

**Case No. D11/23**

**Salaries tax** – whether the taxpayer is liable to pay salaries tax – ‘60-day rule’ under section 8(1B) of the Inland Revenue Ordinance – whether a transfer passenger arrives at Hong Kong Airport is in the territory of Hong Kong – whether the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or made subject to duration or purpose as contended – onus of proof

Panel: Wu Pui Ching Teresa (chairman), Chan Wing Kit Winnie and Chung Wai Yin Christine.

Date of hearing: 1 November 2022.

Date of decision: 20 September 2023.

The Company is a private company incorporated in Hong Kong. The taxpayer was employed by the Company. The taxpayer rendered services to the Company in Hong Kong during the period of 1 April 2017 and 31 March 2018. The taxpayer objected to the salaries tax assessment for the year of assessment 2017/18, claiming that her income should be exempted from salaries tax. The taxpayer claimed that she had stayed in Hong Kong for 56 days during the said year of assessment, after counting a partial day as a full day. According to the Immigration Department, the taxpayer was present in Hong Kong for a total of 63 days during the said year of assessment. Therefore the Assessor did not accept that the taxpayer could be exempted from salaries tax.

The taxpayer objected on the ground that she did not visit Hong Kong for more than 60 days in the said year of assessment. The Taxpayer’s case in advancing the Appeal is that there are a total of 7 days of transit which should not be counted as days of visit in Hong Kong under section 8(1B) of the Ordinance. Next, the taxpayer argued that the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or subject to duration or purpose as contended by the Taxpayer.

The single pertinent issue in the Appeal to be determined by the Board is whether the Taxpayer is liable to pay salaries tax for her income obtained from the employment with the Company for the year of assessment 2017/18.

**Held:**

1. The fact that the Taxpayer did not leave Hong Kong Airport or passed through the immigration controls on those 7 days of transit simply would not advance her appeal. Under the Interpretation and General Clauses Ordinance (Chapter 1), Hong Kong Airport clearly falls within the ambit of ‘Hong Kong’. In other words, once a transfer passenger arrives at Hong Kong Airport he or she is in the territory of Hong Kong. Therefore, even

though the Taxpayer merely stayed in the transit area while waiting for her connecting flight and did not pass through the immigration controls, she was still considered to be present in Hong Kong on those 7 days of transit in question.

2. The Board does not accept that the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or subject to duration or purpose as contended by the Taxpayer. It is indisputable that when the Taxpayer transited through Hong Kong Airport, she was present and stayed in Hong Kong for changing flights. The Taxpayer fails to satisfy the Board as to why her presence and stay in Hong Kong Airport should not be considered as ‘visits’ in Hong Kong. Specifically, the Taxpayer fails to show to the Board’s satisfaction that the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or made subject to duration or purpose as contended (D40/07, (2007-08) IRBRD, vol 22, 983, D19/16, (2017-18) IRBRD, vol 32, 183, D39/04, IRBRD, vol 19, 319 and D37/01, IRBRD, vol 16, 326 considered; D10/20, (2021-22) IRBRD, vol 36, 17 followed).
3. It is well-established that the context and purpose will, in the vast majority of cases, be determinative of the meaning of the words sought to be construed (Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45 and Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR 351 followed).
4. The Taxpayer bears the onus of proving that the Salaries Tax Assessment under appeal is excessive or incorrect under section 68(4) of the Ordinance (Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433 followed)

**Appeal dismissed and costs order in the amount of \$10,000 imposed.**

Cases referred to:

D40/07, (2007-08) IRBRD, vol 22, 983  
D19/16, (2017-18) IRBRD, vol 32, 183  
Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888  
Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174  
D37/01, IRBRD, vol 16, 326  
D39/04, IRBRD, vol 19, 319  
D10/20, (2021-22) IRBRD, vol 36, 17  
Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45  
Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR 351  
Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433

Appellant in person.

Ching Wa Kong, Yau Yuen Chun, Chan Wun Fai and Wong Hoi Ki, for the Commissioner of Inland Revenue.

**Decision:**

**A. INTRODUCTION**

1. Before this Board of Review ('the **Board**') is the appeal ('the **Appeal**') of Ms A ('the **Taxpayer**') from the determination ('the **Determination**') of the Deputy Commissioner of Inland Revenue ('the **Commissioner**') dated 30 September 2019 rejecting the Taxpayer's objection and ruling that the Taxpayer's income for the year of assessment 2017/18 should not be exempted from the charge to salaries tax under section 8(1A)(b)(ii) read together with section 8(1B) of the **Inland Revenue Ordinance** (Chapter 112) ('the **Ordinance**'), but the part of it attributable to the Taxpayer's services rendered in the US subject to tax there should be excluded and the salaries tax assessment ('the **Salaries Tax Assessment**') be revised accordingly.

2. After the appeal hearing, the Board is not satisfied that there is any merit in the Appeal and has therefore decided to dismiss it and confirm the Determination for the reasons detailed below.

