were passed to Mr H together with the cash cheques. Should there be problems, Mr H would contact Mr I.

(d) The Taxpayer denied that the arrangement between her and Mr H was a private one and that the arrangement was not known to the club. She insisted that the club knew about her arrangement with Mr H. She had no way of proving Mr I' s knowledge of her arrangement with Mr H. All she could say was that Mr H first talked to Mr I and then to her and Mr H agreed to pay her $10,000 per month for the first three months and thence $13,000 per month and the girls' commissions. She did not know the kind of arrangement Mr H had with Mr I. As soon as she received the tax assessment, she took steps to deal with the matter. She believed Mr H wanted to avoid his tax liabilities. He had taken a long time to respond to the Revenue.

Our findings

23. Both parties have presented us with various Board of Review decisions and also authorities on the distinctions between a contract of service and a contract for services. We have carefully considered those cases cited to us and the material before us. Applying the indicia or tests propounded in those authorities to the facts and evidence of the present case, we find that the Taxpayer was not carrying on business on her own account but was employed by Mr H to perform the task of a PR manageress in Club D.

24. From the foregoing evidence, a picture emerges of an independent contractor, Mr H, entering into a contract for services with Mr I for and on behalf of Company E operating Club D. It was an agreement whereby Mr H was to provide PR girls to work in the club and a PR manageress to manage these PR girls while they worked in the club. In return, the club was to pay Mr H a monthly fee, the commission (**拆鐘**), calculated by reference to the chargeable hours of these PR girls so provided. Out of the commission, Mr H was to pay the PR girls and the PR manageress. The Taxpayer was engaged and employed by Mr H to perform the duties of this PR manageress. Although the Taxpayer claimed that she was an independent contractor, we find on evidence that she was nonetheless an employee. We come to this conclusion for the following reasons.

25. During the investigation the Taxpayer repeatedly acknowledged her status as an employee, albeit, of Company E and not of Mr H. We do not hold this against the Taxpayer. Since her duties were performed in the club and her salaries were paid out of the cheques issued by Company E, it is not surprising that the Taxpayer as a lay person would have treated Company E as her employer. The Taxpayer changed her stance in her grounds of appeal and claimed that she was an independent contractor in her engagement with Club D, because the Commissioner invoked section 12(1)(a) of the IRO in her determination. During the hearing, the Taxpayer endeavoured to cloak herself with the appearance of a self-employed person by saying that she had irregular working hours; she could come and go at will; she did not have to report to anyone in the club; she did not need to wear uniform; and the club had no control over the manner of her performing her services. However, flexibility as to the working hours or the lack of regulations or dress code does not necessarily make a person not an employee. There are other important factors to be considered. To quote Cook J at page 185 in Market Investigations v Minister of Social Security [1969] 2 QB173:

> ‘ *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.*’

In the present case, the Taxpayer did not hire her own staff. She admitted that the PR girls of her team were not her staff. She was paid a regular salary for her work. Although she was promised a bonus if her performance was good, the bonus was only a discretionary one. She confirmed that she bore no financial risks in the performance of her duties as the club’ s manageress. These are relevant factors which determine that the Taxpayer was only an employee. However, in coming to this conclusion, we find that the Taxpayer was an employee of Mr H and not of Company E. This is evidenced by the fact that the cash cheques from Company E were passed to Mr H for withdrawal and Mr H paid the Taxpayer out of the sums withdrawn. This points to the fact that Mr

H was the employer of the Taxpayer and acted accordingly by paying the Taxpayer her salary each month. Our view is further fortified by the Taxpayer' s oral testimony that while she was working in the club, if she wanted to take leave, she would inform Mr H and if she wanted a pay rise, she would approach Mr H; and she was promised a discretionary bonus by Mr H if her performance was good. Had Company E been her employer, Mr H should not have come into the picture as described. Under the circumstances, we are satisfied that the Taxpayer was an employee of Mr H and was rightly assessed to salaries tax.

26. Having dealt with the first issue, we now come to the second issue under this appeal, whether the amount of income which the Taxpayer derived from her engagement with Company E, was $292,160 or $121,000. Although the Taxpayer changed her stance in relation to the nature of her engagement with Club D, her claim of receiving a lesser amount than that put forward by Company E in its employer' s return, remains the same throughout the course of the investigation and the hearing of this appeal. The information on the background giving rise to the payment and the means of payment, supplied by the Taxpayer during the investigation was consistent with that given throughout the hearing. We accept the Taxpayer' s evidence that she was approached by Mr H who knew both herself and Mr I and was offered the position of a PR manageress in the club and each month she received a cash cheque from Mr I, which she passed to Mr H and Mr H then cashed the cheque and paid her her salary out of the sum withdrawn. We also accept the evidence that the Taxpayer had no record of the amounts on the cash cheques received because since she was only entitled to a fixed salary, she was not concerned with the amounts which Mr H was to receive. We accept that she received $10,000 per month for the first three months and thereafter $13,000 per month and while she was promised a discretionary bonus if her performance was good, she was never paid any. On this second issue, having considered the evidence as a whole, we find that the Taxpayer has satisfied us that on the balance of probabilities the remuneration she derived from her employment with Mr H as a PR manageress in Club D was in the sum of $121,000 and not $292,160.

27. In reaching the above decision, we have not taken into account Mr H' s letter to the assessor of 21 May 1997 and Miss K' s declaration. Since Mr H was not called to give evidence or to be cross-examined, we are not prepared to place weight on his letter. Equally, since Miss K was not available for examination on her declaration given in support of the Taxpayer' s case, in reaching our above decision, we have not relied on any of the statements made by Miss K in her declaration. As to the reason why Company E filed an employer' s return in respect of the Taxpayer for the year of assessment 1993/94 for $292,160, since we have not been unable to examine Mr H or Mr I, or any one else from Company E, we are not prepared to speculate on the same.

28. For the foregoing reasons, we order that the salaries tax assessment of the Taxpayer for the year of assessment 1993/94 be reduced by an amount of $171,160 being $292,160 less $121,000.