



Inland Revenue Department
The Government of the Hong Kong Special Administrative Region
of the People's Republic of China

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 25 (REVISED)

SERVICE COMPANY “TYPE I” ARRANGEMENTS

SALARIES TAX

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department’s interpretation and practices in relation to the laws as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

These notes replace those issued in August 1995.

CHU Yam-yuen
Commissioner of Inland Revenue

November 2011

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

No. 25 (REVISED)

CONTENT

	Paragraph
Introduction	
Background	1
The principle	4
To address the mischief	5
Scheme of the legislation	
Three main elements	7
Prima facie liability	8
The operative provisions	11
Section 9A(1)(i) – commencement and termination of employment	12
Section 9A(1)(ii) – treated as employee and employer	16
Section 9A(1)(iii) – remuneration assessed as employment income	18
Section 9A(2) – remuneration for services	20
Specified criteria	
Operative provisions do not apply	21
Section 9A(3)(a) – provision of employment-type benefits	22
Section 9A(3)(b) – personal performance	23
Section 9A(3)(c) – subject to control or supervision	24
Section 9A(3)(d) – basis of remuneration	26
Section 9A(3)(e) – termination of the arrangement	28
Section 9A(3)(f) – representation to the public	29
Satisfying the criteria	31
The Commissioner’s discretion: Section 9A(4)	
Focus on the substance	34
Control test and integration test	41
Economic reality test	42
Mutuality of obligation	44
Comprehensive details	45

Advance rulings	
Request for advance ruling	47
Questions to be answered	48
Compliance	
Notification requirements under section 52	50
Section 80(1AA)	51
Commencement of the legislation	
Appointed day	55
Tax position of the parties	
Tax position of corporation and trustee	59
Tax position of relevant individual	60
Service companies used by professionals	61
Appendices	

INTRODUCTION

Background

In the 1994-95 Budget Speech, the Financial Secretary announced that steps would be taken to deal with tax avoidance aspects of certain “service company” arrangements. Two types of arrangements were identified as constituting a significant and increasing risk to the public revenue. The first category was referred to as arrangements to disguise employer/employee relationships (Type I cases), and the second as arrangements involving the payment of inflated management fees (Type II cases). Following consultation, it was concluded that legislation was required to address tax avoidance involving Type I cases. This led to the Inland Revenue (Amendment) (No. 2) Ordinance 1995 (“the Amendment Ordinance”) at Appendix A, which was enacted on 6 July 1995 and came into operation on 18 August 1995 (the “appointed day”).

2. The Amendment Ordinance amended the Inland Revenue Ordinance (“the Ordinance”) by adding the provisions in section 9A to counteract arrangements made to avoid salaries tax by the use of service companies¹. The effect is that remuneration paid to such a company for the services of the individual who or whose associate controls it will be treated as being income derived by that individual from an employment of profit.

3. At the same time, Departmental Interpretation and Practice Notes No. 24 was published to explain how the Department would deal with Type II cases, and sought to discourage avoidance arrangements by explaining the circumstances under which deduction of management fees would be restricted.

The principle

4. It is a long standing principle that the tax treatment of income is determined by its nature. That is, income which is properly employment income should be assessed as such. Consistent with this principle, section 9A

¹ Section 9A caters not only for the arrangements where payment is made to a corporation controlled by the relevant individual, but also for arrangements under which payment is made to a corporation controlled by an associate of the relevant individual or to a trust under which the relevant individual or an associate is a beneficiary. In the context of DIPN No. 25, for the sake of brevity the term “service company” is used to cover these arrangements.

seeks to ensure that even if an individual is working through a corporation or trust, but the underlying nature of the arrangement is one of employment, salaries tax should be assessed and paid accordingly.

To address the mischief

5. Key to the legislation in section 9A is the payment of remuneration under an agreement for services to a corporation controlled by an individual or his associate, a trustee of a trust under which the individual or his associate is beneficiary. Instead of being paid as a salary to the individual concerned, the remuneration is paid as a consultancy fee to the service company. The arrangement is structured with a view to the service company paying little, if any, tax on the fee as a result of deductions claimed for “tax efficient” employee benefits provided to the individual or his associate. Under section 9A, the remuneration will be assessed to salaries tax as employment income.

6. Prior to the introduction of the provisions in section 9A, the parties concerned directed their efforts at circumventing formal employer/employee relationships and accordingly did not comply with the notification requirements imposed on employers and employees under the Ordinance. Section 9A(1) makes it clear that for the purposes of the Ordinance, unless specified criteria are satisfied, the person for whom the services are rendered and the individual who renders the services are to be respectively treated as employer and employee. As such, the normal notification and compliance requirements imposed by the Ordinance on employers and employees will be applicable. Failure to comply with the requirements might lead to penalty actions. In Board of Review Decision *Case No. D45/05 20 IRBRD 606*, additional tax of approximately 65 per cent of tax undercharged was upheld where the taxpayer failed to report as his employment income in accordance with section 9A sums paid to a service company controlled by the taxpayer and his father. The Board of Review (“the Board”) ruled that misapprehension of the law was not an excuse for the incorrect return made and the responsibility of making correct returns rested squarely on the taxpayer even if auditors were engaged.

SCHEME OF THE LEGISLATION

Three main elements

7. Briefly, the legislation has three main elements which are contained in section 9A:

- (a) There is a prima facie liability to salaries tax where remuneration for services rendered by a “relevant individual” is paid to a corporation controlled by the individual or his associate or a trustee of a trust under which the individual or his associate is a beneficiary.
- (b) The scope of the provisions is restricted by excluding cases which satisfy specified criteria (i.e. where particular indicators or hallmarks of an office or employment of profit are not present under the arrangement).
- (c) Under an “escape clause” for the benefit of taxpayers, the Commissioner has a discretionary power to exclude a case where, even though an indicator of employment might be present, he is satisfied that in carrying out the services under the agreement the relevant individual is not in substance holding an office or employment of profit.

The three elements are further discussed below, together with related matters.

Prima facie liability

8. Section 9A(1) specifies the circumstances under which the provisions can have application to remuneration paid to a corporation or trustee of a trust estate. In this regard, an arrangement will come within the scope of the section where:

- (a) there is an agreement;

- (b) a person called the “relevant person” is carrying on or deemed under the Ordinance to be carrying on a trade, profession or business, or prescribed activity, is a party to the agreement;
- (c) services have been carried out under the agreement by an individual called the “relevant individual” on or after the “appointed day” (see paragraph 1) for the relevant person or any other person; and
- (d) remuneration for the services has been paid or credited on or after the appointed day to a corporation or trustee as defined in section 9A(1)(a), (b) or (c).

