

Case No. D55/08

Salaries tax – locality of employment – whether reimbursement of relocation expenses upon taking up of employment and relocation allowance upon termination chargeable or not – sections 8(1)(a), 8(1A)(a) and 12(1)(a) of the Inland Revenue Ordinance (‘IRO’).

Panel: Colin Cohen (chairman), Francis Tak Kong Ip and David Yu Hon To.

Date of hearing: 16 January 2009.

Date of decision: 18 February 2009.

The Taxpayer, a resident in Country R, entered into an employment agreement with Company F on 21 March 2006.

Company F is an overseas company registered under Part XI of the Companies Ordinance. Since 1995, Company F maintained its place of business in Hong Kong.

The Taxpayer arrived in Hong Kong on 15 June 2006 to commence his employment with Company F. On 21 March 2007, his employment with Company F was terminated.

During his employment with Company F, the Taxpayer resided in Hong Kong together with his wife and his child. He spent the majority of his time in Hong Kong.

The Taxpayer contended that he had an overseas employment and the portion of his income attributable to services rendered outside Hong Kong should not be subject to salaries tax.

The Taxpayer further contended that the reimbursement of various expenses incurred on relocation upon taking up of employment, the relocation allowance to Country R upon termination and the 3-months’ post-termination housing allowance are not income by nature and should not be chargeable to salaries tax.

Accepting to exclude the 3-months’ post-termination housing allowance from assessment; the Assessor maintained her views that the Taxpayer held a Hong Kong employment and rejected the Taxpayer’s time basis claim.

The Taxpayer appealed yet he failed to file his appeal within time and he applied for an extension of time under section 66(1A).

Held:

1. The Board granted an extension of time under section 66(1A) as the Taxpayer was prevented from filing his appeal within time due to the fact that for most of the relevant period, he was out of Hong Kong.
2. Hong Kong was the place where the income actually really came to the Taxpayer through his employment with Company F which maintained its place of business in Hong Kong:
 - 2.1 Company F, through its Hong Kong branch, did carry on business activities in Hong Kong.
 - 2.2 As the Regional Packaging Development Manager of Company F, the Taxpayer was employed to work in Hong Kong.
 - 2.3 The employment contract of the Taxpayer was governed by Hong Kong law and it had a real and substantial connection with Hong Kong.
3. For a sum to be compensation, it must be shown that there is a loss or surrender of rights on the part of the employee and a legal liability on the part of the employer to pay compensation for the loss of such rights.
4. The reimbursement of various relocation expenses upon taking up of employment and the relocation allowance upon termination arose directly from and were all provided for in the Taxpayer's employment contract with Company F which should be chargeable to salaries tax.
5. The Taxpayer did not put forward any evidence that he had incurred any of the relocation expenses. In any event, even if the Taxpayer had incurred those relocation expenses, they were not incurred by the Taxpayer in the performance of his duties under his employment and as such, they were not deductible under section 12(1)(a) of the IRO.

Appeal dismissed.

Cases referred to:

CIR v Goepfert [2 HKTC 210]
D79/97, IRBRD, vol 12, 461

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D68/06, (2006-07) IRBRD, vol 21, 1194

D19/92, IRBRD, vol 7, 156

Taxpayer in person.

Lau Wai Sum and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Taxpayer in respect of a Determination of the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') dated 1 September 2008 in respect of a salaries tax assessment for the year 2006/07. The Taxpayer lodged a notice of appeal dated 12 October 2008 which was received by the Clerk to the Board of Review by hand on 13 October 2008.

Late appeal

2. There was an application by the Taxpayer for the Board to exercise its discretion under section 66(1A) of the Inland Revenue Ordinance ('IRO') to allow an extension of time in his favour.

3. It was clear that the Determination was sent by registered post and this was received at the Taxpayer's home address on 2 September 2008. From the Immigration Department's travel records, the Taxpayer was out of Hong Kong from 1 August 2008 and did not return back to the territory until 27 September 2008. The Taxpayer also drew to our attention that he was aware as to the fact that there were communications and correspondence from the Inland Revenue Department ('IRD') upon his return to Hong Kong. He indicated to us that he looked at the Determination but he did not have enough time to prepare his notice of appeal. It is also clear from his travel records that he departed from Hong Kong on 7 October 2008 and returned back on 10 October 2008.

4. As we have stated above, he lodged a notice of appeal with the Clerk to the Board of Review on 13 October 2008.

5. Section 66(1A) provides as follows:

'If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection

(1). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.'

6. Miss Lau did not oppose the application made by the Taxpayer to apply for an extension of time to file a notice of appeal out of time but indicated that she would leave this to the Board to consider whether or not we felt it was appropriate to do so.