**B. FACTUAL BACKGROUND**

3. First of all, it is necessary for the Board to set out the facts material to the Appeal for consideration below. The parties are in agreement of a large part of them, unless otherwise specified:

- (1) The Taxpayer objected to the Salaries Tax Assessment for the year of assessment 2017/18, claiming that her income should be exempted from salaries tax.
- (2) Company B ('the **Company**') is a private company incorporated in Hong Kong in 2009. At all relevant times, it maintained a registered office at Address C, Hong Kong, carrying on the business of consultancy services for luxury travels including the provision of hotel ratings etc. The Taxpayer adds, for the purpose of the Appeal, that the Company is a subsidiary of its US headquarter, Company B providing the same consultancy services.
- (3) By a contract of employment dated 28 August 2009 ('the **Contract**') together with an addendum, the Company offered to employ the Taxpayer as the Position D, Asia with effect from 28 August 2009. The Contract set out, among others, the following terms:

***Preamble***

- (a) The Taxpayer would report to the Global Director and be responsible for performing various types of sales activities assigned to her to maximize the Company's revenue and profit. The offer was contingent on the Taxpayer being granted a suitable work permit by the Hong Kong Government.

***Clause 1 – Basic Salary***

- (b) The Taxpayer's annual compensation would be HK\$775,000, which was equivalent to HK\$32,291.66 per pay period, to be paid on the 15<sup>th</sup> and the last day of each month. The annual compensation amount was inclusive of an annual housing rental refund of HK\$240,000.

***Clause 4 – Mandatory Provident Fund ('MPF')***

- (c) The Taxpayer would participate in the MPF as required by the law in Hong Kong. The Company and the Taxpayer would make contribution according to the statutory requirements.

***Clause 5 - Work terms, public holiday and vacation***

- (d) The Taxpayer would be required to work 5 days a week, with entitlement to public holidays as designated by the Hong Kong Government. Her annual paid vacation entitlement would be 15 working days.
  - (e) On 30 September 2009, the Taxpayer accepted the terms of the Contract.
- (4) The Company filed the Employer's Return of Remuneration and Pensions in respect of the Taxpayer for the year of 1 April 2017 and 31 March 2018 containing, among others, the following particulars:
- (a) Period of employment: 01/04/2017 – 31/03/2018
  - (b) Capacity of employment: Position E, Asia Pacific
  - (c) Income: HK\$2,575,219
  - (d) Place of residence
    - Address Location F, City G, Country H
    - Period of provision 01/04/2017 – 31/03/2018
    - Rent paid to Landlord by Employee HK\$420,000
    - Rent refunded to Employee by Employer HK\$420,000

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- (5) In the Taxpayer's Tax Return – Individuals for the year of assessment 2017/18, she declared the same income particulars as reported by the Company above. The Taxpayer also claimed that she had stayed in Hong Kong for 55 days during the period of 1 April 2017 and 31 March 2018. The Taxpayer corrects, for the purpose of the Appeal, that the stay should be 56 days from 1 April 2017 to 31 March 2018, after counting a 'partial' day as a full day.
- (6) In response to the Assessor's enquiries, the Company provided the following information and documents:
- (a) The Taxpayer was based in City G and travelled to other countries including Hong Kong during the year of assessment 2017/18. The Taxpayer's travel schedule during the year of assessment 2017/18 showed, among others, that she had travelled to the US to attend meetings and entertain clients on the following dates:

<u>Date</u>	<u>No. of days</u>
02/01/2018 – 09/01/2018	8
25/02/2018 – 02/03/2018	<u>6</u>
	<u>14</u>

The Taxpayer claims, for the purpose of the Appeal, that the international trip should take place from 12 to 18 October 2017, 2 to 9 January 2018 and 25 February to 7 March 2018.

- (b) The Taxpayer was responsible for managing the generation of revenue and the growth of consulting business within the Asia-Pacific region. She also oversaw a team of three persons based in Hong Kong.
- (c) The Taxpayer's working hours in City G were 7:30 a.m. to 6:30 p.m. On her travel days, including those in Hong Kong, her working hours were 8:00 a.m. to 6:00 p.m. on weekdays.
- (d) The Taxpayer took vacation leave and floating holidays on the following dates during the period of 1 April 2017 and 31 March 2018:

<u>Date</u>	<u>No. of days</u>
04/07/2017 – 07/07/2017	4
10/07/2017 – 14/07/2017	5
30/10/2017 – 03/11/2017	<u>5</u>
	<u>14</u>

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The Taxpayer disagrees with the above and contends, for the purpose of the Appeal, that additional vacation was taken from 23 December 2017 to 1 January 2018 for the Christmas and the New Year and from 10 to 18 February 2018 for the Chinese New Year.

