Case No. D14/24

Salaries tax — non-Hong Kong employment — income attributable to services rendered in Hong Kong — whether the 60-day exemption under section 8(1B) of the Inland Revenue Ordinance ('Ordinance') applied — whether the taxpayer rendered services in Hong Kong during his visits — time apportionment — sections 8(1), 8(1A)(a), 8(1A)(b)(ii), 8(1B), 11B, 11D, 68(4) and 68(9) of the Ordinance

Panel: Wu Pui Ching Teresa (chairman), Kwan Yan Tung Chloe and Leung Sze Ning.

Dates of hearing: 25 April 2024.
Date of decision: 18 February 2025.

The Taxpayer was employed by companies in the Chinese Mainland within a group headed by a Hong Kong-listed company. He held a senior management position in finance for Greater China. His employment with the Mainland companies was located outside Hong Kong. From 1 January 2017, he was employed by a Hong Kong group company, with Hong Kong as his principal place of employment.

The Commissioner accepted that the Taxpayer's remuneration from the Mainland companies, including a 13^{th}-month salary, bonus and gains from share awards, did not arise from an employment in Hong Kong. The Assessor nevertheless assessed a proportion of the relevant income to be attributable to services rendered in Hong Kong under section 8(1A)(a) on a time-apportionment basis.

The Taxpayer appealed, contending that the 60-day exemption in section 8(1B) applied and that he rendered no services in Hong Kong during the 20.5 working days identified by the Assessor.

Held:

1. The burden of proving that the assessment appealed against is incorrect is on the Taxpayer.

2. The Taxpayer was present in Hong Kong for 111 days in the year of assessment (2016/17). He could not therefore rely on the 60-day exemption.

3. The Taxpayer had rendered services in Hong Kong during the 20.5 working days identified by the Assessor. His attendance at a senior-management training programme and meetings, networking with business associates,

and participation in team building, training and other activities with the Hong Kong accounting team were work-related activities.

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

Cases referred to:

Commissioner of Inland Revenue v George Andrew Geopfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
Randeep S Grewal v Commissioner of Inland Revenue, HCIA 3/2022 (unreported, 6 December 2023) [2023] HKCFI 3109
Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174
D40/07, (2007-08) IRBRD, vol 22, 983

Appellant in person.
Ching Wa Kong, Lee Chui Mei and Chow Hoi Yi, for the Commissioner of Inland Revenue.

Decision:

A. INTRODUCTION

1. This is the appeal ('the **Appeal**') of Mr A ('the **Taxpayer**') of the determination ('the **Determination**') of the Deputy Commissioner of Inland Revenue (generally, 'the **Commissioner**') dated 1 November 2023 dismissing the Taxpayer's objections and endorsing the computations of the Assessor with the following assessments ('the **Assessments**'):

(1) The salaries tax assessment for the year of assessment 2016/17 showing net chargeable income of $582,996 with tax payable thereon of $67,109[1] has been revised, with increases in both net chargeable income and tax payable thereon to $588,012 and $67,962 respectively.

(2) The salaries tax assessment for the year of assessment 2017/18 showing net chargeable income of $2,355,825 with tax payable thereon of $356,990[2] has been revised, with reductions in both net chargeable income and tax payable thereon to $1,990,119 and $294,820 respectively.

[1] See Charge Number X-XXXXXXX-XX-X dated 23 November 2017
[2] See Charge Number X-XXXXXXX-XX-X dated 20 July 2018

(3) The additional salaries tax assessment for the year of assessment 2017/18 showing additional net chargeable income of $260,348 with additional tax payable thereon of $44,259[3] is annulled.

2. For the reasons below, the Board has dismissed the Appeal.

B. MATERIAL FACTS

3. The facts set out in the Determination, as reproduced below, are largely not in dispute or are indisputable. Unless otherwise specified, references to paragraph numbers refer to paragraphs in the Determination (and are identified as '**Fact x**').

4. The Taxpayer has objected to the salaries tax assessments for the years of assessment 2016/17 and 2017/18 and the additional salaries tax assessment for the year of assessment 2017/18, claiming that they were excessive.