7. Having considered all matters and in particular, the explanation put forward by the Taxpayer, we were prepared to accede to the application. It was clear that the Taxpayer was prevented from filing his appeal within time due to the fact that for most of the relevant period, he was out of Hong Kong.

The issues

8. The issue for us to determine is whether the Taxpayer's employment income should be fully assessed under section 8(1)(a) of the IRO or partly assessed on a time apportionment basis under section 8(1A)(a) of the IRO. We also need to consider the correct quantum of the Taxpayer's net chargeable income for the relevant year of assessment 2006/07.

The evidence

9. The Taxpayer gave evidence before us.

10. He confirmed to us that he agreed the relevant facts as set out in the Determination ('the Facts'). For ease of reference, we now set them out:

- (1) The Taxpayer has objected to the 2006/07 salaries tax assessment raised on him. The Taxpayer claims that the assessment is excessive in that he had an overseas employment and thus the portion of his income attributable to services rendered outside Hong Kong should not be subject to salaries tax.
- (2)
 - (a) Company F is a company incorporated in Country Q. It registered in Hong Kong as an oversea company under Part XI of the Companies Ordinance (Cap. 32).
 - (b) Company F operates as a branch in Hong Kong. At all relevant times, it maintained a principle place of business in Hong Kong at Address G.
- (3) By letter dated 21 March 2006 [the Employment Letter'], Company F offered to employ the Taxpayer as its Regional Packaging Development Manager, to be based in Hong Kong. The Employment Letter contained, inter alia, the following terms and conditions:

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- ‘ Base Salary & 13th Month bonus : **HKD65,000** per month. You will receive an Annual Wage Supplement (13th month bonus) equivalent to one (1) month’s base salary for a full year’s service or prorated thereof.
- Housing Allowance : **HKD5,000 per month.**
- Annual Incentive Bonus : You will be eligible for an annual bonus up to **HKD100,000**, subject to your achieving targets on performance.
- Mandatory Provident Fund (MPF) : You are entitled to participate in the Provident Fund which aims to provide you a cash benefits upon retirement. Contribution to the MPF shall be subject to prevailing rates as stipulated by the Hong Kong’s Mandatory Provident Fund Schemes Authority (MPFA)
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- Termination Notice : **1 month’s** shall be required should either party wish to terminate the employment....
-
- Relocation Benefits : You will be eligible for the following:
- The Company will pay the costs of a serviced apartment for (up to) **two** months in Hong Kong while you find suitable permanent housing.
 - You will receive a one time allowance of **HKD15,000** for the purchase of household necessities in Hong Kong.
 - Payment of applicable fees for the sale of property in [Country R] capped at a maximum of **CAD8,000 (if applicable).**
- Confidentiality :
- Miscellaneous : The company will reimburse you for any [Country R] taxes incurred during your first two years of employment with the us [sic].
-’

(4) By letter dated 3 April 2007 [‘the Termination Letter’], Company F confirmed the termination of Taxpayer’s employment on 21 March 2007 and agreed to pay him \$109,520 on termination. Such sum was arrived at as follows:

- (a) \$65,000, being payment in lieu of one month’s notice.

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- (b) \$15,270 for the untaken portion of the Taxpayer's pro-rated annual leave entitlement (5.09 days).
- (c) \$14,250, for the pro-rated Annual Wage Supplement.
- (d) \$15,000 for 3 months' housing allowance.

(5) On 2 May 2007, Company F furnished a notification under section 52(6) of the IRO in respect of the Taxpayer showing, inter alia, the following particulars:

- (a) Capacity in which employed : Regional Packaging Development Manager
- (b) Period of employment : 19/6/06 - 21/3/07
- (c) Income particulars :

Salary	\$617,307
Leave pay	15,270
Annual wage supplement	49,154
Relocation & housing allowance	<u>\$100,000</u>
Total	<u>\$781,731</u>
- (d) Place of residence provided : Yes
 - Nature :

	<u>Hotel room</u>	<u>Serviced apartment</u>
Period provided	19/6/06 – 24/6/06	24/6/06 – 23/8/06
Rent paid to landlord by employer	\$11,300	\$34,500

(6) In his 2006/07 Tax Return – Individuals, the Taxpayer

- (a) reported the following income particulars:
 - (i) Name of employer : Company F
 - (ii) Period of employment : 19/6/06-21/3/07
 - (i) Days in the period 365
 - (ii) Days in Hong Kong 216