- (e) The Taxpayer rendered services to the Company in Hong Kong, including attendance of meetings and entertaining of clients during the period of 1 April 2017 and 31 March 2018.
- (7) According to the information provided by the Immigration Department, the Taxpayer was present in Hong Kong for a total of 63 days during the year of assessment 2017/18 (on the basis that part of a day spent in Hong Kong was counted as one whole day in Hong Kong):

<u>Arrival Date</u>	<u>Arrival Time</u>	<u>Departure Date</u>	<u>Departure Time</u>	<u>No. of days in Hong Kong</u>
01/04/2017	13:37	01/04/2017	22:59	1
26/04/2017	20:31	27/04/2017	07:54	}
27/04/2017	17:36	28/04/2017	07:13	
28/04/2017	16:10	01/05/2017	07:04	
31/05/2017	23:28	03/06/2017	12:34	4
04/06/2017	14:36	05/06/2017	15:01	2
21/06/2017	21:04	25/06/2017	08:01	5
01/08/2017	16:23	02/08/2017	13:06	2
03/08/2017	16:06	05/08/2017	14:43	3
17/08/2017	15:06	19/08/2017	19:42	3
25/09/2017	14:35	28/09/2017	07:42	4
30/09/2017	11:38	01/10/2017	08:25	2
12/10/2017	06:43	12/10/2017	11:32	1
18/10/2017	22:23	18/10/2017	22:50	1
14/11/2017	19:29	15/11/2017	14:46	2
09/12/2017	17:35	11/12/2017	07:55	3
12/12/2017	12:52	13/12/2017	22:06	2
15/12/2017	10:45	15/12/2017	17:58	1
23/12/2017	20:55	28/12/2017	11:20	6
29/12/2017	12:45	30/12/2017	17:29	2
09/01/2018	17:57	09/01/2018	18:23	1
07/02/2018	14:21	07/02/2018	22:21	1
10/02/2018	13:13	18/02/2018	13:42	9
07/03/2018	19:08	08/03/2018	06:22	<u>2</u>
				<u>63</u>

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For the purpose of the Appeal, the Taxpayer does not agree with the above information.

- (8) Since the Taxpayer rendered services in Hong Kong and stayed in Hong Kong for 63 days during the year of assessment 2017/18, the Assessor did not accept that she could be exempted from salaries tax and therefore raised on her the Salaries Tax Assessment for the year of assessment 2017/18:

	HK\$
Income	2,575,219
Value of residence provided	<u>257,521</u>
	2,832,740
<u>Less: Deductions</u>	<u>18,000</u>
Net Income	2,814,740
<u>Less: Allowances</u>	<u>264,000</u>
Net Chargeable Income	<u>2,550,740</u>
Tax Payable thereon	<u>390,125</u>

The Taxpayer does not agree with the above and reiterates, for the purpose of the Appeal, that the number of days spent in Hong Kong should be 56 days.

- (9) The Taxpayer objected to the Salaries Tax Assessment on the ground that the travel records were incorrect and did not match with her flight schedules. She contended that she was in Hong Kong for a total of 57 days during the period of 1 April 2017 and 31 March 2018 and the following 6 days should not be regarded as ‘visits’ to Hong Kong:
- (a) On 31 May 2017, her flight from City J landed Hong Kong at 11:50pm and she did not enter Hong Kong until 1 June 2017. The Taxpayer corrects, for the purpose of the Appeal, that the accurate landing time should be 11:28pm.
- (b) On 12 October 2017, 18 October 2017, 9 January 2018, 7 March 2018 and 8 March 2018, she was only transiting through the Hong Kong International Airport (‘Hong Kong Airport’) and did not leave the transit area.
- (10) The Taxpayer further contended as follows:
- (a) She did not ‘visit’ Hong Kong for more than 60 days in the year of assessment 2017/18. To her understanding, a ‘visit’ to Hong Kong should be an intentional visit and one that should have gone through the immigration controls.

- (b) She was not aware that there was anything in the Ordinance and the Department Interpretation and Practice Notes No. 10 (Revised) suggesting that the taking of connecting flights in Hong Kong would constitute ‘visits’ to Hong Kong. The law on what would constitute a ‘visit’ to Hong Kong was unclear and it was therefore unfair to regard those transits in Hong Kong as ‘visits’.
  - (c) When she took the connecting flights, it was neither her wish nor intention to visit Hong Kong. It was just a flight route for her to get on to her destination and she should not be penalized.
  - (d) If passengers who had not passed through the Hong Kong arrival immigration controls were exempted the Air Passenger Departure Tax, the same should be equally applicable to salaries tax. Hong Kong Airport was one of the largest and busiest airports in the world. There would be double taxation if passengers taking connecting flights in Hong Kong were required to pay landing or airport taxes. It would also be a discouragement to the Hong Kong economy and an unnecessary and unfair penalty for those who travelled frequently.
- (11) The Assessor explained to the Taxpayer that her income could not be exempted under section 8(1A)(b)(ii) and 8(1B) of the Ordinance and should be fully chargeable to salaries tax. The Assessor also invited the Taxpayer to withdraw her objection.
- (12) The Taxpayer refused to withdraw her objection. She put forth further arguments as follows:
- (a) City G was not an international travel hub and as a result, she had no choice but to connect with flights via one city or another. Her tickets showed her intention of travelling directly from the place of origin to the destination. She had no intention to travel to or stop over Hong Kong, and had never passed through the immigration controls. It was very unfortunate and unfair for Hong Kong to penalize those international travellers who took connecting flights in Hong Kong but without intention to travel to Hong Kong.
  - (b) On 31 May 2017, her flight from City J was delayed and the plane might have touched down at 23:28. She also did not cross the immigration controls until after midnight because she was in the back row of the plane. Therefore, the record which showed that she had arrived Hong Kong at 23:28 was incorrect.