5. Company B (formerly known as Company B1) ('**Company B - City E**') and Company D ('**Company D - City F**') are both PRC companies.

6. Company G (formerly known as Company G1) ('**Company G - Asia**') and Company J ('**Company J - HK**') are Hong Kong companies incorporated in 1970 and 1973 respectively.

7. Company B - City E, Company D - City F, Company G - Asia and Company J-HK were, at the relevant times, the wholly-owned subsidiaries of Company K ('**Company K - Parent**'), a Hong Kong listed company (stock code: XXX).

8. By an employment agreement dated 15 February 2007[4], Company G1 (ie Company G - Asia) offered to employ the Taxpayer as a Senior Management member of the Company G1 / China Strategic Council with effect from 1 July 2007, subject to, among others, the following terms and conditions, which the Taxpayer accepted on 3 March 2007:

(1) The Taxpayer's legal employment was with Company G1 (ie Company G - Asia).

(2) The Taxpayer was expected to actively participate in the development and implementation of the Hong Kong/ China strategy.

(3) The remuneration package encompassed the remuneration for the necessary services which the Taxpayer would render for the group in Hong Kong.

9. By a labour contract (勞動合同) dated 1 June 2009 ('the **2009 Labour Contract**'), the Taxpayer was employed by Company B1 (ie Company B - City E, City F

3 See Charge Number X-XXXXXXX-XX-X, dated 16 October 2018

4 Under the letterhead of Company G1 Group

Branch) as Position L (職位 L) with effect from 1 July 2009. The Taxpayer's location of work was City F.

10. By a letter[5] dated 15 April 2011, it was confirmed that the Taxpayer's employment would be with Company B1. The Taxpayer was informed that as a result of the merger of Company K - Parent and Company G1 Group Limited, his employment terms and conditions under the 2009 Labour Contract would have, among others, the following changes with effect from 1 April 2011:

(1) ***Job Grade and Title***

The Taxpayer's Job Title was Position M – Finance, Greater China.

(2) ***Monthly Basic Salary***

'To align with the salary structure of Company K Group ("the **Group**") and taking into consideration of the annual salary review and the alignment of [the Taxpayer's] benefits to the policies of the Group, [the Taxpayer's] new monthly basic salary will be RMB121,248, and is on a 13-month payment cycle.'

…

'On top of the Monthly Salary, [the Taxpayer's] current Special Allowance shall remain and it has been restructured according to the Group's policy and would be granted as follows:

Housing Allowance: RMB24,000.00 payable on 12 months per annum

Special Allowance: RMB33,231.00 payable on 13 months per annum'

(3) ***Working Hours***

'The normal working hours are Monday - Friday 9:00 am - 5:30 pm with one-hour lunch break.'

(4) ***Year-end Double Pay (13th month salary)***

'[The Taxpayer] will be entitled to receive a 13th month salary at the Company's prevailing policy. Staff who leave the Company before the payment date will not be entitled to this payment unless they have worked for the whole payment period from January 1 to December 31. The payment date will be in January of each year.'

(5) ***Profit Sharing Scheme***

[5] Under Company G - Asia's letterhead

'[The Taxpayer] will be eligible to join the Company's prevailing Profit Sharing Scheme. Those who resign or leave before the payment date will not be entitled to this payment.'

(6) ***Annual Leave***

'[The Taxpayer] [is] entitled to paid leave of 15 working days per annum. Any subsequent changes to this basic entitlement will be granted based on [his] length of service subject to the Company's prevailing Annual Leave Policy.

For purpose of calculating [his] leave entitlement, [his] years of service with the Company will be fully recognized…'

(7) ***Share Option Scheme***

'[The Taxpayer] [is] eligible to participate in the Company's prevailing Share Option Scheme. The granting of share options is subject to the sole discretion of the Company.'