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(iii)	Capacity in which employed	:	Regional Packaging Manager
(iv)	Total Income	:	\$617,307
(v)	The amount in Fact (6)(a)(iv) has included lump sum payments received on retirement/termination of employment contract	:	\$64,424
(vi)	Amount of income to be excluded by reason of exemption of income	:	\$278,296 ^[1]
(vii)	Assessable income	:	\$403,435 ^[2]
(viii)	Place of residence provided by employer	:	Yes
	- Address	:	[Address E]
	- Nature	:	Flat
	- Period provided	:	23/8/06-31/3/07
	- Rent paid to landlord by employee	:	\$84,000
	- Rent refunded by employer	:	\$35,000

Notes: 1. The Assessor observed that the Taxpayer calculated the amount of income to be excluded as follows:

$$(\$617,307 + \$64,424) \times \frac{(365-216)}{365} = \underline{\underline{\$278,296}}$$

2. The Assessor observed that the Taxpayer calculated the amount of assessable income as follows:

$$\$617,307 + \$64,424 - \$278,296 = \underline{\underline{\$403,435}}$$

- (b) claimed deduction of mandatory contributions to recognized retirement schemes in the capacity of an employee in the amount of \$10,000.
- (7) The Assessor did not accept the Taxpayer's time basis claim. She raised on the Taxpayer the 2006/07 salaries tax assessment as follows:

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Income per Fact (5)(c)	\$781,731
<u>Add: Value of residence provided</u>	
$[(\$781,731 - \$100,000) \times \frac{66}{276}^{[1]} \times 10\%]$	<u>16,302</u>
Assessable income	798,033
<u>Less: Contributions to retirement schemes [Fact (6)(b)]</u>	(10,000)
Married person's allowance	(200,000)
Child allowance	<u>(40,000)</u>
Net chargeable income	<u>\$548,033</u>
Tax payable thereon	<u>\$93,626</u> ^[2]

- Notes:
1. The number of days from 19 June 2006 to 23 August 2006 is 66.
The number of days from 19 June 2006 to 21 March 2007 is 276.
 2. The assessment was raised before the tax relief measure to reduce salaries tax by 50% (capped at \$15,000) came into effect on 23 May 2007.

- (8) The Taxpayer objected to the assessment per Fact (7) on the grounds that the assessment was excessive in that his assessable income for the year of assessment 2006/07 should be \$403,435 only.
- (9) In response to the Assessor's enquiries, the Taxpayer put forth the following contentions:
- (a) The breakdown of the relocation allowance and housing allowance of \$100,000 in Fact (5)(c) was as follows:

Relocation to Country R	\$40,000
Housing allowance for July 2006 to March 2007	45,000
Housing allowance for April to June 2007	<u>15,000</u>
	<u>\$100,000</u>

- (b) 'The first interview was a tele-conference between [Company F] in [Country S] and [the Taxpayer] in [Country R] in the week commencing on the 12th February 2006. The second interview was conducted in [Company F] headquarter in [City T, Country Q] on the 7th March 2006.'

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- (c) ‘The terms of employment were negotiated between [Ms H], HR Director for [Company F] stationed in [Country S] and [the Taxpayer].’
- (d) ‘...I was hired by [Company F] who is an [Country Q] company residing outside Hong Kong. [Company F] has an office in Hong Kong which I was based at. The Hong Kong office has no involvement in my employment process except providing all logistics following instructions from [Company F] outside Hong Kong. In another word, I am not hired by Hong Kong office.’
- (e) ‘... my responsibility covers the entire Asia and Pacific region although my office is in Hong Kong. I am responsible for R&D group and [Mr I] is one of my report lines as his responsibility for Greater China. Meanwhile I also report to VP of Purchase in [Country S] as stated in contract as well as Global R&D Leader in [Country Q].’
- (f) ‘There is a misunderstanding on contribution to the Mandatory Provident Fund [“MPF”]. As a matter of fact the MPF requirement does not apply to me as advised by [Company K], the trustee for [Company F] because I have been carrying a similar [Country R] retirement scheme. However my employer and I have elected to participate the scheme by voluntary contributions as a supplementary benefit.’
- (g) ‘As a fact that my family relocated to Hong Kong because of the employment, I accepted my remuneration in Hong Kong currency for convenience of access.’
- (h) ‘The Hong Kong office has never borne my remuneration. Any payment has to be approved and come from the regional office in [Country S].’
- (i) ‘All payment of my remuneration is made outside Hong Kong and transferred to my bank account in Hong Kong afterwards via telegraph.’
- (j) The relocation allowance was a reimbursement for estimated expenses for returning to Country R. It is therefore not an income.
- (k) The 3-months’ housing allowances paid beyond termination were exclusively for the purpose of compensating rental cost based on a pre-assumed departure date and should not be taxable.
- (l) The reimbursement of Country R tax was received beyond termination,

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it is deemed to be compensation for cost or expenses rather than an employment income and thus not taxable in Hong Kong.

