CACV 235/2021
[2022] HKCA 710

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 235 OF 2021
(ON APPEAL FROM HCIA NO 2 OF 2020)

BETWEEN

THE COMMISSIONER OF INLAND REVENUE — Applicant

and

LO WA MING PATRICK — Respondent

Before: Hon Yuen, Au and G Lam JJA in Court
Date of Hearing: 12 May 2022
Date of Judgment: 17 May 2022

J U D G M E N T

Hon G Lam JA (giving the Judgment of the Court):

Introduction

1. Section 8(1A)(c) of the Inland Revenue Ordinance (Cap 112) ("**Ordinance**"), enacted to give a measure of relief from double taxation, "excludes income derived by a person from services rendered by him in any territory outside Hong Kong" from chargeability to salaries tax under certain specified conditions. Where a taxpayer has rendered services under a Hong Kong employment both within and outside Hong Kong during a relevant period, a question may arise, in the absence of any contractual allocation, how his income should be apportioned for the purpose of this exclusion. The issue in this appeal is the proper approach for the apportionment exercise.

Background

2. The relevant facts as found by the Board of Review ("**Board**") are as follows. The relevant year of assessment is 2014/15. Mr Lo, the taxpayer, was an employee of CLP Power Hong Kong Ltd. In the 8-month period between August 2014 and March 2015 (inclusive), he was seconded under a series of secondments to work as a deputy maintenance superintendent for Guangdong Pumped Storage Co Ltd ("**GPSC**") in Conghua, Guangdong Province, although his home employment continued to be with CLP Power Hong Kong Ltd. During the secondment period, Mr Lo returned to Hong Kong occasionally to perform services, such as attending meetings, reporting to management, and

supporting work, which formed part of his work for GPSC. Under the terms of his employment and secondment, Mr Lo was entitled to paid rest days on Saturdays, Sundays and Mainland public holidays, and to annual leave, which he spent visiting Hong Kong for his own holiday purposes. We shall refer to such paid days of rest or leave generally as "**paid leave days**" and to an employee's salary apportioned to those days as "**leave pay**". There is no dispute that Mr Lo's entire salary for the period of secondment was chargeable to individual income tax in the Mainland and that he had paid such tax; in other words, the conditions in section 8(1A)(c)(i) and (ii) were satisfied.

3. Following an initial salaries tax assessment and subsequent revisions by an assessor, Mr Lo raised an objection to the effect that the whole of his income during the period of secondment should be exempt from salaries tax in Hong Kong. Determining the objection against Mr Lo, the Deputy Commissioner of Inland Revenue took the view that his income was properly assessed on the basis of the "Day in, Day out Formula". Counting as a full day in the Mainland where Mr Lo departed Hong Kong before 10 am and/or arrived in Hong Kong after 4 pm, and as a half day in the Mainland where he departed or arrived in Hong Kong between 10 am and 4 pm, the Deputy Commissioner calculated the number of days Mr Lo had spent in the Mainland, being a total of 130 days in the year, of which 124 days fell within the secondment period. Using the Day in, Day out Formula, the Deputy Commissioner applied the ratio of the number of days spent in the Mainland in each calendar month to the number of days in that month to determine the proportion of Mr Lo's monthly salaries exempted under section 8(1A)(c).

4. On appeal by Mr Lo from that determination, the Board in its decision dated 11 May 2020 ("**Board Decision**") rejected the Day in, Day out Formula, and adopted a different formula for apportioning Mr Lo's income for the purposes of section 8(1A)(c) ("**Board's Formula**"). The Board started with the days on which Mr Lo had rendered services in Hong Kong in each month, and took the remaining days in that month as the days on which Mr Lo had rendered services in the Mainland (arriving at a total of 208 days for the year of assessment). The proportion that those days in each month bore to the number of days in the month was then taken as the proportion of income exempted in respect of that month.

5. With leave granted by the Court of First Instance under section 69 of the Ordinance, the Commissioner of Inland Revenue ("**CIR**") appealed from the Board Decision on two points of law, namely:

(1) the Board erred in law by apportioning income to be exempted under section 8(1A)(c) using the Board's Formula, which is inconsistent with the overarching provision for assessment of salaries tax under section 8(1)(a); and

(2) the CIR's Day in, Day out Formula as an apportionment method for calculating exempted income is not inconsistent with or in contradiction to and in any event does not lead to an arbitrary or unjust result under sections 8(1)(a) and 8(1A)(c).