11. By a letter dated 21 May 2015 ('the **Award Letter**'), the Taxpayer was awarded 252,000 shares of Company K - Parent ('the **Shares**') at par value of HK$0.0125 each pursuant to the share award scheme ('the **Scheme**') 'in consideration of [his] services rendered to Company B - City E, City F Branch'. The Shares would be vested in the Taxpayer according to the following vesting schedule:

	Vesting date				
	31 Dec 2015	31 Dec 2016	31 Dec 2017	31 Dec 2018	31 Dec 2019
Service year					
2014	28,000	28,000	28,000	-	-
2015	-	28,000	28,000	28,000	-
2016	-	-	28,000	28,000	28,000
No. of the Shares	28,000	56,000	84,000	56,000	28,000

12. According to the Rules of the Scheme[6]:

(1) '2.1 The purposes of the Scheme are:

[6] Adopted pursuant to an ordinary resolution of the shareholders of Company K - Parent on 21 May 2015

(a) to align the interests of Eligible Persons[7] with those of the Group[8] through ownership of Shares, dividends and other distributions paid on Shares and/ or the increase in value of the Shares; and

(b) to encourage and retain Eligible Persons to make contributions to the long-term growth and profits of the Group.'

(2) '6.3 In determining the Selected Participants[9], the Board may take into consideration matters including the present and expected contribution of the relevant Selected Participant to the Group.'

(3) '11.1 If a Selected Participant ceases to be an Eligible Person by reason of (i) retirement of the Selected Participant, (ii) death of the Selected Participant, (iii) termination of the Selected Participant's employment or contractual engagement with the Group or an Affiliate by reason of his/ her permanent physical or mental disability, (iv) termination of the Selected Participant's employment or contractual engagement with the Group by reason of redundancy, the Board may at its absolute discretion determine either that all or part of any outstanding Award Shares and Related Income not yet vested shall vest in such manner as it thinks fit or that they shall be forfeited.'

(4) '11.2 If a Selected Participant, being and Employee whose employment is terminated (i) by the Group or an Affiliate by reason of the employer terminating the contract of employment without notice or payment in lieu of notice or (ii) by the Employee due to reasons other than those set out in Rule 11.1 above, or the Selected Participant having been convicted of any criminal offence involving his or her integrity or honesty, any outstanding Award Shares and Related Income not yet vested shall be immediately forfeited, unless the Board determines otherwise at its absolute discretion.'

(5) '13.1 For the avoidance of doubt:

(a) a Selected Participant shall have only a contingent interest in the Award subject to the vesting of such Award in accordance with Rules 10 and 14;

[7] Defined as 'any individual, being an Employee, director, officer, consultant or advisor of any member of the Group or any Affiliate who the Board considers, in its sole discretion, to have contributed or will contribute to the Group'

[8] Defined as 'the Company and its Subsidiaries from time to time, and the expression member of the Group shall be construed accordingly'

[9] Defined as 'any Eligible Person approved for participation in the Scheme and who has been granted an Award pursuant to Rule 6.1 or Rule 6.2'

(b) no instructions may be given by a Selected Participant to the Trustee in respect of the Award or any other property of the trust and the Trustee shall not follow instructions given by a Selected Participant to the Trustee in respect of the Award or any other property of the Trust;

(c) the Trustee shall not exercise the voting rights in respect of any Shares held under the Trust (including but not limited to the Award Shares, the Returned Shares and any bonus Shares);

…

(g) in the event a Selected Participant ceases to be an Eligible Person on or prior to the relevant Vesting Date and the Award in respect of the relevant Vesting Date shall lapse or be forfeited pursuant to the Scheme, such Award shall not vest on the relevant Vesting Date and the Selected Participant shall have no claims against the Company or the Trustee, unless the Board determines otherwise at its absolute discretion.'

13. By a labour contract dated 1 June 2016, the Taxpayer was employed by Company D - City F as Position M – Finance, Greater China (Grade 1) commencing on 1 June 2016 under, among others, the following terms and conditions:

(1) The Taxpayer's initial work location was City F. His work location, however, could be adjusted by Company D - City F according to the business needs as well as his abilities and performance [Clause 2.1].