9. In considering whether the circumstances referred to above are present in relation to a particular arrangement, the following points should be kept in mind:

- (a) The agreement need not be in writing and can have been entered into before, on or after the appointed day.
- (b) Section 9A(1) generally will only have application where the relevant person is carrying on, or is deemed to be carrying on, a trade, profession or business. It is expected, based on experience prior to the introduction of the Amendment Ordinance, that this will cover the vast majority of disguised employment arrangements. However, if it is discovered that other relevant persons are entering into such arrangements, section 9A(6) provides the Commissioner with the power to bring the persons concerned within the ambit of the legislation by prescribing, by notice in the Gazette, an activity for the purposes of section 9A. Such a notice will involve subsidiary legislation and will be subject to the scrutiny of the Legislative Council under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1).
- (c) Although section 9A(1) can only apply to a particular relevant individual where he has carried out services under an agreement, it does not require that the agreement itself must contain any

specific reference to the relevant individual or to the service company. In other words, it cannot be claimed that section 9A does not apply to a particular arrangement simply because the relevant individual is not mentioned in the agreement. Also, the application of the legislation is not restricted to the situation where the services are carried out by the relevant individual for the relevant person. To ensure that arrangements involving third parties are catered for (e.g. where the services are carried out for a subsidiary of the relevant person), the subsection refers to services carried out “for the relevant person or any other person”.

- (d) Where a disguised employment arrangement is used, the remuneration under the agreement will clearly not be paid directly by the relevant person to the relevant individual. Typically, payment is made to a corporation controlled by the individual or his associate or a trustee of a trust under which the individual or his associate is a beneficiary.

10. The provisions in section 9A encompass arrangements which involve one or more than one associate, together with or without the relevant individual. Relevant terms, such as “associate”, “beneficiary”, “control”, “principal officer” and “relative”, are defined in section 9A(8) and along similar lines to those contained in sections 16E, 21A and 39E of the Ordinance. It should be noted, however, that the definition of “associate” used in section 9A(8) has been worded so that where more than one relevant individual carries out services under a single agreement, each will be an associate of the other.

The operative provisions

11. Where the circumstances referred to above are present, an arrangement is subject to what may be called the operative provisions of section 9A(1)(i), (ii) and (iii) unless it falls outside their application by virtue of the escape clauses provided in subsections (3) and (4). In essence, the effect of the operative provisions is to treat the relevant individual and the relevant person as employee and employer respectively, and the remuneration for the services carried out by the relevant individual as his income from an employment of profit, and therefore chargeable to salaries tax.

Example 1

Mr. E is an IT consultant who provides services through a service company S Ltd. to a client C Ltd. The agreement is between S Ltd. and C Ltd. Mr. E and his wife Mrs. E own 100 per cent of the shares in S Ltd. Had Mr. E supplied his services direct to C Ltd., the terms of the contract are such that he would have been an employee of C Ltd.

The operative provisions in section 9A(1)(i) to (iii) are applicable. Section 9A(3) and (4) cannot be invoked to exempt Mr. E from salaries tax. The effect is: Mr. E is treated as having an employment with C Ltd.; and remuneration paid to or credited to S Ltd. under the agreement will be treated as employment income derived by Mr. E from an employment with C Ltd.

Example 2

Mr. E is an IT consultant who provides services through a trust arrangement to a client C Ltd. The agreement is between a manager of the trust and C Ltd. Mr. E and his wife Mrs. E are beneficiaries of the trust. Had Mr. E supplied his services direct to C Ltd., the terms of the contract are such that he would have been an employee of C Ltd.

Section 9A(1)(i) to (iii) are applicable. Further section 9A(3) and (4) do not apply and Mr. E is caught under the operative provisions. The effect is: Mr. E is treated as having an employment with C Ltd.; and remuneration paid to or credited to the trustee under the agreement will be treated as employment income derived by Mr. E from an employment with C Ltd.

Section 9A(1)(i) - commencement and termination of employment

12. Section 9A(1)(i) provides that the relevant individual is to be treated as having an employment of profit with the relevant person. Subparagraphs (A)(I) and (A)(II) set down the rules for determining the date of commencement of the employment.

13. Where the relevant person is carrying on a trade, profession or business, the date of commencement under subparagraph (A)(I) is taken to be the day the relevant individual commenced to carry out services under the agreement or on the appointed day, whichever is the later. Accordingly, for disguised employment arrangements which commenced prior to the introduction of the legislation, the date of commencement is taken to be the appointed day.

14. Where the relevant person is carrying on a prescribed activity, rather than a trade, profession or business, the date of commencement under subparagraph (A)(II) is taken to be the day the Commissioner prescribed the activity by notice in the Gazette under section 9A(6) or, if it is later, the day the relevant individual commenced to carry out services under the agreement.

15. By virtue of subparagraph (B), the employment of profit is treated as continuing until the agreement terminates “without the relevant individual continuing to carry out any of these services as an employee of the relevant person”. In other words, if the relevant individual continues to serve as an employee of the relevant person after the agreement terminates, the situation will not be viewed as involving a cessation of employment.

Section 9A(1)(ii) - treated as employee and employer

16. Section 9A(1)(ii) unequivocally states that whilst the relevant individual is treated, under paragraph (i), as having an employment of profit with the relevant person:

- (a) “the relevant individual shall be treated as an employee of the relevant person”; and
- (b) “the relevant person shall be treated as the employer of the relevant individual”.

17. It is pertinent in this regard that the closing words of section 9A(1) provide in effect that where the operative provisions are applicable “the other provisions of this Ordinance (including section 52) shall be construed accordingly”. It follows that if an arrangement comes within the scope of the operative provisions the relevant person concerned is subject to the compliance requirements imposed on employers, and in particular those under section 52

concerning notification of commencement and cessation of employment etc. Persons who fail to comply with the requirements in question may be liable under the offence provisions contained in Part XIV of the Ordinance.