6. In his Judgment dated 14 April 2021 ("**Judgment**"), [1] K Yeung J, responding to both points of law in the negative, dismissed the appeal with no order as to costs.

7. The CIR now appeals to this court. Ms Elizabeth Cheung and Ms Joycelyn Ho, who did not appear below, have appeared in this appeal on behalf of the CIR. Mr Lo did not provide written submissions, but made brief oral submissions before us. As Mr Lo is not legally represented and the decision in this appeal may have wider ramifications beyond the immediate parties, Mr Stewart Wong SC and Mr John C K Chan were appointed *amici curiae* ("***Amici***") and provided written and oral submissions. This court is indebted to counsel for their assistance.

Relevant statutory provisions

8. Section 8 of the Ordinance relevantly provided at the material times as follows:[2]

> "**8. Charge of salaries tax**
>
> (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; and
>
> (b) any pension.
>
> (1A) 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;
>
> (b) subject to subsection (1AB), excludes income derived from services rendered by a person who—

1 [2021] HKCFI 916; [2021] 2 HKLRD 522.

2 Section 8(1A)(c) has since been amended by the Inland Revenue (Amendment) (No 6) Ordinance 2018 which also amended section 50. These amendments are concerned with double taxation arrangements, and apply only to the year of assessment 2018/19 and later. There exist such arrangements between Hong Kong and the Mainland: see Specification of Arrangements (The Mainland of China) (Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income) Order (Cap 112AY).

(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and

(ii) renders outside Hong Kong all the services in connection with his employment; and

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where—

(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and

(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.

……

(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.

……”

The need for apportionment

9. It is common ground in this appeal that the source of Mr Lo's employment in question is Hong Kong and the whole of the corresponding income therefore falls within the basic charge to salaries tax under section 8(1)(a), subject to any applicable exclusions. The exclusion in section 8(1A)(b)(ii), read with section 8(1B), has no application because Mr Lo rendered services in Hong Kong during visits exceeding a total of 60 days in the relevant year of assessment. Mr Lo may, however, rely on the exclusion in section 8(1A)(c) in respect of such part of his income as was derived from services rendered in the Mainland, since the two conditions in section 8(1A)(c)(i) and (ii) are satisfied. There is no dispute that the derivation of income should be assessed by reference to the taxpayer's contractual right to emoluments for work performed: *Varnam v Deeble* [1985] STC 308, 312. In the absence of any contractual allocation, an exercise of apportionment becomes necessary.

10. It is not in dispute that an apportionment by reference to time is the appropriate approach, on the basis that the annual or monthly salary accrues from day to

day and is apportionable accordingly. It has the advantage of practicality, objectivity and certainty over apportioning income based on the nature, importance, complexity, difficulty, or value of the taxpayer's work which would call for *ex post facto* value judgments based on facts not known to the Revenue: *Varnam v Deeble*, 312.

11. Four different methods of time-based apportionment have been canvassed in these proceedings:

(1) The days on which the taxpayer *worked outside Hong Kong* are identified. Only the income apportionable to those days is regarded as income derived from services rendered outside Hong Kong and excluded. This is essentially the CIR's primary position as advanced by counsel in this court.

(2) The days on which the taxpayer *worked in Hong Kong* are identified. The income apportionable to all the *other* days in the period in question is regarded as income derived from services rendered outside Hong Kong and excluded. This is essentially the Board's Formula.

(3) The days on which the taxpayer *spent outside Hong Kong*, *whether working days or not*, are identified. The income apportionable to these days is regarded as income derived from services rendered outside Hong Kong and excluded. This is the Day in, Day out Formula.

(4) The days on which the taxpayer *worked outside Hong Kong* are identified, *together with the paid leave days attributable thereto*. The income apportionable to these days in aggregate is regarded as income derived from services rendered outside Hong Kong and excluded. This is an alternative formula advanced by CIR on this appeal and supported by the *Amici*.