- (10) In response to the Assessor's enquiries, Company F supplied the following information and documents:
- (a) 'The principal activities of the Hong Kong office is to provide purchasing services in North Asia for a major international fast food chain.'
 - (b) 'The post of Regional Packaging Development Manager was based in Hong Kong because this position is to service the North Asia region. Furthermore, the food promotion team of the international fast food chain is based in Hong Kong and the Regional Packaging Development Manager was required to work closely with that team.'
 - (c) '[The Taxpayer's] remuneration was stipulated in Hong Kong currency because the position of Regional Packaging Development Manager is based in Hong Kong. [The Taxpayer] was required to relocate to Hong Kong and work at the Hong Kong office during the Employment Period.'
 - (d) '[The Taxpayer] was an employee of the Hong Kong office of [Company F] during the Employment Period. ...'
 - (e) 'The employment contract is enforceable in Hong Kong as the appropriate forum because [the Taxpayer's] employment with [Company F] had real and substantial connection with Hong Kong, with [Company F] established as a place of business in Hong Kong and [the Taxpayer] resident in Hong Kong. Similarly, the Employment Ordinance is applicable to [the Taxpayer's] employment ...'
 - (f) 'During the period of [the Taxpayer's] employment with [Company F], [he] was supervised by and reported to [Mr I] on a daily basis. [Mr I] is the Vice President of [Company F] in Hong Kong and is also based in the Hong Kong Office of [Company F].'
 - (g) '[The Taxpayer] also reported to [Company F's] Global Leader in [Country Q] on a "dotted line" basis. This means that [the Taxpayer] was required to prepare a monthly report to the Global Leader in [Country Q] in relation to the progress of work in the Asia Pacific region. The Global Leader in [Country Q] did not have any involvement in [the Taxpayer's] supervision on a day to day basis.'

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- (h) '[Mr I] was responsible for granting or withholding permission for any leave requested by [the Taxpayer] during the Employment Period.'
 - (i) The Taxpayer's employment was terminated by an oral notice given by Mr I on 21 March 2007.
 - (j) The employment costs incurred in respect of the Taxpayer's employment were fully charged as expenses in the profit and loss account of the Hong Kong office of Company F. The Hong Kong office accounts are separate from the accounts of Company F in Country Q.
 - (k) The Taxpayer's remuneration was paid by bank transfer from Company F's bank account in Country S to his bank account maintained at Bank L in Hong Kong.
 - (l) Payment of the relocation allowances of \$15,000 and \$40,000, as stated in the Employment Letter and the Termination Letter, were made to the Taxpayer on 21 September 2006 and 12 June 2007 respectively.
 - (m) Pursuant to the terms of the Employment Letter, Company F made payments totalling \$189,545.03 to the Taxpayer as reimbursement of his Country R Tax liability in April 2007.
 - (n) The 'back pay, termination awards or gratuities' of \$15,000 reported in the Revised Notification [Fact (11) infra] was the 3-month housing allowance offered in the Termination Letter. The payment was made by Company F on the understanding that it would be difficult for the Taxpayer to relocate immediately while his daughter was still in school. The payment was made 'out of goodwill to tie him over until the summer holidays'.
 - (o) The 'Property Sale Commission' was reimbursement of applicable fees for the sale of property in Country R pursuant to the Employment Letter and Company F's Relocation Policy for homeowner. The amount claimed by the Taxpayer was CAD19,122, which was equivalent to HK\$130,870.97 at the exchange rate of CAD 1 to HK\$6.844. After deducting MPF contributions of \$4,000, Company F paid \$126,870.97 to the Taxpayer by bank transfer on 26 October 2006.
- (11) On 27 March 2008, Company F filed a revised notification ['the Revised Notification'] in respect of the Taxpayer showing, inter alia, the following

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particulars:

(a) Particulars of income:

Salary from 19/6/2006 to 21/3/2007	\$615,000
Leave pay & annual wage supplement [Fact (5)(c)]	64,424
Back pay, terminal awards & gratuities [Fact (10)(n)]	15,000
Other benefits and allowances	<u>418,723</u> ^[Note]
Total	<u>\$1,113,147</u>

Note: The breakdown of the 'other benefits and allowances' is as follows:

Housing allowance from 19/6/2006 to 21/3/2007	\$47,307.70
Relocation allowances [Fact (10)(l)]	55,000.00
Property sale commission [Fact (10)(o)]	126,870.97
Reimbursement of Country R tax [Fact (10)(m)]	<u>189,545.03</u>
	<u>\$418,723.70</u>