Section 9A(1)(iii) - remuneration assessed as employment income

18. Section 9A(1)(iii) ensures that the remuneration referred to in subsection (1) (i.e. the remuneration which is paid or credited on or after the appointed day to the service company for services carried out under the agreement by the relevant individual on or after that day) is treated as employment income of the relevant individual. To cover the timing aspect for the purposes of section 11B, section 9A(1)(iii) also provides that the remuneration should be treated as being “received by and accrued to the relevant individual at the time that it is paid or credited to the corporation or trustee concerned referred to in paragraph (a), (b) or (c)”.

19. Situations may arise where remuneration is paid or credited after the appointed day in respect of services which are carried out by the relevant individual partly before and partly after that day. In such cases the Department accepts that only the remuneration which is reasonably attributable to the services carried out on or after the appointed day comes within the scope of section 9A. The Department will generally allow apportionment on a time basis, although no hard and fast rules are laid down. Whatever basis is used it should be clearly explained in the salaries tax return of the relevant individual. As to the taxation treatment of the remuneration attributable to the services carried out prior to the appointed day, see paragraph 57 below.

Section 9A(2) - remuneration for services

20. It is also possible that a single service company agreement may provide for services to be carried out by more than one relevant individual and/or for payments to be made for purposes other than remuneration for such services. Where such an arrangement is used it is in the interests of the parties concerned to clearly specify, in the agreement or otherwise, exactly what each payment is for, including the amount of remuneration for the services carried out by each relevant individual. Section 9A(2) is relevant in this regard. This subsection provides, in essence, that where an agreement does not specify the remuneration of a particular relevant individual, any sum paid or credited under the agreement to the service company will be treated as remuneration for

services carried out by that individual unless it is established to the satisfaction of the Commissioner by the relevant individual concerned or the relevant person that all or part of the sum should be excluded on the ground that it was paid for some other purpose. In other words, unless the relevant particulars are provided, each relevant individual will be potentially liable to salaries tax in respect of the full amount paid or credited to the service company on or after the appointed day.

Example 3

Mr. E and Mr. F are IT consultants who provide their services through a service company S Ltd. to a client C Ltd. The agreement is between S Ltd. and C Ltd. Mr. E and Mr. F own 100 per cent of the shares in S Ltd. Had Mr. E and Mr. F supplied their services direct to C Ltd., the terms of the contracts are such that they would have been employees of C Ltd.

Section 9A(1)(i) to (iii) are applicable. Further section 9A(3) and (4) cannot be invoked to exempt Mr. E and Mr. F from salaries tax. Section 9A(7)(a) makes it clear that the operative provisions will apply to Mr. E and Mr. F individually. The effect is: Mr. E and Mr. F are each treated as having an employment with C Ltd.; and remuneration paid to or credited to S Ltd. under the agreement will be treated as employment income derived by Mr. E and Mr. F from C Ltd.

SPECIFIED CRITERIA

Operative provisions do not apply

21. The operative provisions discussed above do not apply in relation to remuneration under an agreement where all of the specified criteria laid down in sections 9A(3)(a) to (f) inclusive are satisfied. The criteria in question represent some of the factors which may indicate that the services carried out under an agreement do not in substance amount to holding an office or employment of profit. Passing or failing any particular criterion is not necessarily conclusive either way. For example, a person may be paid on a periodic basis

which does not satisfy section 9A(3)(d), yet still be able to satisfy the Commissioner that he does not in substance hold an office or employment of profit. The Department accepts, however, that if the criteria are all satisfied an office or employment of profit is not involved. Each is briefly discussed in turn below.

Section 9A(3)(a) - provision of employment-type benefits

22. This criterion will be satisfied if neither the agreement nor any related undertaking provides for remuneration for the services carried out by the relevant individual to include or to be the provision of any of the specified or similar employment-type benefits or any benefit (including money) in lieu thereof. It should be noted that in considering whether or not the criterion has been satisfied, the key question is not whether the relevant individual has directly received a benefit as compensation, but whether the agreement or related undertaking provides for the remuneration to include such a benefit or compensation (i.e. the identity of the recipient need not be taken into account).

Section 9A(3)(b) - personal performance

23. This criterion reflects the view that it is far more usual for an employment relationship to require that services be performed personally by a particular individual than it would be in the case of an independent contractor. In the latter situation it is not unusual to allow the engagement of sub-contractors. However, it is recognised that an independent contractor may be engaged on terms which require a certain individual to carry out services required (e.g. a particular architect may be nominated to prepare the plans for a building). Accordingly, the general position under this provision is that the criterion will not be satisfied where the agreement or any related undertaking requires that the services be performed personally by the relevant individual. However, to cater for a genuine contractor who has more than one client, it will be satisfied where the relevant individual also carries out the same or similar services for persons other than the person for whom they are carried out under the agreement.

Section 9A(3)(c) - subject to control or supervision

24. This provision is concerned with the question of whether the relevant individual in performing the services under the agreement is subject to control or supervision of a kind which is usual under an employment relationship. In this regard, the criterion will be satisfied if there is not any control or supervision “which may be commonly exercised by an employer in relation to the performance of his employee’s duties”. It would be unusual for a relevant person to exercise such control or supervision in respect of an individual carrying out duties on behalf of an independent contractor. Whereas an employer normally (although there can be exceptions) has the right to direct the manner in which work is performed by an employee, a contractor usually has freedom as to the way in which tasks are carried out, subject to compliance with job specifications as detailed in the relevant contract. Accordingly, where supervision or control of the kind specified is present, it will generally provide a strong indication of employment.

25. In considering the position of a relevant individual in relation to this criterion, section 9A(3)(c)(ii) has the effect of providing that any control or supervision exercised by the corporation or trustee concerned may be disregarded. As a matter of practice the Department will also not take into account any supervision or control which can be directly attributed to statutory requirements and is not dependent on the existence of an employer/employee relationship.

Section 9A(3)(d) - basis of remuneration

26. The focus of this provision is the basis on which the remuneration is paid or credited. The criterion will be satisfied if the remuneration “is not paid or credited periodically and calculated on a basis commonly used in relation to the payment or crediting and calculation of remuneration under a contract of employment”. As such, regard must be had not only to the question of whether payments are made periodically, but also to the basis for calculating the payments for the work performed.

27. It should as a rule be a relatively straightforward matter to distinguish payments of a kind made to contractors, even if made by instalments or as progress payments, from those made on a basis used under

employment contracts. For contractor situations the payments will generally be in relation to an agreed sum for specified work under a contract, whereas for employment cases payments are usually in respect of the time worked or position occupied and made on a regular basis (e.g. weekly, fortnightly or monthly).