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- (c) On 12 October 2017 and 18 October 2017, she was travelling roundtrip from City G (where she resided) to City K (via Hong Kong and other cities). The tickets she purchased were direct bookings between City G and City K, and she had no intention to travel to Hong Kong.
  - (d) On 9 January 2018, the ticket was a direct route from City K to City G. It took her 23 minutes to connect with a flight via Hong Kong Airport. There was no intention whatsoever on her part to stay in Hong Kong.
  - (e) On 7 March 2018, her flight from City L to Hong Kong, which was supposed to land at 17:30, was delayed and only landed at 19:20. She missed her connecting flight to City G and had to stay overnight at the airport and take the next available flight in the next morning.
  - (f) If taking a connecting flight in Hong Kong would constitute a ‘visit’, the law must be clear and the Hong Kong Government should put it on the website and address it clearly. She did not believe anyone would know the interpretation of ‘visit’ by reading the Ordinance. If ‘visit’ was not defined clearly in the Ordinance, it would be unfair for the Inland Revenue Department (‘IRD’) to define it to its benefit only upon challenge or after the happening of certain material event. IRD should reconsider or rewrite the Ordinance to clearly define the word ‘visit’.
  - (g) Taxpayers had the right to know about their rights and planned for their affairs accordingly. If she knew that landing in Hong Kong would constitute a ‘visit’ to Hong Kong, she would avoid routing her flights with transits in Hong Kong.
  - (h) She distinguished D40/07 (2007-08) 22 IRBRD 983 and D19/16 (2017-18) 32 IRBRD 183 from her case, as she did not stay in Hong Kong for more than 30 minutes, make consumption in Hong Kong or have the intention to route through Hong Kong.
  - (i) She was a US citizen and had to pay for the tax in the US in respect of her income from the Company.
- (13) In support of her objection, the Taxpayer supplied the following documents for consideration:

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- (a) The itineraries issued by Company M showing, among others, her flight schedules on 31 May 2017, 12 October 2017, 18 October 2017, 9 January 2018 and 7 March 2018.
  - (b) A 'trip confirmation and receipt' from the N Airlines regarding her trips on 12 October 2017, 17 October 2017 and 18 October 2017.
  - (c) The US Individual Income Tax Return for the year 2018 showing that the Taxpayer's wages and salaries of US\$338,513 were subject to tax.
- (14) The Assessor maintained the view that the Taxpayer's income could not be exempted from salaries tax under sections 8(1A)(b)(ii) and 8(1B) of the Ordinance. However, it was considered that the Taxpayer's income for her services rendered in the US could be exempted from tax under section 8(1A)(c) of the Ordinance. The Salaries Tax Assessment for the year of assessment 2017/18 should therefore be revised as follows:

	HK\$
Income	2,575,219
<u>Less: Income to be excluded under section 8(1A)(c)</u>	<u>98,776</u>
	2,476,443
Value of residence provided	<u>247,644</u>
	2,724,087
<u>Less: Deductions</u>	<u>18,000</u>
Net Income	2,706,087
<u>Less: Allowances</u>	<u>264,000</u>
Net Chargeable Income	<u>2,442,087</u>
Tax Payable thereon	<u>371,654</u>

Note:

According to the Company's records, the Taxpayer rendered services in the US for 14 days. Thus, the amount of income to be excluded under section 8(1A)(c) of the Ordinance was computed as follows:

$$(\text{HK\$}2,575,219 \times 14/365 \text{ days}) = \text{HK\$}98,776$$

The Taxpayer does not agree with the above and contends, for the purpose of the Appeal, that based on the fact that she did not visit Hong Kong for more than 60 days, and the precedent set in the year of assessment 2014/2015, there should be exemption in her case.

## C. DISCUSSION

4. The single pertinent issue in the Appeal to be determined by the Board is whether the Taxpayer is liable to pay salaries tax for her income obtained from the employment with the Company for the year of assessment 2017/18.

### *Charge of salaries tax under section 8 of the Ordinance*

5. Section 8 of the Ordinance provides:

*‘(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*

...

*(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) excludes income derived from services rendered by a person who—*

...

*(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 (emphasis added).*

6. Macdougall J in CIR v George Andrew Goepfert [1987] HKLR 888 discussed the operation of section 8 of the Ordinance at 901-902 as follows:

*‘As a matter of statutory interpretation I am unable to escape the conclusion that, although s. 8(1) must be construed in the light of and in conjunction with s. 8(1A), s. 8(1A) creates a liability to tax additional to that which arises under s. 8(1). It is an extension to the basic charge under s. 8(1). If it were otherwise s. 8(1A)(a) would be virtually otiose and s. 8(1A)(b) completely unnecessary.*

*It follows that the place where the services are rendered is not relevant to the enquiry under s. 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.*

...

*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.*

...