(b) Particulars of place of residence provided:

Nature	<u>Hotel room</u>	<u>Serviced apartment</u>
Period provided	19/6/06 – 24/6/06	24/6/06 – 23/8/06
Rent paid to landlord by employee	\$11,300	-
Rent refunded to employee	\$11,300	-
Rent paid to landlord by employer	-	\$34,500

- (12) According to the Taxpayer's arrival and departure records obtained from the Immigration Department, out of the 276 days during the period from 19 June 2006 to 21 March 2007, the Taxpayer was present in Hong Kong for 205 days.
- (13) The Assessor accepted that the 3-months' housing allowance could be excluded from assessment. However, she maintained the views that the Taxpayer held a Hong Kong employment with Company F. Moreover, as the

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contributions made by the Taxpayer to MPF were voluntary contributions, no deduction should be granted. The Assessor now considers that the Taxpayer's 2006/07 salaries tax assessment should be revised as follows:

Income per the Revised Notification [Fact (11)]	\$1,113,147
<u>Add</u> : Adjustment on property sale commission ^[1]	4,000
<u>Less</u> : 3-months' housing allowance [Facts (9)(k) & (10)(n)]	<u>(15,000)</u>
	1,102,147
<u>Add</u> : Value of residence provided ^[2]	<u>14,560</u>
Assessable Income	1,116,707
<u>Less</u> : Married person's allowance and child allowance [Fact (7)]	<u>(240,000)</u>
Net chargeable income	<u>\$876,707</u>
Tax payable thereon (after taken into account the tax relief measure)	<u>\$141,074</u>

Notes: 1. The taxable amount of property sale commission should be the gross figure of \$130,870.97 instead of the net figure of \$126,870.97, after deducting MPF contributions of \$4,000 [Fact (10)(o)].

2. As the place of residence provided to the Taxpayer during the period from 19 June 2006 to 24 June 2006 was a hotel room, the value of the place of residence provided should be calculated at 4% of his income for that period instead of 10%. The value of place of residence was calculated as follows:

$$(\$65,000 \text{ [salary]} + \$5,000 \text{ [housing]}) \times \left(\frac{6}{30} \times 4\% + \frac{60}{30} \times 10\% \right) \\ = \underline{\underline{\$14,560}}$$

11. The Taxpayer resided in Country R. He was approached by a search company and was given details of an opportunity to work here in Hong Kong. He advised the search company of his interest in the post in late December 2005 and entered into communications and correspondence with them in early 2006. A first interview took place by way of a telephone conference call in early 2006 and there then followed a further interview in City T between the Taxpayer and the various representatives of Company F. The interview went well and in turn, he entered into communications and correspondence with Ms H, the Human Resource Director of Company F. The Taxpayer told us of his expertise in developing packaging for consumer goods. His role was to assist and deal with the research and development representatives of the clients of Company F. One of the major clients who he had to deal with was Company M.

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12. On 21 March 2006, he entered into an employment agreement (see paragraph (3) of the Facts). He was to be based in Hong Kong, his salary was HK\$65,000 a month, there was a housing allowance of HK\$5,000 a month and an annual incentive bonus subject to achieving certain targets in the sum of HK\$100,000. There were the relevant Mandatory Provident Fund provisions along with one month's notice of termination. He was also entitled to various relocation benefits. He drew to our attention the fact that since his child was still at school in Country R, he was not able to immediately start work.

13. Therefore, he did not arrive in Hong Kong until 15 June 2006 and he was only able to commence employment once all the immigration formalities had been completed. He confirmed that he obtained the relevant work permit, he was sponsored by Company F and the contents of the relevant forms which were completed by his employer were correct. He was to be employed as a Regional Packaging Development Manager and his duties were to be performed at Address G.

14. His duties consisted of three main areas. The first area was dealing with the clients of Company F in Hong Kong and in particular, liaising with their research and development departments. In his view, one-third of his time was spent in dealing with Company M in Hong Kong to assist them with regard to their packaging and other relevant matters. The second area he dealt with was what he termed as cross-functional team projects throughout the Asia Pacific region. This involved him in dealing with various regional group teams. The third area of his job was considering setting up new research and development task forces for Company F.

15. He resided in Hong Kong with his wife and his child went to School P. He spent the majority of his time in Hong Kong. Out of a total number of 276 days and during the relevant period from 19 June 2006 to 21 March 2007, he was present in Hong Kong for 205 days.