12. We shall discuss these approaches below in turn.

The CIR's primary position

13. Counsel for the CIR submit that Mr Lo's entitlement to the paid leave days was not attributable to any particular services rendered by him in a particular place or a particular period of time. Relying on *Perro v Mansworth* [2001] STC (SCD) 179 and the Board's decision in *D 106/89*, they submit that Mr Lo's leave pay is in the nature of an emolument attributable only to his Hong Kong-sourced employment package and is not apportionable as it is not payment made in respect of duties performed in a particular time period or a particular tax jurisdiction.

14. Quite apart from the fact that the CIR did not advance this contention in the Board or before the Judge, as a matter of principle we do not agree with it. As the *Amici* submit, "income from any office or employment" for the purposes of the basic charge under

section 8(1)(a) includes "leave pay": see section 9(1)(a). There is no reason, when it comes to the exclusion under section 8(1A)(c), to think that income derived from services rendered outside Hong Kong may not include any leave pay that is a reward for, and referable and attributable to, such services.

15. The phrase "including leave pay attributable to such services" which is found in section 8(1A)(a) shows that the Legislature considers that leave pay may conceptually be attributable to services rendered *in* Hong Kong even where it is part of a non-Hong Kong employment package chargeable under the "extended charge" provision in section 8(1A)(a) (*Commissioner of Inland Revenue v Goepfert* [1987] HKLR 888, 901). We note that the same phrase does not appear in section 8(1A)(c), but it would in our view be to put an excessive significance on its omission to infer that the Legislature thereby intended the exact opposite of the concept stated in section 8(1A)(a) or, in other words, that "income derived from services rendered outside Hong Kong" must not include any leave pay attributable to such services. Such a construction does not seem to us to be required by the purpose of section 8(1A)(c) which is to give relief from double taxation. There is no reason in principle why leave pay on which tax is charged and paid in the other jurisdiction should necessarily not be part of the exclusion in Hong Kong. It is notable that the phrase is likewise not found in section 8(1A)(b), but it would be surprising if a taxpayer who falls within that provision (i.e. who has rendered all his services outside Hong Kong and whose income derived from those services is exempt from tax) would nevertheless have to pay Hong Kong tax on his leave pay.

16. *Perro v Mansworth* and *D 106/89* both concern reimbursement of local tax paid by an employee. The local tax was payable by reason of the services rendered within the jurisdiction. It was held that the reimbursement paid by the employer in respect of such local tax was referable solely to services rendered locally and therefore wholly taxable in the jurisdiction without apportionment. In our view these two cases lend no support to the CIR's primary position.

The Board's Formula

17. In the Board Decision, the Board stated that the relevant question is whether the taxpayer rendered any services *in* Hong Kong and derived income from such service.[3] Its approach is based on the number of days on which Mr Lo rendered services in Hong Kong; it deducts those days from the total number of days in the period, and adopts the difference as the number of days on which he rendered services in the Mainland. With respect, this approaches the matter from the wrong end. Section 8(1A)(c) is an exclusionary provision that directs attention to income derived from services rendered *outside* Hong Kong. The Board's Formula focuses on the days worked *in* Hong Kong and the income apportioned to those days. As the Judge observed, the Board's Formula was a "reverse" method requiring one to work "backwards".[4] This risks confusing the statutory provision as an inclusionary charge instead of an exclusion. In our judgment, the method is wrong in principle because it automatically characterises the income apportionable to all

3 Board Decision, §28.
4 Judgment, §§48(c)(iii) and 51(c).

the days in the period in question, including holidays, other than the days worked in Hong Kong, as income derived from services rendered outside Hong Kong. Insofar as this results in excluding leave pay attributable to services rendered in Hong Kong, it is also contrary to section 8(1A)(a) which expressly provides that such income is taxable. If the Board considered that all the leave pay should on the facts be attributed to services rendered outside Hong Kong, it did not say so in its decision; nor is there any factual basis for that view.

18. The Board drew support for its approach from the decision of the Board (differently constituted) in *D 24/17*. In that case the taxpayer was required by her Hong Kong employment to work in Shanghai. She was in Hong Kong for 82 days during the relevant period, but out of those 82 days she only did work on 7 occasions all of which was of a minor nature such as having lunch with clients and sitting in meetings. The Revenue applied the Day in, Day out Formula to the 82 days in Hong Kong. Disagreeing with that approach, the Board said in its decision there:

> "81. … Instead of applying an arbitrary 'day in, day out' formula, the Assessor should have investigated requirement (i).[5] Instead of asking how many days the Appellant was physically in Hong Kong, the pertinent question should be whether the Appellant rendered any services in Hong Kong and derived income from such service."