Section 9A(3)(e) - termination of the arrangement

28. This criterion is concerned with the provisions under the agreement relating to the termination of the arrangement between the parties. It will be satisfied if the relevant person does not have the right to cause any of the services under the agreement “to cease to be carried out in a manner, or for a reason, commonly provided for in relation to the dismissal of an employee under a contract of employment”. In this regard, the services of an employee can generally be terminated by providing the relevant notice and/ or meeting other requirements under an award or statute. By way of contrast, under a relationship involving an independent contractor, the contract will usually be discharged by performance, but may also specify other circumstances, such as default situations, under which it can be terminated.

Section 9A(3)(f) - representation to the public

29. As is stated in the provision, this criterion will be satisfied where “the relevant individual is not held out to the public to be an officer or employee of the relevant person”. The term “held out to the public” is not defined in the Ordinance and should therefore be given its ordinary meaning. As such, if either the relevant individual or relevant person acts in a manner or does something that is intended to lead members of the public to believe that the relevant individual is an officer or employee of the relevant person, the criterion will not have been satisfied. This could occur, for example, through material included in trade or professional directories, journals or other publications, the issue of name cards, statements made at public functions, information contained in press releases etc.

30. It is appreciated that there may be cases where “independent” agents working in, for example, the real estate and insurance fields will be unable to satisfy this criterion. However, if the persons concerned are held out to the public to be employees of the organisations they represent, then their cases will in any event warrant close examination before it is accepted that employment is not involved.

Satisfying the criteria

31. Where all of the specified criteria are satisfied, a relevant individual will not have any liability to salaries tax by virtue of section 9A. Likewise, the section will not have the effect of imposing on the relevant person the compliance requirements applicable to employers under section 52.

32. In Board of Review Decision *Case No. D13/06 21 IRBRD 341*, the taxpayer through his wholly-owned company entered into a contract for the provision of his services to a hospital. The Board concluded that section 9A(3) had not been satisfied: in relation to section 9A(3)(b) his teaching services for other persons were irrelevant since they were not material or incidental to the services performed under the contract; in relation to section 9A(3)(c) he was at the top of his field and the level of control should be viewed in light of this; and in relation to section 9A(3)(e) though express termination provision are absent, the contract could still be terminated for a reason commonly provided for in relation to an employee.

33. Where a relevant individual is unable to meet one or more of the specified criteria, it does not necessarily follow that the operative provisions shall apply to remuneration under the agreement. Section 9A(4) provides another avenue of escape for those cases where the relevant individual establishes to the satisfaction of the Commissioner that at all relevant times the carrying out of the services under the agreement “was not in substance the holding by him of an office or employment of profit with the relevant person”.

THE COMMISSIONER’S DISCRETION: SECTION 9A(4)

Focus on the substance

34. Section 9A(3) may be viewed as a somewhat mechanical means of ascertaining whether the operative provisions can be disregarded. However, the approach has been taken on the footing that where none of the indicators of employment covered by the specified criteria is present, it may be safely concluded, without examining the case in greater detail, that in substance employment is not involved. In short, it is intended to be a pragmatic approach for the convenience of taxpayers and the Department alike.

35. The situation is clearly quite different where one of the specified criteria is not satisfied. In such a case there will at least be an indication of an employment relationship. Careful consideration of all of the circumstances of the arrangement will be required before it can be concluded whether or not in substance one exists.

36. In considering cases under subsection (4), the Commissioner will of course have regard to the substantial body of case law concerning the distinction between a contract of service (i.e. one of employment) and a contract for services (i.e. independent contractor).

37. In *Poon Chau Nam v. Yim Shiu Cheung* [2007] HKLRD 951, Ribeiro PJ at the Court of Final Appeal confirmed that the modern approach to the question whether a person was an employee was to examine all the features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment. This involved a nuanced and not a mechanical approach: painting a picture from the accumulation of detail. The indicia included the degree of control exercised by the “employer”; whether the person performing the services provided his own equipment; whether he hired his own helpers; what degree of financial risk he took; what degree of responsibility for investment and management he had; and whether and how far he had an opportunity of profiting from sound management in the performance of his task. In Board of Review Decision *Case No. D13/06 21 IRBRD 341*, referred to in paragraph 32, the Board also ruled that section 9A(4) was not satisfied: the taxpayer had one full-time job; he received a monthly income; he was under the hospital’s control; he held himself out as an officer of the hospital and no real entrepreneurship on the part of the taxpayer.

38. Subsection (4) was considered in Board of Review Decision *Case No. D155/01 17 IRBRD 231* though the case was decided primarily on the ground that section 61A applied to counteract the tax benefit from the arrangement entered into. The case involved the provision of services by a programme production manager to a television company through his personal services company. The Board concluded that section 9A applied to the arrangement. Although factors existed in support of the taxpayer’s contention that he was not an employee of the television company (such as the fact that he did not receive all benefits available to employees, no redundancy payment was

made on the termination of the agreement for the provision of services, he had no set office hours, he had no computer and he was not required to attend staff meetings), the Board upon a global assessment was satisfied that the taxpayer was in substance an employee.

39. Subsection (4) was also considered in *Case No. D78/06 22 IRBRD 36*, which decided primarily that the interposition of the service company was to be disregarded under section 61. The Board were not satisfied that the taxpayer, a resident engineer for a project, was not in substance an employee of two companies contracting with the service company for his services because: remuneration was payable monthly in arrears and was fixed (subject to adjustment); neither the taxpayer nor the service company ran any financial risk nor could they profit from sound management; the taxpayer was granted annual leave; he was given office space; he did not provide his own equipment and the agreement could be summarily terminated.

40. In *Case No. D78/06 22 IRBRD 36*, the Board explained that the relationship had to be determined by an investigation and evaluation of the factual circumstances in which the work was performed and it had been firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court.

Control test and integration test

41. Although in many cases the control test can still be simply applied to determine the matter, there are situations where it proves to be inadequate. For example, it is not now unusual for professional or highly skilled individuals to perform their tasks on the basis of their own judgement when engaged as employees. It is therefore not surprising that a further test, known as the integration test, was recognised alongside the control test. This was introduced by Lord Denning in *Bank voor Handel en Scheepvaart NV v. Administrator of Hungarian Property [1954] 35 TC 311, HL* where he said:

“In this connection I would observe the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.”