*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’ test it may be that what is meant is this very process. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under s. 8(1).*

*It is plain that, without specifically referring to the English cases, the Board of Review in BR 20/69 applied the correct test in dismissing the appeal of an appellant taxpayer. Had the converse factual situation existed, that is to say, had the taxpayer been employed by an overseas company who paid for the services rendered by the taxpayer in Hong Kong from money originating overseas, the Board, in applying the reasoning they employed*

**in that case, would have been obliged to decide that the taxpayer's income was not liable to salaries tax under s. 8(1).** It is not surprising therefore that s. 8(1A)(a) was enacted so as to operate as an extension to the basic charge under s. 8(1).

**After its enactment, the cases show that there was no consistency of approach adopted by variously constituted Boards of Review. It seems probable that the totality of facts test has been interpreted differently by different Boards. It is only when that so-called test embraces the place where the services were rendered or otherwise introduces irrelevant matters that it becomes impermissible.**

Having stated what I consider to be the proper test to be applied in determining for the purpose of s. 8(1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarised 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 **(emphasis added).**

7. Insofar as the words 'not exceeding a total of 60 days' in section 8(1B) of the Ordinance are concerned, Mortimer J in CIR v So Chak Kwong, Jack 2 HKTC 174 explained at 188 as follows:

**'It is conceded by the taxpayer that his salary for the relevant year of assessment arose in or was derived from Hong Kong from an office or employment of profit in accordance with Section 8(1B) of the Ordinance.** He contends however that his income is to be excluded from assessment because all the services in connection with his employment were rendered outside Hong Kong (Section 8(1A)(b)).

On a number of occasions he came to Hong Kong in connection with his employment and he took the opportunity of spending additional time here with his family. During the relevant time he spent 108 days in Hong Kong. 28 of those were spent rendering services in connection with his employment, the remainder he spent here either on home leave or causal leave.

Following the Taxpayers' contentions the Board of Review found that in deciding whether all services in connection with his employment were rendered outside Hong Kong no account should be taken of those services rendered during the 28 days because he was protected by the provisions of

*Section 8(1B) as the 60 days' total related only to days when services were actually rendered.*

...

*The Board of Review was persuaded that Section 8(1B) was ambiguous and capable of two interpretations. I disagree. In this regard this Section is clear and unambiguous. **The words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered'. Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period (emphasis added).***

***The source of income was located in Hong Kong***

8. In the present case, the source of the Taxpayer's income in question was clearly, on the totality of facts, located in Hong Kong:

- (1) The Taxpayer's income arose in or was derived from Hong Kong from her employment with the Company.
- (2) The Taxpayer entered into the contract of employment with the Company. The Company was incorporated in Hong Kong and was a Hong Kong employer.
- (3) Pursuant to the Contract, the Company offered the Taxpayer the position as the Position D of Asia inclusive of Hong Kong. The Taxpayer would be able to work in Hong Kong, as the offer was made by the Company contingent on the express condition of her being able to successfully obtain a suitable work permit from the Hong Kong Government.
- (4) The Taxpayer was assigned to be responsible for performing sale activities for the benefit of her Hong Kong employer in terms of maximizing its revenue and profit.
- (5) The Taxpayer's annual compensation was denominated in Hong Kong dollars, so as its annual housing rental refund.
- (6) The Taxpayer was required to participate in the MPF under the law in Hong Kong.
- (7) The public holidays to which the Taxpayer was entitled under the Contract were those designated by the Hong Kong Government.
- (8) The Company and the Taxpayer respectively filed with the IRD in Hong Kong the Employer's Return of Remuneration and Pensions

and the Tax Return – Individuals for the year of assessment 2017/2018.

9. It follows, as submitted by the Commissioner, that the Taxpayer's entire income derived from the employment with the Company should be chargeable to salaries tax by virtue of section 8(1)(a), subject to the exclusion under section 8(1A)(b)(ii) and (c)(i)(ii), to be read with section 8(1B) of the Ordinance.

***Reliance on the '60-day rule' under section 8(1B) of the Ordinance***

10. The Taxpayer's case in advancing the Appeal is that there are a total of 7 days of transit which should not be counted as days of visit in Hong Kong under section 8(1B) of the Ordinance. In gist, the Taxpayer argues and relies on as grounds of appeal that the definition of the word 'visits' in Hong Kong is incomplete and not transparent and there are inconsistencies in her arrival and departure dates and times etc.:

- (1) 1 April 2017, 9 January 2018, 7 and 8 March 2018: The Taxpayer transited through Hong Kong International Airport ('**Hong Kong Airport**') on 8 April 2017, 3 May 2017, 2 January 2018 and 25 February 2018. She did not leave Hong Kong Airport, nor passed through the immigration controls. These days were not included on the immigration records and not counted for the purpose of section 8(1B) of the Ordinance. This being the case, 1 April 2017, 9 January 2018, 7 and 8 March 2018, with similar pattern, should therefore also not be counted as days of visit in Hong Kong out of consistency.
- (2) 31 May 2017: The entry time of 23:28 on that day shown on the immigration records was the landing time of the flight no. XXXXX after delay. The Taxpayer did not pass through the immigration controls until after midnight, ie 1 June 2017. The difference in time between the landing and the connecting flight on that day should not be counted as a day of visit in Hong Kong.
- (3) 12 and 18 October 2017: There were no direct flights from City G to the US. The intended destination was not Hong Kong. The air ticket was purchased according to the pricing policy of the Company. She had to transit through Hong Kong as it was the most economical option.