> In that case the Board concluded that the work in Hong Kong was "minimal and peripheral and had no impact on her salary and bonus in any way".[6] The Board in effect found that no income was derived from the services rendered in Hong Kong at all, and did not therefore have to deal with any apportionment. Its concern expressed in the passage quoted above was that the assessor had simply looked at days of *physical presence* in Hong Kong, when he should have looked further to see whether the taxpayer rendered any services in Hong Kong on those days and derived income therefrom. The Board in the present case erred in relying on that passage in formulating its approach to the question of apportionment.

19. The Judge directed himself to the correct inquiry: whether the part of Mr Lo's income apportioned to weekends and Mainland holidays was income "derived by [him] from services rendered by him in any territory outside Hong Kong". He answered it affirmatively, saying:

> "Even though the Respondent did not actually render any services during those days, those days are his rest days for the work he rendered, and the apportioned income should as a matter of principle be regarded as having

[5] This is the requirement "that the income was derived from services overseas", referred to by the Board earlier at §77 of its decision in *D 24/17*.

[6] Decision of the Board in D 24/17, §84.

been derived from the services the Respondent otherwise provided in the Mainland during working days".[7]

Accordingly, the Judge considered that in the present case, Mr Lo's leave pay should qualify for exclusion from Hong Kong tax irrespective of where he was on those days.[8] In the result the Judge therefore dismissed the CIR's appeal, though he was careful to say that it is a question of fact and evidence as to what part of a taxpayer's income satisfies the requirements of section 8(1A)(c) and that the Board's Formula may not necessarily be appropriate in every case.[9]

20. In our judgment, the Judge is correct in saying that although Mr Lo did not actually work on the paid leave days, he was paid on those days because of the services he rendered on working days. In so far as the Judge considered that the paid leave days were "earned" *only* by the services provided *in the Mainland*, however, we disagree with him. In a case where the services rendered in Hong Kong are substantial (in contrast to *D 24/17*), there is no reason in principle why the paid leave days cannot be regarded as in part attributable to the Hong Kong working days. There is no factual basis in the present case for the Judge to conclude that *all* the paid leave days were granted to Mr Lo on account *only* of the services he rendered in the Mainland.

21. For these reasons, in relation to the first point of law, we hold that the Board did err in law by apportioning the relevant income on the basis of the Board's Formula.

The Day in, Day out Formula

22. Under the Day in, Day out Formula, the number of days the taxpayer spent physically within and outside Hong Kong respectively are used as the basis of apportionment. It has been applied by the Revenue in practice for apportionment under section 8(1A)(c), but it appears not to have been considered in any depth by the Board before its decision in *D 24/17*. In that case, although the need for apportionment did not eventually arise, the Board expressed the view that none of the requirements for exclusion under section 8(1A)(c) has any correlation with the number of days the taxpayer may fortuitously happen to be in or out of Hong Kong, and regarded the Day in, Day out Formula as "arbitrary".[10]

23. Since the Board in the present case focused on the question of whether the taxpayer rendered any services in Hong Kong and derived income from such service, it also rejected the Day in, Day out Formula because it would include all the weekends and holidays that Mr Lo spent in Hong Kong, which the Board considered incorrect.[11]

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7 Judgment, §45(g)(v).
8 Judgment, §48(f).
9 Judgment, §§48(b) & (e) and 51(c).
10 See the Board's decision in *D 24/17*, at §§79(4), 80, 81.
11 Board Decision, §33.

24. The Judge also rejected the Day in, Day out Formula. In his view, the language of section 8(1A)(c) does not justify a test based only on presence in or out of Hong Kong. Presence outside Hong Kong is not statutorily linked to the performance of overseas duties. Application of that formula would lead to anomalies that depend on where the taxpayer decided to spend his weekends and holidays.[12] He concluded that the formula is inconsistent with the statutory provisions and leads to arbitrary or unjust results.