16. The Taxpayer gave details as to the circumstances that led to his termination of employment with Company F. Before he received the termination letter dated 3 April 2007, there were discussions with Company F as to his future. He received a document entitled 'Agreement and General Release' dated 20 March 2007 which Company F asked him to sign. However, he was not prepared to do so. Various meetings and discussions took place but an agreement could not be reached. It was clear to him that Company F intended to give him notice of termination.

17. Since he did not sign the letter, he was told not to attend the office and on 3 April 2007, he received a letter from Company F setting out the terms of the termination of his employment and payment was made to him.

18. He took issue with Company F as to the various returns which were made to the IRD. On cross-examination, the Taxpayer confirmed that Company F was a company that was registered under Part XI of the Companies Ordinance. Company F was originally incorporated in Country Q and had a branch office here in Hong Kong.

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19. The Taxpayer also confirmed that he did not relocate back to Country R and did not incur any of the expenses in respect of the removal and relocation monies he received from Company F.

20. In answering the various questions from members of the Board, the Taxpayer confirmed that he spent a considerable amount of his time dealing with research and development issues from Hong Kong and was responsible for the North Asia region of which Hong Kong was part.

21. His salary was paid into his bank account in Hong Kong but the sums were remitted from Country S. He received his salary in Hong Kong dollars. In respect of various business trips he went on, all claims for expenses were sent to Country S for processing and in turn, he was reimbursed back in Hong Kong.

22. He emphasized to us that he was of the view that the Hong Kong office had little management by way of human resources, treasury, finance or information technology. However, he confirmed that his Manager, Mr I was based in Hong Kong and was in charge of operations.

23. The Taxpayer worked in research and development, below him was Mr N who dealt with strategic procurement. Mr O was part of the research and development team and there were three other persons who were involved in the administration, operations and other relevant matters.

24. When pushed, he conceded that the main reason for him being based in Hong Kong was to enable him to work closely with their major client, Company M. He tried to assert to us that no income was received or billed by Company F in Hong Kong, however, his attention was drawn to the various returns submitted to the Immigration Department in respect of the turnover of Company F over the past three years prior to his employment. However, he himself never charged clients for the services he rendered.

The relevant statutory provisions

25. Section 8(1) of the IRO is the basic charge for salaries tax. Section 8(1) provides as follows:

‘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; and*
- (b) any pension.’*

26. Section 8(1A)(a) of the IRO provides as follows:

‘For the purposes of this Part, income arising in or derived from Hong Kong from any employment-

(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;’

27. Section 9(1)(a) of the IRO provides as follows:

‘(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others,’

28. Section 12(1) of the IRO provides as follows:

‘In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person-

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income;

.....’

29. Section 68(4) of the IRO provides as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

The applicable legal principles

A. Whether the income arose in or was derived from employment in Hong Kong

30. The leading case of CIR v Goepfert [2 HKTC 210] clearly sets out the various principles applicable in respect of this matter. Macdougall J stated at page 238 as follows:

‘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.

.....

On the other hand, if a person, whose income does not fall within the basic charge to salaries tax under section 8(1), derives income from employment in respect of which he rendered services in Hong Kong, only that income derived from the services he actually rendered in Hong Kong is chargeable to salaries tax. Again, this is subject to the “60 days rule”.’

31. Maccougall J also set out the correct approach in identifying the source of income. He stated at page 237 as follows:

‘Specifically, it is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.

This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinize all evidence, documentary or otherwise, that is relevant to this matter.

.....

There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment.

It occurs to me that sometimes when reference is made to the so called “totality of facts” text it may be that what is meant is this very process.’

32. We have had the opportunity also to consider D79/97, IRBRD, vol 12, 461. There, the taxpayer was employed by an overseas company as the director of operation in Region B. He was based mainly in Hong Kong and was paid in Hong Kong currency. The facts were very similar to the case before us, the Board dismissed the taxpayer’s time apportionment claim.

The Board said as follows:

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7. *A careful reading of the aforesaid provisions [i.e. section 8(1) and 8(1A) of the Ordinance] suggests that the key element to be identified is the source of income as opposed to the location of employment. The statute does not speak of any employment of profit **in Hong Kong** but any income arising in or deriving from Hong Kong from **any** employment of profit.*
8. *Within this tax regime, a person is liable for salaries tax if he is employed in Hong Kong but renders some of his services out of Hong Kong. This is completely in line with common sense. Let us take the example of a foreign domestic maid who signed her contract of employment in say, Country C. The contract of employment was made overseas but she came to Hong Kong and worked full time in Hong Kong. She must be undoubtedly liable for salaries tax for everything she earned while working in Hong Kong.*
9. *Let us then take the example one step further; say she was required by her employer to accompany the employer's children occasionally to Country D. Can it be said that she earned part of her salary not in Hong Kong but in Country D? We think not. She was asked, as apart of her job in Hong Kong, to perform certain duties out of Hong Kong. The salary she earned as a result of that arrangement was earned in Hong Kong, or to use the language of the section: her income arose in or was derived from Hong Kong even though her services were not rendered in Hong Kong.*

.....