Economic reality test

42. A further test, the economic reality test, was applied in *Market Investigations Ltd. v. Minister of Social Security*, [1969] 2 QB 173. This test has regard to matters such as whether the individual is involved in the management of the work and is placed at financial risk, whether he can employ others to assist and whether he provides major equipment. However, in 1984 the Court of Appeal, in *Nethermere (St. Neots) Ltd. v. Gardiner* 1 CR 612, rejected the view that the economic reality test was “the fundamental test” and regarded it as “no more than a useful test”.

43. What has become clear from the cases, as Nolan J stated in the Court of Appeal in *Hall v. Lorimer* [1994] STC 23, is that:

“In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another.”

He went on to cite with approval the views expressed by Mummery J earlier in the case in the High Court, where he said:

“The process involves painting a picture in each individual case. As Vinelott J said in *Walls v. Sinnett (Inspector of Taxes)* [1986] STC 236 at 245: ‘It is, in my judgment, impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.’ ”

Mutuality of obligation

44. The doctrine of mutuality of obligation has become an important test in determining employment status. The essence of the employment is that the employer is under an obligation to provide work to the employee just as much as the employee is under an obligation to carry out work. There must be an

irreducible minimum of mutual obligation for there to be a contract of service. That irreducible minimum is that the engager must be obliged to pay a wage or other remuneration, and that the worker must be obliged to provide his or her own work or skill. In the case of *Poon Chau Nam*, Ribeiro PJ confirmed the importance of mutuality of obligation in establishing the existence of an umbrella or global contract of service where there is a series of engagements. In *Usetech v. Young* [2004] STC 1671, Park J explained that the want of mutuality would preclude the existence of a continuing contract of employment where there was both no obligation to provide work and no obligation to pay the worker for time in which work was not provided.

Comprehensive details

45. It should therefore be clear that the Commissioner will only be able to form a view for the purposes of section 9A(4) if he is provided with comprehensive details of all the facts surrounding an agreement.

46. A relevant individual who wishes to have the Commissioner exercise his discretion under the subsection may advise the Department either at the time of lodging his or her tax return or by means of a separate application for an advance ruling which can be made at any time. The supporting material and information required is the same in each case and is discussed below.

ADVANCE RULINGS

Request for advance ruling

47. A request for an advance ruling should be in writing and be addressed to the Commissioner. It must be signed by the relevant individual or his authorized representative. The following material and information should support the request:

- (a) Copies of the agreement and any related undertaking. If an agreement or undertaking has not been reduced to writing, an explanation of why this is the case should be provided together with full details of its terms and conditions.

- (b) If not otherwise apparent, full details of the remuneration payable under each agreement or undertaking, including fringe benefits, share awards, share options etc.
- (c) Copies of the respective organisation charts of the relevant person and the service company.
- (d) A statement setting out the relevant individual's:
 - (i) duties and obligations in relation to the relevant person and the service company respectively; and
 - (ii) previous employment history, if any, with the relevant person or any associated party.
- (e) A statement listing, together with supporting details, the specified criteria in subsection (3) which have been satisfied.
- (f) An explanation of why it is considered that the relevant individual did not in substance hold an office or employment of profit.

Questions to be answered

48. To facilitate consideration of the application, answers should also be provided to the questions listed on Appendix B. If a particular question is not pertinent to the relevant individual's situation, this should be noted together with a brief explanation of why that is the case.

49. Under normal circumstances, where the information referred to above is provided, it should be sufficient to allow a ruling to be made. In such cases, it will be issued in letter form signed by the Commissioner or an authorised officer, generally within 6 weeks of the date of receipt of the application. In some cases, however, it may be necessary for the Department to seek further information from the relevant individual or a third party. Where this occurs it may not be possible to issue the ruling within the 6 weeks period. It should be noted that rulings will not be provided in respect of hypothetical, contemplated or proposed situations.

COMPLIANCE

Notification requirements under section 52

50. From the perspective of the relevant person, if an agreement has been entered into which comes within section 9A(1) and is not excluded from the scope of the operative provisions by virtue of subsection (3) or (4), there will be an obligation to comply with the notification requirements of section 52 (i.e. on the basis that the relevant person is the employer of the relevant individual - see paragraphs 11 to 20 above). On the other hand, if it is clear that subsection (3) or (4) is applicable, the provisions of section 52 will not apply.

Section 80(1AA)

51. It is possible, however, that a relevant person may be unsure as to whether the operative provisions apply to a particular arrangement (e.g. it may not be clear as to whether the relevant individual controls the service company or whether all of the specified criteria in subsection (3) have been satisfied). To cater for such cases, section 80(1AA) in effect allows a relevant person to presume in certain circumstances that the reporting obligations do not apply. The section provides that it shall be a defence in any proceedings against a person for failure to comply with the requirements of section 52(4), (5), (6) or (7) if he shows that he relied upon a statement in writing by the relevant individual “in the form specified” and it was reasonable for him to rely upon that statement. In this regard, section 80(1AC) provides that the Commissioner may specify the form of statement by notice in the Gazette (see Appendix C).

52. It can be seen from the specified form that a relevant individual should only complete the statement where he is able to say that, to the best of his knowledge and belief, one or more of the following situations is applicable in relation to the agreement:

- (a) the party to which the remuneration is paid or credited is not a corporation or trustee of the kind referred to in section 9A(1) (e.g. if a corporation, it is not controlled in the manner described);

- (b) all of the specified criteria are satisfied;
- (c) the Commissioner has confirmed in writing that he is satisfied that in carrying out services under the agreement he is not in substance holding an office or employment of profit with the relevant person.

53. It goes without saying that the defence provided for in section 80(1AA) will not apply if a relevant person has reason to doubt that the relevant individual is entitled to make a statement of the kind in question. In such a situation the relevant person should, as a matter of prudence, proceed on the footing that the reporting requirements are applicable. The Department will not, however, take any action in relation to a failure of the employer to comply with the requirements if during the relevant period the relevant individual was awaiting the outcome of an application for a ruling from the Commissioner under section 9A(4).

54. As far as the relevant individual is concerned, if he has any doubt as to whether the service company is of the kind referred to in section 9A(1) or whether all of the specified criteria are satisfied, he should obtain a ruling from the Commissioner before providing the relevant person with a statement in writing. In this regard, it should be kept in mind that section 80(1AB) provides that a person who knowingly or recklessly makes such a statement which in a material respect is false or misleading shall be guilty of an offence. The sanctions provided for under sections 82 and 82A may also have application where a relevant individual fails to comply with his obligations.