25. In support of the Day in, Day out Formula, counsel for the CIR pray in aid the decision in *Goepfert* in which apportionment on a "time in time out basis"[13] was applied albeit in a different context. In our view that case provides no support for adopting the Day in, Day out Formula for the purposes of section 8(1A)(c). *Goepfert* was a case where the taxpayer had a non-Hong Kong employment but performed much of his work in Hong Kong, although for 41 days in the relevant year he had rendered his services outside Hong Kong. It was held that he was liable for salaries tax under the extended charge in section 8(1A)(a) in relation to his income derived from the services he rendered in Hong Kong. The income from the 41 days' overseas services was not chargeable to tax and had to be excluded. For this purpose the apportionment was done on a "time in time out" basis. The case was therefore concerned with what income falls within the extended charge in section 8(1A)(a) in the case of a non-Hong Kong employment, not with what is excluded by section 8(1A)(c) from the basic charge in the case of a Hong Kong employment. The method of apportionment appeared to have been accepted by the Board,[14] and there was no real discussion of it in the appeal on case stated. Furthermore, an examination of the facts shows that apart from the 41 days of overseas work, the taxpayer was also out of Hong Kong during some overseas leave,[15] but it appears that none of those leave days was excluded from the extended charge. Thus although the method was referred to as the "time in time out" basis, the apportionment was actually *not* done on the Day in, Day out Formula as advanced by the CIR in the present case which depends solely on physical location; rather, it was done on the basis that the (presumably paid) overseas leave was wholly attributable to the services rendered in Hong Kong. It does not appear from the judgment that the taxpayer had argued that part of the paid leave was attributable to the 41 days of overseas services.

26. Reference has been made in argument to what was said by the Financial Secretary during the second reading of the Inland Revenue (Amendment) (No. 2) Bill 1987 pursuant to which section 8(1A)(c) was enacted.[16] On one reading it shows that the administration considered that by that provision, it was introducing a time-based apportionment, but beyond that no light is shed on how such apportionment should be conducted. In our view, this material, even if admissible, provides no support for the Day in, Day out Formula.

12 Judgment, §§45(d)-(f) & (h), 48(a), 50.
13 at p 903B-C.
14 See pp 896D-E & 897B.
15 See p 891D.
16 *Legislative Council proceedings*, 14 October 1987, pp 74-76.

27. The underlying assumption in using the Day in, Day out Formula for the purpose of section 8(1A)(c) – that mere presence in Hong Kong on a particular day means that income for that day could not be excluded, and absence from Hong Kong means that day's income is derived from services rendered overseas and is therefore to be excluded – seems to us to have little logic in it and may very often be invalid. The formula can easily give rise to anomalies and injustice. In the present case, the formula means that Mr Lo would have to pay Hong Kong tax on all his leave pay because he spent his paid leave days in Hong Kong, but a similar employee who chose to spend his paid leave days outside Hong Kong (either in the Mainland or elsewhere) could claim exclusion of his leave pay. This seems to us manifestly unfair.

28. Counsel for the CIR submit that since Mr Lo spent all his holidays in Hong Kong, the days on which he was outside Hong Kong actually correlate to the days he spent rendering services in the Mainland, and that there was therefore no arbitrary or unjust result from the application of the Day in, Day out Formula. This however does not begin to explain why his leave pay should *all* be attributed to his working days in the Mainland and *not* to his working days in Hong Kong at all, as discussed in §§13-16 above.

29. Reliance has been placed on the English cases of *Varnam v Deeble*, *Coxon v Williams* [1988] STC 593, and *Leonard v Blanchard* [1993] STC 259 for support of the Day in, Day out Formula. We agree with, and shall not repeat, the Judge's careful analysis as to why those authorities, decided on the basis of materially different legislation, do not assist in answering the question at hand.[17]

30. Counsel for the CIR also submit that under the Day in, Day out Formula the days spent by the taxpayer out of Hong Kong are used as a "proxy" for the days on which he rendered services outside Hong Kong. This is an objectively verifiable parameter and readily ascertainable through border movement records. The anomalies and injustice that may arise in hypothetical situations would only result if the formula was applied without any modification, but this "rough and ready practical method" is not set in concrete and its application can be adapted or displaced outright depending on the facts of the case. It merely creates a "rebuttable presumption" that can be displaced by evidence adduced by the taxpayer.