(2) The Taxpayer's remunerations comprised [Clause 4.1]:

(a) a monthly basic salary of RMB129,736 for 13 months;

(b) a monthly Special Allowance of RMB33,231 for 13 months;

(c) a monthly Housing Allowance of RMB24,000 for 12 months.

(3) The Taxpayer's years of service in Company B - City E, City F Branch (date of joining: 1 July 2007[10]) would be recognised and counted by Company D - City F [Clause 10.4].

14. By an agreement dated 1 January 2017 ('the **2017 Agreement**'), the Taxpayer was employed by Company J - HK as Position M – Finance, Greater China commencing on 1 January 2017 under, among others, the following terms:

[10] Company G - Asia offered to employ the Taxpayer as a Senior Management member of the Company G1/ China Strategic Council with effect from 1 July 2007

(1) '2. Place of Work

2.1 The [Taxpayer]'s principal place of employment shall be at Hong Kong. The [Taxpayer] may be required to relocate to other locations in Hong Kong or abroad and/ or undertake travel in and outside Hong Kong, from time to time, as may be necessary in the interests of the Company [Company J (ie Company J - HK)]'s business.'

(2) '3. Scope of Employment

3.1 The [Taxpayer] shall during the continuance of his/ her employment: -

3.1.1 devote such of his/ her time, attention and skill to the duties of his/ her office as Position M – Finance, Greater China, hereunder as the Company may reasonably require, it being recognised that the [Taxpayer] shall devote certain of his/ her time, attention and skill to the business of other Group Companies, including Company K and Company N…'

(3) '5. Remuneration and Annual Leave

5.1 The [Taxpayer] shall receive during the continuance of the [Taxpayer]'s employment under this Agreement a monthly basic salary of Hong Kong Dollars One Hundred and Eighty-eight Thousand only (HK$188,000), such salary to accrue on a day-to-day basis and to be payable in arrears, on or around the last day of each succeeding month, on a twelve (12) months basis.

5.2 The [Taxpayer] will also be entitled to receive a year-end bonus at one twelfth of the annual basic salary payable on completion of a calendar year. Should the [Taxpayer] cease employment with the Company before the payment date, his/ her entitlement to this year-end bonus will be determined in accordance with applicable law.'

(4) '10. Miscellaneous

10.2 This Agreement and the Appendices hereto constitute the entire understanding relating to the terms of employment between the [Taxpayer] and the Company and (save, for the avoidance of doubt, for any rights and/ liabilities which have already accrued) shall supersede, replace and extinguish any subsisting agreements, arrangements and understandings between any Group Company and the [Taxpayer] relating to the employment of the [Taxpayer] and there are no representations, understandings or agreements relative thereto which are not fully expressed therein, provided that any period of continuous employment of the [Taxpayer] with any Group Company immediately prior to this Agreement will be recognised as part of the [Taxpayer]'s continuous employment with the Company.

…

10.7 This Agreement shall be governed by and construed in accordance with the laws of Hong Kong, and the parties hereto submit to the non-exclusive jurisdiction of the Courts of Hong Kong in the determination of any dispute rising thereunder.'

15. By a letter dated 26 January 2017, Company J - HK informed the Taxpayer that his position would be changed to Position M – Finance & Accounting at Grade 1 with effect from 1 February 2017, with all other terms and conditions of his employment remaining unchanged.

16. Company J - HK submitted employer's returns for the Taxpayer, with the years of assessment being 2016/17 and 2017/18, containing particulars, among others, as follows:

		2016/17		2017/18	
Year of assessment					
(a)	Period of employment:	1 Jan 2017 to 31 Mar 2017		1 Apr 2017 to 31 Mar 2018	
(b)	Capacity in which employed:	Position M – F & A			
(c)	Income:	$		$	
	(i) Salary/wages	564,000		2,000,000	
	(ii) 13th month salary	181,822	**('Sum A')**	-	
	(iii) Bonus	-		350,000	**('Sum C')**
	(iv) Share award gain	201,174	**('Sum B')**	354,480	**('Sum D')**
	(v) Dividend	-		62,950	
		946,996		2,767,430	
(d)	Place of residence provided:	No		Yes[11]	
	Period provided:			1 Apr 2017 to 31 Mar 2018	
	Rent paid to landlord by employee:			$444,000	
	Rent refunded to employee:			$444,000	

17. The Taxpayer declared his income accrued from Company J - HK in the Tax Returns-Individuals for the years of assessment 2016/17 and 2017/18 as follows:[12]

[11] Stating the address to be Address P

[12] The Taxpayer repeated the same particulars of place of residence as stated in the employer's return for the year of assessment 2017/18 above.