11. The Board is unable to accept the Taxpayer's case as contended.

***The Taxpayer was present in Hong Kong on the 7 days of transit***

12. First, the fact that the Taxpayer did not leave Hong Kong Airport or passed through the immigration controls on those 7 days of transit simply would not advance her appeal.

13. Under the **Interpretation and General Clauses Ordinance** (Chapter 1), Hong Kong Airport clearly falls within the ambit of ‘Hong Kong’:

(1) Section 3 thereof provides:

‘Hong Kong means the Hong Kong Special Administrative Region.’

‘Hong Kong Special Administrative Region means the Hong Kong Special Administrative Region of the People’s Republic of China, the geographical extent of which is the land and sea specified or referred to in Schedule 2.’

(2) Pursuant to Schedule 2:

‘The land and sea comprised within the boundary of the administrative division the Hong Kong Special Administrative Region of the People’s Republic of China promulgated by the Order of the State Council of the People’s Republic of China No. 221 dated 1 July 1997 and published as S.S. No. 5 to Gazette No. 6/1997 of the Gazette.’

(3) According to the map of the administrative division of the Hong Kong Special Administrative Region of the People’s Republic of China in the Order of the State Council of the People’s Republic of China No. 221, Hong Kong Airport located at Chek Lap Kok, the Lantau Island is within the boundary of Hong Kong.

14. In other words, once a transfer passenger arrives at Hong Kong Airport he or she is in the territory of Hong Kong.

15. Therefore, as submitted by the Commissioner, even though the Taxpayer merely stayed in the transit area while waiting for her connecting flight and did not pass through the immigration controls, she was still considered to be present in Hong Kong on those 7 days of transit in question.

***The word ‘visit’ in section 8(1B) of the Ordinance should not be subject to or qualified by condition***

16. Next, the Taxpayer relies heavily on the fact that there is no statutory definition of the word ‘visits’ under section 8(1B) of the Ordinance to advance the following arguments. Essentially:

- (1) The Ordinance does not provide that as soon as she landed at Hong Kong Airport she should be considered to have made a ‘visit’ in Hong Kong irrespective of the length of her stay here.
- (2) There is nowhere in the Ordinance stating that the mere taking of connecting flights or crossing of immigration controls by her at Hong Kong Airport should be considered as a ‘visit’ in Hong Kong.



- (3) The Ordinance also does not state that her landing at Hong Kong Airport was equivalent to a ‘visit’ in Hong Kong irrespective of whether or not she had any actual intent to travel to Hong Kong in the first place.

17. The Board does not accept that the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or subject to duration or purpose as contended by the Taxpayer.

18. In Case No. D40/07 (2007-08) 22 IRBRD 983, section 8(1B) of the Ordinance was considered and 6 approaches were put forth for counting the total number of days in Hong Kong. The Board in that case accepted that a fraction of a day should properly be counted and construed as a whole day:

*‘92. The respective Board in D37/01 and D27/03 both felt bound by the High Court decision of So Chak Kwong, Jack. This Board certainly is no less bound by So Chak Kwong, Jack than the Board in D37/01 and D27/03. **For the purpose of section 8(1B), therefore, there is only one method of counting the 60 days and that is by the number of days of visits and not the dates of service. There is no ambiguity.***

*93. **What constitutes a day of visit in Hong Kong? Ordinary language would mean any day when a person is present in Hong Kong and it does not matter at which hour he arrives or at which hour he departs. This is the so-called fraction-equals-whole approach.***

...

*96. **Mr Fung on the other hand submitted that the plain wordings ‘visits not exceeding a total of 60 days’ of section 8(1B) leave no room for qualifying ‘visits’ by the purpose of such visits, nor for qualifying ‘days’ by number of hours, half-days, 24-hours or counting arrival and departure as one. Mr Fung said that none of the six approaches suggested by Mr Sieker...could satisfy the plain wordings of section 8(1B); all six approaches in one way or another involve re-writing the wordings in section 8(1B):***

*Approach A: Fractions to be counted as fractions*

*Mr Fung submits that section 8(1B) does not say and therefore could not be construed as ‘visits not exceeding a total of period which adds up to 60 days’ or ‘visits not exceeding a total of 60 full days’.*

*Approach B: Half-day approach*

*Mr Fung says that section 8(1B) does not say ‘visits not exceeding a total of 120 half days’. Half-day approach*

*adopted in the Arrangement between the Mainland of China and the HKSAR for the Avoidance of Double Taxation is not relevant to construe section 8(1B).*

*Approach C: Day and hour approach*

*Mr Fung says that the word ‘day’ in section 8(1B) cannot bear such convoluted meaning.*

*Approach D: Departure and arrival as one day approach*

*Mr Fung says that section 8(1B) plainly does not say this.*

*Approach E: Disregard short term transit approach*

*Mr Fung says that section 8(1B) plainly does not disregard short term presence.*