13. *It follows that the key question we have to ask ourselves is: where is the locality of the contract for payment of salary? In this respect, the locality of the actual payments for employment is highly relevant.'*

33. In D68/06, (2006-07) IRBRD, vol 21, 1194, the Board in dismissing the taxpayer's appeal said as follows:

- '30. *We also find that there is no dispute that Company A – Hong Kong had its place of residence here in Hong Kong and its place of business in this jurisdiction. It is also clear that all remuneration of the Taxpayer's salary and bonuses was paid by Company A – Hong Kong in Hong Kong dollars. It is also clear that housing allowances were paid in Hong Kong and that all of these were consistent with the relevant declarations set out in the Company A – Hong Kong's returns filed for the Taxpayer. It is also clear*

that the Taxpayer's duties and responsibilities were for him to be based here in Hong Kong although as we have previously said he had to travel extensively around the region.

31.

32. *Again, we rely on D79/97 where regard must be had to how his remuneration was paid. Here, it is quite clear that all remuneration was paid in Hong Kong and in Hong Kong dollars. The Taxpayer tried to suggest that this was only paid as a matter of convenience. Again, we reject this particular submission.'*

B. The correct quantum of the Taxpayer's chargeable income

34. The issue as to whether relocation allowance paid to an employee to cover the expenses incurred on behalf of himself and his family to come to Hong Kong should be chargeable to salaries tax has been considered in D19/92, IRBRD, vol 7, 156.

35. In D19/92, IRBRD, vol 7, 156, the taxpayer was paid a lump sum payment at the commencement of his employment which was negotiated and calculated with reference to what the taxpayer thought would be the costs of moving himself and his family from the UK to Hong Kong. The Board in dealing with this matter stated at page 163 as follows:

'The starting point in any salaries tax matter must be section 8 of [the Ordinance]. Sub-section (1) states that "salaries tax shall ... be charged ... on every person in respect of his income ... from ... any office or employment of profit." These are the words which impose the charge of salaries tax. The question can then be simply stated. We must decide whether or not the lump sum payment was part of the income of the Taxpayer from his employment with the HK employer.'

36. The Board went on to state at pages 163 and 164 that:

'... Allowance means a sum of money allotted or granted for a particular purpose such as expenses and a perquisite is a little more complex meaning an incidental emolument, fee, or profit over and above fixed income, salary, or wages or alternatively any bonus or fringe benefit granted to an employee. On the facts which we have found the lump sum payment is closer in meaning to an allowance ...

There is nothing in section 8 or 9 of [the Ordinance] which limit taxable payments to remuneration for services rendered or to be rendered. Section 8

relates to income from a source namely the employment. This lump sum payment was part and parcel of the employment of the Taxpayer with the HK employer. It arose directly from the employment which the HK employer offered to the Taxpayer and which the Taxpayer accepted. Accordingly it is assessable to salaries tax.'

The Taxpayer's arguments

37. The Taxpayer in his notice of appeal and in respect of the submissions before us put to us the following arguments:

- (a) He submitted that his employment with Company F was located outside Hong Kong because:
 - (1) Company F was primarily located in Country S which managed the office of individual markets including Hong Kong. He asserted that the Hong Kong office had no involvement in his hiring process and his employment contract was entered into outside Hong Kong.
 - (2) He asserted that although he performed much of his work in Hong Kong, his position in Hong Kong was merely a matter of convenience since he was performing work for entities located out of Hong Kong from within Hong Kong.
 - (3) Again, he emphasized that payment of his remuneration was made outside Hong Kong although this was transferred into his bank account in Hong Kong in Hong Kong dollars by way of convenience.
 - (4) He drew to our attention that his exemption from Mandatory Provident Fund scheme is an evidence of his non-Hong Kong employment status.

38. With regard to the Taxpayer's position in respect of the quantum chargeable income, he made the following submissions:

- (a) With regard to his relocation allowance to Country R, the reimbursement was for estimated expenses for returning to Country R and therefore it is not income.
- (b) The reimbursement of Country R tax was received after termination and it should be deemed as compensation and should not be taxable.
- (c) The payment of various expenses incurred on relocation and disposal of his

property in Country R were compensation of expenses or losses due to taking up his employment with Company F and as such, they were not incurred in employment but for the employment purposes and therefore, they were not private and domestic in nature.