COMMENCEMENT OF THE LEGISLATION

Appointed day

55. As provided in the Amendment Ordinance, the legislation came into operation on the “appointed day” (i.e. 18 August 1995). The legislation does not apply to any service company agreement entered into before the appointed day where the remuneration was paid or the services were carried out, or both were effected, prior to that date. The legislation will apply in relation to such an agreement where the remuneration is paid or credited and the services are

carried out on or after that date. The legislation will, of course, also apply in respect of agreements entered into on or after the appointed day.

56. The “appointed day” serves to place it beyond any doubt that where an arrangement is in existence on or after that date and comes within the scope of the legislation, there is a compliance obligation to provide information to the Department. As far as arrangements which commenced before the appointed day are concerned, the Department will not take any penalty action in respect of failure to comply with section 52 reporting requirements that may have existed before that date. The table setting out the Department’s position in relation to the application of sections 9A and 52 is attached as Appendix D.

57. One of the purposes of the legislation is to facilitate the identification of disguised employment arrangements. It stands to reason that where it is established that such an arrangement exists, income derived both before and after the appointed day may be charged to salaries tax. The Department’s view is that if the provisions of the Ordinance (including sections 61 and 61A) existing prior to the introduction of section 9A had the effect of rendering the earlier income chargeable to salaries tax, it is only appropriate to assess the income accordingly.

58. It is pertinent to mention at this point that where an arrangement falls outside the scope of section 9A (i.e. even if entered into after the appointed day), it may still, depending on the facts of the case, be charged to salaries tax by application of the general anti-avoidance provisions. For example, it might be considered appropriate to apply those provisions if a “relevant person” not carrying on a trade, profession or business or prescribed activity engaged a person to carry out services under a disguised employment agreement. The Department considers that its position in this regard is supported by the decision of the Privy Council in *CIR v. Challenge Corporation Limited* [1987] 2 WLR 24. This was to the effect that a general anti-avoidance provision can apply notwithstanding the existence of related specific anti-avoidance provisions. In *Case No. D78/06 22 IRBRD 36*, the Board of Review in its decision ruled that the interposition of the service company was to be disregarded under section 61A while agreeing with Deputy Commissioner that the case was also caught under section 9A.

TAX POSITION OF THE PARTIES

Tax position of corporation and trustee

59. To prevent double taxation, section 9A(5) provides that where by virtue of section 9A a relevant individual is chargeable to salaries tax on remuneration referred to in subsection (1), the corporation or trustee to whom that remuneration is paid or credited is not chargeable to tax on the remuneration. Accordingly, no deductions under section 16 or depreciation allowances under Part VI will be granted to the service company in respect of related expenditure.

Tax position of relevant individual

60. Subsection (5) also provides, in effect, that the relevant individual is not chargeable to tax on any remuneration paid or credited to him by the corporation or trustee as an employee to the extent that the remuneration is attributable to services carried out under the agreement. This exemption will not apply in respect of any remuneration which is not attributable to such services (e.g. services carried out by the relevant individual which are unrelated to the agreement with the relevant person).

Service companies used by professionals

61. Reflecting the taxation principle that it is not possible for a man to employ himself, section 9A(7) has the effect of providing that the proprietors and partners of unincorporated businesses (e.g. professional firms) with service companies are excluded from the application of the operative provisions of section 9A. Section 9A(7)(b)(i) covers the situation where a sole proprietorship is involved and section 9A(7)(b)(ii) addresses partnership cases. The Department's treatment of service company arrangements of this kind is detailed in Departmental Interpretation and Practice Notes No. 24.

HONG KONG

ORDINANCE No. 54 OF 1995

L.S.

I assent.

Christopher PATTEN,

Governor.

6 July 1995

An Ordinance to amend the Inland Revenue Ordinance.

[]

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

1. Short title and commencement

(1) This Ordinance may be cited as the Inland Revenue (Amendment) (No. 2) Ordinance 1995.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for the Treasury by notice in the Gazette.

2. Section added

The Inland Revenue Ordinance (Cap. 112) is amended by adding—

**“9A. Remuneration under certain agreements
treated as being income derived from
an employment of profit**

(1) Where a person (“relevant person”) carrying on (or deemed under this Ordinance to be carrying on) a trade, profession or business, or prescribed activity, has entered into an agreement, whether before, on or after the appointed day, under which any remuneration for any services carried out under the agreement on or after that day by an individual (“relevant individual”) for the relevant person or any other person is paid or credited on or after that day to—

(a) a corporation controlled by—

- (i) the relevant individual;
- (ii) an associate or associates of the relevant individual; or
- (iii) the relevant individual together with an associate or associates of the relevant individual;

(b) a trustee of a trust estate under which the relevant individual or an associate or associates of the relevant individual is a beneficiary, or are beneficiaries, as the case may be, under the trust; or

(c) a corporation controlled by such a trustee,
then, subject to subsections (3) and (4), for the purposes of this Ordinance—

(i) the relevant individual shall be treated as having an employment of profit with the relevant person—

(A) commencing on—

(I) in the case of the trade, profession or business, the day the relevant individual commenced to carry out any of those services or the appointed day, whichever is the later;

(II) in the case of the prescribed activity, the day the notice concerned under subsection (6) commenced or the day the relevant individual commenced to carry out any of those services, whichever is the later;

(B) until the agreement terminates without the relevant individual continuing to carry out any of those services as an employee of the relevant person;

- (ii) the relevant individual shall be treated as an employee of the relevant person, and the relevant person shall be treated as the employer of the relevant individual, whilst the relevant individual is treated, under paragraph (i), as having an employment of profit with the relevant person; and
- (iii) any such remuneration shall be treated as being—
 - (A) income derived by the relevant individual from an employment of profit with the relevant person; and
 - (B) received by and accrued to the relevant individual at the time that it is paid or credited to the corporation or trustee concerned referred to in paragraph (a), (b) or (c),

and the other provisions of this Ordinance (including section 52) shall be construed accordingly.