*Approach F: Presence during working hours approach*

*Mr Fung says that section 8(1B) does not say ‘visits not exceeding a total of 60 days on which the person was present in Hong Kong from 8 a.m. to 6 p.m. on Monday to Friday’.*

**97. We accept Mr Fung’s submission.**

98. The Board in D11/03 (2003), IRBRD, vol 18, 355 at 357...held:

*‘A long line of cases...before this Board has consistently held that fractions of a day should count as whole days. The Appellant maintains that those cases are out of date given the relative ease on the part of the Revenue in obtaining the time that he came into and went out of Hong Kong. We do not accept this argument. **The construction that fractions of a day should count as whole days has the merit of certainty. The alternative construction would impose an intolerable burden on the Revenue in adding up minutes if not seconds. That could not have been the legislative intent.***

99. **Ambiguity does not exist if we adopt the fraction-equals-whole approach in interpreting the plain wordings of section 8(1B). Ambiguities exist only if we attempt to complicate the word ‘days’ with some other qualification or definition.** Indeed, there could be no boundary for other method of calculation which a taxpayer may consider more favourable or preferable to him. **We therefore decide that for the purpose of calculating the number of ‘days of visit’ for the purpose of section 8(1B), fractions of a day should be counted as whole days (emphasis added).**’

19. In Case No. D19/16 (2017-18) 32 IRBRD 183, the taxpayer identified 13 days of his presence in Hong Kong as days of transit and contended that they should not be counted. The Board rejected the taxpayer’s argument and held:

*'24. We agree that the proper approach is to count part of a day as a day for the purpose of section 8(1B).*

*25. Adopting the above approach for calculation, the Appellant's immigration records showed that he had visited Hong Kong 61 days during the relevant year of assessment.*

*26. **The Appellant invited the Board not to count the 13 identified days as he said, those were days of transit.** The Appellant did not refer to any authority to support his contention that such days should not be counted for the purpose of section 8(1A)(b)(ii) or section 8(1B).*

...

*28. As to the present case of the Appellant, looking at the time of entries and departures on those 13 days, the Appellant has landed and stayed in Hong Kong for about an hour to four hours respectively. **Notwithstanding the period of short stay, it is clear that the Appellant had landed in Hong Kong and stayed here for some time. Taking the plain and ordinary meaning of the Ordinance, there is no reason to regard these days as not being a 'visit' in Hong Kong for the purpose of section 8(1B) (emphasis added).***

20. To challenge the 'fraction-equals-whole' approach, the Taxpayer seeks to rely on Case No. D37/01 16 IRBRD 326, which held:

*'10. In relation to the first proposition, the Revenue relies on Commissioner of Inland Revenue v So Chak Kwong, Jack (1986) 2 HKTC 174, a decision of Mortimer J as he then was in 1986. It was an extremely short judgment with hardly any argument as to how the section should be construed. This was not surprising as the appeal was by the Revenue and the taxpayer did not appear. The learned Judge was thus deprived of proper arguments to the contrary. The learned Judge decided the matter on the basis that grammatically, the words 'not exceeding in total of 60 days' must qualify the word 'visits' and not 'services rendered'.*

*11. **With respect, that will give rise to extraordinary results.** For example, someone spending 61 days of holidays or weekends in Hong Kong will not qualify for exemption if he so much as spent half an hour on an ad hoc assignment for his employer in Hong Kong. Such an absurd result could not possibly be the intention of the legislature.*

...

*13. It may be that the words 'services rendered' should be construed to mean regular work contemplated by the contract of employment and exclude any work done on an ad hoc or an informal basis. Be that as it may,*

*we are bound by the decision in the So Chak Kwong, Jack case. All that we can say is that it is perhaps time for the legislature to review this subsection to clarify precisely what is the true intention of this subsection.*

**14. The draconian construction referred to above will work to even greater injustice if the word ‘days’ is to include part of a day. The word is not defined in the IRO. Nor does section 71(1) of the Interpretation and General Clauses Ordinance (Chapter 1) help (emphasis added).**

21. It must however be noted that the taxpayer in Case No. D37/01 (*supra*) had not rendered any services in Hong Kong, which fact was confirmed and corroborated by his employer in that appeal. The taxpayer’s salaries were therefore excluded by section 8(1A)(b)(ii), and there was no need for him to rely on section 8(1B) of the Ordinance. In other words, the Board’s non-satisfaction with the Commissioner’s computation of the taxpayer’s days of visit in Hong Kong in that case was simply obiter.

22. The view of the Board in Case No. D37/01 (*supra*) was not followed in Case No. D39/04 (2004) 19 IRBRD 319.

23. The Board in Case No. D40/07 (*supra*) also agreed with the view expressed in Case No. D39/04 (*supra*) and declined to follow Case No. D37/01 (*supra*).