Our analysis

A. Whether the income arose in or was derived from employment in Hong Kong

39. We have already referred to the various authorities and it is clear that the locality of employment is a question of fact and the correct approach is to consider the ‘totality of facts’ test in determining this particular issue.

40. We accept Miss Lau’s submissions that an international company doing business in different parts of the world will usually set up offices in different places to take care of part of its business. We accept that the residence and location of central management of the head office are not necessarily relevant in the consideration of the source of income. We refer to D79/97 which we have already referred to above.

41. However, our task is to review and consider all relevant factors. The Taxpayer has not produced any evidence to show how payment of his remuneration was made outside Hong Kong and then transferred to his bank account in Hong Kong. In our view, it is clear that the Taxpayer’s income arose in or was derived from Hong Kong through his employment with Company F. It is clear beyond any doubt that Hong Kong was the place where the income actually really came to the Taxpayer.

42. The Taxpayer’s employer was Company F. The company was incorporated in Country Q but it has been registered as an overseas company under Part XI of the Companies Ordinance and has since 1995 maintained its place of business in Hong Kong.

43. Company F through its Hong Kong branch did carry on business activities in Hong Kong, namely to provide purchasing services, advice and assistance to a major international fast food chain, Company M.

44. Company F offered to employ the Taxpayer as its Regional Packaging Development Manager. We find that the Taxpayer was employed to work in Hong Kong because he was needed to work very closely with the research and development team of Company M which in turn was based in Hong Kong.

45. Company F also confirmed that the employment contract of the Taxpayer was governed by Hong Kong law and in turn, they also confirmed that it had a real and substantial connection with Hong Kong. It was clear that Company F considered and accepted the Taxpayer

as an employee of its Hong Kong office. In Company F's answers to the IRD's enquiries, they confirmed that the Taxpayer's salary was paid into the Taxpayer's bank account maintained with Bank L in Hong Kong.

46. It is also clear from the evidence that the Taxpayer's immediate supervisor was Mr I who he directly reported to. It was Mr I who dealt with all the relevant forms with the Director of Immigration with regard to the Taxpayer's application for a work permit.

47. Therefore, having carefully considered the evidence and the submissions of the parties and having looked at the 'totality of facts', we have no hesitation in coming to a conclusion and having regard to the above findings that the Taxpayer's income should be fully assessed under section 8(1)(a) of the IRO. In our view, Hong Kong was the place where the income was derived from. Having regard to the 'totality of facts', it is unequivocal that this was the true position.

B. The correct quantum of the Taxpayer's chargeable income

48. We take the view that the submissions put forward by the Taxpayer are not sustainable. Whether a sum is income from employment is a question of fact. We accept the submissions of Miss Lau that for a sum to be compensation, it must be shown that there is a loss or surrender of rights on the part of the employee and a legal liability on the part of the employer to pay compensation for the loss of such rights.

49. In respect of the one-time allowance for the purchase of household necessities in Hong Kong, the Country R tax reimbursement and the property sale commission reimbursement, these were all provided for in the Taxpayer's employment contract. We accept that such sums were part and parcel of the Taxpayer's employment with Company F. We take the view that there can be no doubt that they arose directly from employment with Company F and Company F offered to the Taxpayer a sum which he accepted. Hence, this income is clearly taxable.

50. In respect of the relocation expenses, again, this arose directly from his employment contract and as such it is an allowance and therefore should be chargeable to salaries tax. The argument which the Taxpayer put forward to us in respect of the Country R tax reimbursement in that he received a reimbursement once his employment terminated cannot be correct. It is clear that this payment was money allotted or granted for a particular purpose and should be treated as an allowance chargeable to salaries tax. The mere fact that it was paid after the Taxpayer left his employment is neither here nor there and does not alter its nature.

51. The Taxpayer did not put forward any evidence that he had paid any of the relocation expenses out of his own pocket in respect of his family's move to Hong Kong. There is also no evidence to show that the Taxpayer was relocated back to Country R and indeed, in evidence, he confirmed that this was not the case.

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52. Therefore, we accept the submissions put forward by Miss Lau that there is no evidence to show that the Taxpayer had incurred any of the relocation expenses. In any event, we also accept the submission that even if the Taxpayer had incurred those relocation expenses, they were not incurred by the Taxpayer in the performance of his duties under his employment and as such, they were not deductible under section 12(1)(a) of the IRO.

53. Therefore, having considered all matters, we have no hesitation in upholding the Determination dated 1 September 2008 and in turn, dismiss the Taxpayer's appeal.

54. Finally, we take this opportunity of thanking the parties for their assistance in respect of this matter.