(2) Where an agreement referred to in subsection (1) does not specify or otherwise identify the amount of any remuneration referred to in that subsection which is from time to time to be paid or credited to the corporation or trustee referred to in paragraph (a), (b) or (c) of that subsection, then any sum which under that agreement is paid or credited to that corporation or trustee, as the case may be, shall be deemed to be such remuneration (and the other provisions of this Ordinance, including that subsection, shall apply accordingly) except any such sum or part thereof in respect of which the relevant individual concerned or the relevant person establishes to the satisfaction of the Commissioner that it was not in substance remuneration for any services carried out under that agreement on or after the appointed day by the relevant individual for the relevant person or any other person.

(3) Paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where—

- (a) neither the agreement referred to in that subsection nor any related undertaking (and whether or not the agreement refers to that undertaking) provides for any remuneration for any of those services to include or to be the provision of annual leave, passage allowance, sick leave, pension entitlements, medical payments or accommodation, or any similar benefit, or any benefit (including money) in lieu thereof;
- (b) if the agreement referred to in that subsection or any related undertaking (and whether or not the agreement refers to that undertaking) requires any of the services referred to in that subsection to be carried out personally by the relevant individual, the relevant individual carries out the same or similar services—
 - (i) for persons other than any person for whom those first-mentioned services are carried out under that agreement; and
 - (ii) during the term of that agreement or undertaking, as the case may be;
- (c) the performance by the relevant individual of any of those services is not subject to any control or supervision—
 - (i) which may be commonly exercised by an employer in relation to the performance of his employee's duties; and
 - (ii) by any person (including the relevant person) other than the corporation or trustee concerned referred to in subsection (1)(a), (b) or (c);
- (d) the remuneration referred to in that subsection is not paid or credited periodically and calculated on a basis commonly used in relation to the payment or crediting and calculation of remuneration under a contract of employment;
- (e) the relevant person does not have the right to cause any of those services to cease to be carried out in a manner, or for a reason, commonly provided for in relation to the dismissal of an employee under a contract of employment; and

(f) the relevant individual is not held out to the public to be an officer or employee of the relevant person.

(4) Paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where the relevant individual establishes to the satisfaction of the Commissioner that at all relevant times the carrying out of the services referred to in that subsection was not in substance the holding by him of an office or employment of profit with the relevant person.

(5) It is hereby declared that where, by virtue of the operation of this section, the relevant individual is chargeable to salaries tax on remuneration referred to in subsection (1), then—

(a) the corporation or trustee concerned referred to in paragraph (a), (b) or (c) of that subsection to whom that remuneration is paid or credited is not chargeable to tax thereon; and

(b) the relevant individual is not chargeable to tax on any remuneration paid or credited to him by that corporation or trustee, as the case may be—

(i) in respect of any office or employment of profit he has with that corporation or trustee, as the case may be; and

(ii) to the extent that the remuneration referred to in this paragraph is attributable to any of the services referred to in that subsection.

(6) The Commissioner may, by notice in the Gazette, prescribe an activity for the purposes of this section.

(7) For the avoidance of doubt, it is hereby declared that—

(a) where there are 2 or more relevant individuals under an agreement referred to in subsection (1), then that subsection shall apply to them individually and not collectively, and the other provisions of this section (including subsection (2)) shall be construed accordingly;

(b) paragraphs (i), (ii) and (iii) of subsection (1) shall not apply where under an agreement referred to in that subsection—

(i) the relevant person is also the relevant individual; or

(ii) the relevant person is a partnership and the relevant individual is a partner of the partnership.

(8) In this section—

“appointed day” (指定日期) means the day appointed under section 1(2) of the Inland Revenue (Amendment) (No. 2) Ordinance 1995 (54 of 1995);

“associate” (相聯者), in relation to the relevant individual, means—

(a) a relative of the relevant individual;

(b) a partner of the relevant individual and any relative of that partner;

(c) a partnership in which the relevant individual is a partner;

(d) any corporation controlled by the relevant individual, by a partner of the relevant individual or by a partnership in which the relevant individual is a partner;

(e) any director or principal officer of a corporation referred to in paragraph (d);

(f) another relevant individual who is such an individual under the agreement referred to in subsection (1) under which the first-mentioned relevant individual is also such an individual;

“beneficiary” (受益人), in relation to a trust estate, means any person who benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust estate, either directly or through any interposed person, or who is able or might reasonably be expected to be able, whether directly or indirectly, to control the activities of the trust estate or the application of its corpus or income;

“control” (控制), in relation to a corporation, means the power of a person to secure—

- (a) by means of the holding of shares or the possession of voting power in or in relation to that or any other corporation; or
- (b) by virtue of any powers conferred by the articles of association or other document regulating that or any other corporation,

that the affairs of the first-mentioned corporation are conducted in accordance with the wishes of that person;

“prescribed activity” (訂明活動) means any activity prescribed in a notice under subsection (6);

“principal officer” (主要職員) means—

- (a) a person employed by a corporation who, either alone or jointly with one or more other persons, is responsible under the immediate authority of the directors for the conduct of the business of the corporation; or
- (b) a person so employed who, under the immediate authority of a director of the corporation or a person to whom paragraph (a) applies, exercises managerial functions in respect of the corporation;

“relative” (親屬) means the spouse, parent, child, brother or sister of the person concerned, and, in deducing such a relationship, an adopted child shall be deemed to be a child both of the natural parents and the adopting parent and a step child to be the child of both the natural parents and of any step parent.”.

3. Penalties for failure to make returns, making incorrect returns, etc.

Section 80 is amended by adding—

“(IAA) Without prejudice to the generality of the term “reasonable excuse” as it is used in subsection (1) in relation to section 52(4), (5), (6) or (7), where a person has failed to comply with the requirements of that section in the case of an individual in respect of whom that person is treated as the employer by virtue of the operation of section 9A, then it shall constitute a defence in any proceedings under this section against that person in respect of such failure if he shows that—

- (a) he did not comply with those requirements because he relied upon a statement in writing—
 - (i) by that individual; and
 - (ii) in the form specified under subsection (IAC); and
- (b) it was reasonable for him to rely upon that statement.

(IAB) A person who knowingly or recklessly makes a statement of the kind referred to in subsection (IAA)(a) which in a material respect is false or misleading shall be guilty of an offence: Penalty a fine at level 3.

(IAC) The Commissioner may, by notice in the Gazette, specify a form for the purposes of subsection (IAA)(a).

(IAD) For the avoidance of doubt, it is hereby declared that a form specified under subsection (IAC) is not subsidiary legislation.”.

