INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D106/02

Salaries tax – whether the location and source of the appellant's employment was in Hong Kong – section 8(1) of the Inland and Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Michael Neale Somerville and Stephen Yam Chi Ming.

Date of hearing: 7 December 2002.
Date of decision: 9 January 2003.

The appellant was employed by a Hong Kong company. The Hong Kong company was wholly owned by its immediate holding company, a company incorporated in the British Virgin Islands, which in turn was wholly owned by the ultimate holding company, a company incorporated in the Cayman Islands. The appellant appealed against the additional salaries tax assessment and testified at the hearing of the appeal that his employment was transferred from the Hong Kong company to the ultimate holding company and the ultimate holding company was his only employer.

Held:

1. The Hong Kong company was incorporated and maintained a place of business in Hong Kong. The employment agreement by the Hong Kong company was negotiated and concluded in Hong Kong. The appellant was paid in Hong Kong dollars. The Board was of the view that the location and source of the appellant's employment by the Hong Kong company was in Hong Kong.

2. The Board disbelieved the appellant's testimony on the alleged 'transfer' of employment. Even if the Board had decided in favour of the appellant on the factual issue, the appellant would still have failed in his appeal. The ultimate holding company maintained a place of business in Hong Kong. The employment agreement by the ultimate holding company was negotiated and concluded in Hong Kong. The appellant was paid in Hong Kong dollars. The Board decided that the location and source of the appellant's employment by the ultimate holding company was in Hong Kong and was caught by the basic charge under section 8(1) of the IRO. His entire income is subject to salaries tax wherever his services may have been rendered and there is no provision for apportionment (CIR v Goepfert 2 HKTC 210 followed).

Appeal dismissed.

Case referred to:

CIR v Goepfert 2 HKTC 210

Lee Yun Hung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 19 September 2002 whereby the additional salaries tax assessment for the year of assessment 2000/01 under charge number 9-1528170-01-A, dated 12 November 2001, showing additional net chargeable income of $1,320,326 with tax payable thereon of $224,455 was confirmed.

2. By an employment agreement dated 1 January 2000 made between a company incorporated in Hong Kong and the Appellant, the Appellant was employed by the Hong Kong company. The Hong Kong company was wholly owned by its immediate holding company, a company incorporated in the British Virgin Islands, which in turn was wholly owned by the ultimate holding company, a company incorporated in the Cayman Islands.

3. At the hearing of the appeal, the Appellant testified that:

(a) in mid-2000 his employment was transferred from the Hong Kong company to the ultimate holding company;

(b) before the transfer, the Hong Kong company was his only employer;

(c) after the transfer, the ultimate holding company was his only employer;

(d) the transfer took place in Hong Kong; and

(e) no other term of his employment changed.

4. At the end of the Appellant's evidence and submission, we told the parties that we were not calling on the Respondent and that our decision would be given in writing.

5. Section 8(1), (1A) and (1B) of the IRO provides that:

> ' *(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –*
>
> *(a) any office or employment of profit ...*
>
> *(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment –*
>
> *(a) ...*
>
> *(b) excludes income derived from services rendered by a person who –*
>
> *(i) ...*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment ...*
>
> *(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.*'

6. The Hong Kong company was incorporated and maintained a place of business in Hong Kong. The employment agreement by the Hong Kong company was negotiated and concluded in Hong Kong. The Appellant was paid in Hong Kong dollars. In our decision, the location and source of the Appellant' s employment by the Hong Kong company was in Hong Kong.

7. His entire income from the employment is caught by the basic charge under section 8(1) of the IRO. As long ago as 1987, Macdougall J held that if a person' s income falls within the basic charge, his entire income is subject to salaries tax wherever his services may have been rendered and there is no provision for apportionment, CIR v Goepfert 2 HKTC 210 at page 238:

> ' *If during a year of assessment a person' s income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of*

exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

8. The Appellant did not invoke the '60 days rule'.

9. We turn now to the alleged 'transfer' of employment. We disbelieve the Appellant's testimony summarised in paragraph 3 above. We find and decide against him on this factual issue. His appeal fails.

(a) His testimony is belied by his tax return-individuals for the year of assessment 2000/01 which he signed and dated 30 June 2001. He declared that he was employed by the Hong Kong company from '1 April 2000 to 31 March 2001' and his answer to the question whether he had received income from an overseas company for his employment or services rendered in Hong Kong was 'No'.

(b) His testimony is contradicted by his own letter dated 14 November 2001 in which he asserted that:

'Part of my total annual income was being charged to all the other operating companies based on days spent outside Hong Kong.

Our companies' Controller/Finance Director made a distribution of my total annual income using a "time basis calculation" on the number of days I spent inside and outside Hong Kong.'

(c) His testimony is further contradicted by his own letter dated 31 December 2001 in which he asserted that:

'There were two amendments to the original terms of employment ...

...

The second amendment refers to my responsibility and employment, which shifted from exclusive dedication to [the Hong Kong company] in Hong Kong, to partial dedication to this company and partial dedication to all the other subsidiary operating companies and holding companies.

...

[The immediate holding company] was the vehicle used by our Controller for the intra-company cost re-allocations.'

(d) His testimony is further contradicted by his own notice of appeal dated 18 October 2002 in which he asserted that:

> ' ... the very important fact that my contractual employment agreement with [the Hong Kong company], the Hong Kong operating company of the [group] of companies, was modified from the initial employment contract with [the Hong Kong company] to reflect employment by ALL FIVE operating companies and was transferred to the newly created sub-holding company [the immediate holding company] a BVI company and its parent company [the ultimate holding company] a Cayman Islands company and the group holding company, once those companies were set up together with the other four operating companies ...'

(e) His testimony is further contradicted by his own letter dated 22 November 2002 in which he asserted that:

> ' I am providing these additional documents because I am unable to provide the actual document that ceased my initial employment with [the Hong Kong company] and established it with all companies within our group located outside Hong Kong, as well as with the Hong Kong subsidiary.'

(f) His testimony is further contradicted by the employer's return for the year ended 31 March 2001, dated 25 May 2001 and submitted by the Hong Kong company which gave '01/04/2000 – 31/03/2001' as the period of the Appellant's employment during the year and stated that the Appellant was paid by an overseas concern, the immediate holding company, in the sum of $1,200,297.

10. In any event, even if we had decided in favour of the Appellant on the factual issue, the Appellant would still have failed in his appeal. The ultimate holding company maintained a place of business in Hong Kong. The employment agreement by the ultimate holding company was negotiated and concluded in Hong Kong. The Appellant was paid in Hong Kong dollars. In our decision, the location and source of the Appellant's employment by the ultimate holding company was in Hong Kong. His entire income from the employment by the ultimate holding company is caught by the basic charge under section 8(1) of the IRO. His entire income is subject to salaries tax wherever his services may have been rendered and there is no provision for apportionment.

11. The Appellant has not discharged the onus under section 68(4) of proving that the assessment appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessment as confirmed by the Commissioner.