31. We do not think this is a complete answer because it does not inform either the assessor or the taxpayer of what ultimately is the correct approach to apportionment, and what facts and evidence may be relevant for rebutting the presumption. There may be cases where the application of the Day in, Day out Formula will, fortuitously, produce the correct result, in which case there can be no valid objection to the assessment. We appreciate a simple method is desirable, not least for facilitating the efficient discharge of the Revenue's functions, but it is in our view questionable whether a proxy formula whose make-up is not closely based on the statutory criteria and which can easily lead to anomalies and unjust results should be adopted simply because it is easy to apply, especially if there is a preferable, practical alternative.

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[17] See Judgment, §§26-28, 42-45.

32. For these reasons, in relation to the second point of law, we consider that the Day in, Day out Formula is not supported by section 8(1A)(c) and its application may well lead to arbitrary or unjust results.

The CIR's alternative formula

33. Section 8(1A)(c) refers to income derived by a person from services rendered by him outside Hong Kong. Subject to contractual provisions, there is no dispute that income for working days worked outside Hong Kong satisfies this condition and that income for working days worked in Hong Kong does not. The dispute that has arisen relates to leave pay. As mentioned in §§14-15 above, although the employee does not render services on leave days, the pay on leave days is in reality a reward to the employee for the services which he does render on the other days. While salaries are apportionable from day to day, the employee is remunerated for the service he provides, not for his rest. There is therefore nothing incongruous with the statutory language to regard leave pay also as income "derived" from services rendered, particularly from services rendered to which the leave concerned is attributable. It is a question of fact in each case to what services the leave pay in question is attributable, or, in other words, from what services rendered the leave pay in question is derived. Where income accrues on leave days that are attributable to services rendered outside Hong Kong, we see no reason why such leave pay should not fall within section 8(1A)(c) and be excluded if the other conditions are also satisfied.

34. With this in mind, the approach for apportionment that commends itself to us, and which we find to be consistent with the wording of section 8(1A)(c), is the following formula put forward by the CIR on this appeal as an alternative method and supported by the *Amici*:

> Excluded income = Income × [Outside-Hong Kong working days[18] + Leave days (including rest days and holidays) attributable to services rendered outside Hong Kong] ÷ Calendar days

35. As mentioned above, it is a question of fact in each case what leave days are attributable to services rendered outside Hong Kong, just as it is a question of fact more generally as to what income was derived from services rendered outside Hong Kong. The provisions of the employment or secondment agreement may be relevant. In the absence of such provisions, the possibility of prorating has been canvassed in argument. Thus, for example, where in the relevant year the taxpayer had 200 working days (of which 80 were spent rendering services in Hong Kong and 120 rendering services outside Hong Kong) and 165 leave days (including weekends, public holidays, annual leave and other paid leave), the leave days prorated to services rendered outside Hong Kong may be calculated as 165 × 120 ÷ 200 = 99 days. The income that may qualify for exclusion under section 8(1A)(c) may be presumptively calculated as: annual income × (120 + 99) ÷ 365 = 60% of annual

[18] In his formulation of this alternative method, the CIR has used "days outside Hong Kong excluding rest days and leave days" but we see no difference in substance between that and "outside-Hong Kong working days".

income. This is arithmetically equivalent to prorating by reference only to working days, where the proportion would be 120 ÷ 200 which is also 60%. We can see the attraction of simplicity in a prorating approach compared to a detailed investigation of how each paid leave day accrued to the taxpayer, but it is unnecessary for this court to make any decision on these approximating techniques.

Conclusion and disposition

36. For the above reasons, the appeal is allowed. In relation to the first point of law, our view is that the Board did err in law by apportioning the relevant income on the basis of the Board's Formula. In relation to the second point of law, our view is that the Day in, Day out Formula is not supported by the provision in section 8(1A)(c) and its application may well lead to arbitrary or unjust results. The matter is remitted back to the Board for decision based on the approach set out in §34 above. We make a costs order nisi (i.e. on a provisional basis) that there be no order as to costs here and below.

(Maria Yuen) Justice of Appeal	(Thomas Au) Justice of Appeal	(Godfrey Lam) Justice of Appeal

Ms Elizabeth Cheung, instructed by, and Ms Joycelyn Ho, of the Department of Justice, for the Applicant (Appellant)

The Respondent, unrepresented, acting in person

Mr Stewart Wong SC and Mr John C K Chan, *amici curiae*