**Questions to be answered when applying
for an Advance Ruling – see paragraph 48**

1. **The Control Test** (*To determine whether the relevant individual is controlled by the relevant person*)
 - (a) Who decides the work to be done by the relevant individual? Who prescribes the time schedule?
 - (b) Is there a fixed place of work? Who provides the place of work?
 - (c) Does the agreement (or related undertaking) between the service company and the relevant person require the relevant individual to perform the work personally?
 - (d) Is the relevant individual required to follow the rules and regulations of the relevant person?
 - (e) Can the service company or the relevant individual work for others without the approval of the relevant person? Can the service company or the relevant individual refuse the performance of a particular task or job requested by the relevant person?

2. **Integration Test** (*To determine whether the relevant individual is holding a position within the organisation of the relevant person*)
 - (a) Does the relevant individual represent to third parties that he is a staff member of the relevant person?
 - (b) Does the relevant individual get promotions within the organisation framework of the relevant person?
 - (c) Does the relevant individual have subordinates who are the staff of the relevant person?
 - (d) Is the relevant individual part and parcel of the organisation of the relevant person?
 - (e) Is the relationship a continuing one or does it exist only to procure a result?

3. **Economic Reality Test** (*To determine whether the income of the relevant individual is in effect derived from the relevant person and whether the relevant individual is at risk with his capital*)
 - (a) Does the relevant person provide the equipment or assistants while the relevant individual is performing his duties?
 - (b) Does the relevant individual contribute capital and in what amount? Can the capital be at risk and in what way?

- (c) How is the remuneration received by the service company from the relevant person computed? How is the remuneration received by the relevant individual from the service company computed?
- (d) What is the duration of the agreement between the service company and the relevant person? Will the agreement be renewed and on what basis?

4. **Mutuality of Obligation Test** (*To determine whether there has been some form of mutual obligation between the relevant individual and the relevant person*)

- (a) Is the relevant person obliged to pay a wage or remuneration?
- (b) Is the relevant individual obligated to provide his work or skill?
- (c) Is the relevant person under an obligation to provide work?
- (d) Is the relevant individual under an obligation to carry out the work?
- (e) Can either the relevant person or relevant individual terminate the relationship without incurring any liabilities?
- (f) Can either the relevant person or relevant individual apply any sanction to the other in the event that work is refused or not offered?

**Inland Revenue Ordinance
(Chapter 112)**

**SPECIFICATION OF FORMS OF STATEMENT FOR THE
PURPOSES OF SECTION 80(1AA) (a)**

FORM 1

STATEMENT FOR PURPOSES OF SECTION 80(1AA)(a) OF THE
INLAND REVENUE ORDINANCE (CAP. 112) AS AMENDED BY
THE INLAND REVENUE (AMENDMENT) (NO. 2) ORDINANCE 1995
(54 OF 1995) WHERE AGREEMENT IS PROPOSED TO BE ENTERED INTO

I, (name of relevant individual) , declare, in relation to the agreement proposed to be entered into by (name of relevant person) under which remuneration for services carried out by me will be paid or credited to (name of party to which the remuneration will be paid or credited) , that to the best of my knowledge and belief one or more of the following situation will be applicable if that agreement is so entered into –

- (a) (name of party to which such remuneration will be paid or credited) will not be a corporation or trustee referred to in paragraph (a), (b) or (c) of section 9A(1);
- (b) paragraphs (i), (ii) and (iii) of section 9A(1) will not apply in relation to that agreement by virtue of section 9A(3);
- (c) paragraphs (i), (ii) and (iii) of section 9A(1) will not apply in relation to that agreement because, pursuant to section 9A(4), I have received confirmation in writing from the Commissioner of Inland Revenue that I have established to his satisfaction that at all relevant times the carrying out of those services will not in substance be the holding by me of an office or employment of profit with (name of relevant person) .

Dated this day of 20 .

(Name and signature of
relevant individual)

FORM 2

STATEMENT FOR PURPOSES OF SECTION 80(1AA)(a) OF THE
INLAND REVENUE ORDINANCE (CAP. 112) AS AMENDED BY
THE INLAND REVENUE (AMENDMENT) (NO. 2) ORDINANCE 1995
(54 OF 1995) WHERE AGREEMENT HAS BEEN ENTERED INTO

I, _____ (*name of relevant individual*), declare, in relation to the agreement dated _____ entered into by _____ (*name of relevant person*) under which remuneration for services carried out by me is paid or credited to _____ (*name of party to which such remuneration is paid or credited*), that to the best of my knowledge and belief one or more of the following situation is applicable –

- (a) _____ (*name of party to which such remuneration is paid or credited*) is not a corporation or trustee referred to in paragraph (a), (b) or (c) of section 9A(1);
- (b) paragraphs (i), (ii) and (iii) of section 9A(1) do not apply in relation to that agreement by virtue of section 9A(3);
- (c) paragraphs (i), (ii) and (iii) of section 9A(1) do not apply in relation to that agreement because, pursuant to section 9A(4), I have received confirmation in writing from the Commissioner of Inland Revenue that I have established to his satisfaction that at all relevant times the carrying out of those services was not in substance the holding by me of an office or employment of profit with _____ (*name of relevant person*).

Dated this _____ day of _____ 20 _____.

(Name and signature of
relevant individual)

Explanatory Note

Section 80(1AA) of the Inland Revenue Ordinance (Cap. 112) as amended by the Inland Revenue (Amendment) (No. 2) Ordinance 1995 provides a defence for a person who has failed to comply with the requirements of section 52(4), (5), (6) or (7) in relation to a person in respect of whom he is to be treated as the employer by virtue of the operation of section 9A. That defence partly consists of that first-mentioned person relying upon a relevant statement in writing by that second-mentioned person in a form specified by the Commissioner of Inland Revenue under section 80(1AC).

	Agreement entered into before appointed day				Agreement entered into on or after appointed day
	Services before appointed day - Paid or credited before appointed day	Services before appointed day - Paid or credited on or after appointed day	Services before and on or after appointed day - Paid or credited on or after appointed day	Services on or after appointed day - Paid or credited on or after appointed day	Services on or after appointed day - Paid or credited on or after appointed day
Assessable under Section 9A?	No	No	Yes ¹	Yes	Yes
Section 52 compliance required?	No	No	Yes ²	Yes	Yes

Notes :

- 1 Only to the extent of remuneration attributable to services rendered on or after the appointed day.
- 2 With effect from the appointed day.