24. As regards the purpose of a visit, the Board in Case No. D10/20 (2021-22) 36 IRBRD 17 rejected the argument that visits for transit purpose should not be included for the purpose of section 8(1B) of the Ordinance:

**‘68. In our view, ‘visits’ in section 8(1B) simply is ‘visits’, the purpose of which has no concern to us. As said by Mortimer J ‘visits’ in section 8(1B) is qualified by ‘not exceeding a total of 60 days’. It is not qualified by the ‘purpose of visits’. If it is interpreted in the way suggested, then each and every ‘visit’ would be examined to see if it should be excluded for the purposes of ascertaining his entitlement of exemption under section 8(1B) of the Ordinance. This should not be the intention of the legislature when section 8(1B) was enacted (emphasis added).**

25. It is indisputable that when the Taxpayer transited through Hong Kong Airport, she was present and stayed in Hong Kong for changing flights. The Taxpayer fails to satisfy the Board as to why her presence and stay in Hong Kong Airport should not be considered as ‘visits’ in Hong Kong. Specifically, the Taxpayer fails to show to the Board’s satisfaction that the word ‘visits’ under section 8(1B) of the Ordinance should be qualified by or made subject to duration or purpose as contended.

26. It is well-established that the context and purpose will, in the vast majority of cases, be determinative of the meaning of the words sought to be construed: see Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45 at §§75-77; Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR 351 at §15.

27. The Taxpayer could not identify any authority to establish that as a matter of proper statutory construction of section 8 of the Ordinance, landing and staying in Hong Kong temporarily without passing through immigration controls should not be constituted as a ‘visit’ in Hong Kong or that a day of transit should not be regarded as a day of ‘visit’ in Hong Kong or the purpose of the ‘visit’ should be taken into account for the purpose of construction of section 8(1B) of the Ordinance.

28. Out of completeness, if and to the extent that the Taxpayer argues that as the word ‘visits’ under section 8(1B) of the Ordinance is not statutorily defined, all ambiguities should be resolved in her favour, such argument must be rejected by the Board.

29. It is important to reiterate that the Taxpayer bears the onus of proving that the Salaries Tax Assessment under appeal is excessive or incorrect under section 68(4) of the Ordinance.

30. Not only that, before the Taxpayer can succeed in her appeal she is required to prove her case in the manner as set out by the Court of Final Appeal in Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433. Bokhary and Chan PJJ in that case explained the ‘true and only reasonable conclusion’ at 450 as follows:

*‘47. Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y. The taxpayer will have to prove his contention. **So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y.** Either way, no appeal by the taxpayer against the Board’s decision could succeed on the ‘true and only reasonable conclusion’ basis unless the court is of the view that the true and only reasonable conclusion is that the position is Y (**‘emphasis added’**).’*

#### ***Other ancillary matters***

31. With respect to the other matters raised by the Taxpayer in support of the Appeal, the Board sees fit to dispose of them briefly below out of completeness.

32. First, the fact that the Immigration Records did not show 8 April 2017, 9 April 2017, 3 May 2017, 2 January 2018 and 25 February 2018 does not assist the Taxpayer. As submitted by the Commissioner, these 5 days should also be counted as days of visit in Hong Kong for the purpose of 8(1B) of the Ordinance, in which case the total number of days in Hong Kong for the year of assessment 2017/18 should be increased from 63 days to 68 days.

33. Second, the itinerary provided by the Taxpayer only shows the scheduled arrival time of flight no. XXXXX, ie 22:55, on 31 May 2017, but not the actual time when it landed Hong Kong Airport etc. According to Company P, the *actual* time of arrival of the flight in Hong Kong should be 23:09 on 31 May 2017. In any event, even taking the

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Taxpayer's case to the highest, namely, the arrival time of the flight in Hong Kong on 31 May 2017 was 23:28, it should still be counted as a day of visit in Hong Kong for the purpose of 8(1B) of the Ordinance as discussed above.

34. Third, the Board is not concerned with the Taxpayer's subjective intent or purpose. The fact that there was no direct flight between City G and the US and that Hong Kong was not the Taxpayer's intended destination is therefore irrelevant in the determination of whether or not 12 and 18 October 2017 should be counted as days of visit in Hong Kong for the purpose of 8(1B) of the Ordinance. The Board further adds that in any event, the Taxpayer deliberately chose Hong Kong because it was the most economical option for her.

35. Fourth, the Taxpayer's reliance on her similar travel pattern in the year of assessment 2014/15 as a '*precedent*' is a non-starter. The fact that the Taxpayer was granted exemption under section 8(1B) of the Ordinance for a particular year of assessment does not mean that she should automatically be entitled to the same exemption in subsequent years of assessment.

36. Lastly, the Taxpayer's argument in reliance on the printout of the Civil Aviation Department's webpage is untenable, as it concerns specifically the Air Departure Tax Exemption and not the salaries tax under the Ordinance. On the other hand, in the Hong Kong Special Administrative Region Government's webpage concerning the interpretation of section 8(1B) of the Ordinance, it is clearly set out that a 'visit' means 'a short and temporary stay', and in deciding whether visits to Hong Kong exceed a total of 60 days, the days of presence are counted and a day is counted even though one may only be present in Hong Kong for only part of that day.

37. In the premises, the Board is not satisfied that the Appeal contains any merits.

#### **D. CONCLUSION**

38. For the reasons above, the Board has decided to confirm the Determination and dismiss the Appeal, with an order that the Taxpayer should pay HK\$10,000 as costs of the Board under section 68(9) of the Ordinance.