Year of assessment	Period	Amount
		$
2016/17	1 Jan 2017 to 31 Mar 2017	745,822
2017/18	1 Apr 2017 to 31 Mar 2018	2,530,750

18. The Assessor raised the following Salaries Tax Assessments on the Taxpayer for the relevant years of assessment:

(1) Salaries Tax Assessments

	(i)	(ii)
Year of assessment	2016/17	2017/18
	$	$
Income	946,996	2,530,750
Add: Value of residence provided	-	253,075
	946,996	2,783,825
Less: Deductions and allowances	364,000	428,000
Net chargeable income	582,996	2,355,825
Tax Payable thereon	67,109	356,990

(2) Additional Salaries Tax Assessment

Year of assessment	2017/18
	$
Income ($2,767,430 – $2,530,750)	236,680
Value of residence provided ($236,680 x 10%)	23,668
Additional Net Chargeable Income	260,348
Additional Tax Payable thereon	44,259

19. The Taxpayer objected to the above assessments, claiming that the (i) 13th month salary (ie Sum A); (ii) bonus (ie Sum C); and (iii) share award gains (ie Sum B and Sum D) were his '*offshore*' income and should not be taxable.[13]

20. The Assessor ascertained the number of (i) calendar days; (ii) rest days (including Saturdays, Sundays and public holidays); and (iii) working days the Taxpayer stayed in Hong Kong during the following relevant periods:[14]

[13] Company J - HK had provided documents to the Assessor in response to enquiries, while the Taxpayer had also rendered additional information for the Assessor's consideration:

[14] Based on the records provided by the Immigration Department, etc.:

Period	No. of calendar days	No. of rest days	No. of working days in Hong Kong
21 May 2015[Note 1] to 31 Dec 2016 [Note 2]	591	205	46.5
1 Jan 2016 to 31 Dec 2016 [Note 2]	366	128	34
1 Apr 2016 to 31 Dec 2016[Note 2]	275	94	20.5

Note 1: Date of grant of the Shares

Note 2: The Assessor considered that the Taxpayer's non-Hong Kong employment ceased on 31 December 2016, as the 2017 Agreement, commencing on 1 January 2017, superseded or replaced the Taxpayer's subsisting agreements with any companies of the Group.

21. The Assessor took the view that as the Taxpayer was required to attend meetings in Hong Kong during his employment with Company B - City E and Company D - City F from 1 April 2016 to 31 December 2016, which constituted his services rendered in Hong Kong, his income derived from Company B - City E and Company D - City F ('the **Chinese Mainland Income**') for that period was therefore attributable to his services rendered in Hong Kong and should be subject to salaries tax for the year of assessment 2016/17 on a time apportionment basis under section 8(1A)(a) of the Inland Revenue Ordinance (Chapter 112) ('the Ordinance'):

Amount of the Chinese Mainland Income subject to apportionment (A)	No. of working days in Hong Kong from 1 Apr 2016 to 31 Dec 2016 (B)	No. of leave days and rest days attributable to services rendered in Hong Kong (C)	No. of calendar days from 1 Apr 2016 to 31 Dec 2016 (D)	Taxable amount (E) = (A) x [(B) + (C)] / (D)
$2,043,648 [Note 1]	20.5	13.5 [Note 3]	275	$252,669
Note 1:	Amount of the Chinese Mainland Income subject to apportionment was calculated as follows:			

Employer	Month of 2016	Total Remunerations RMB	Exchange rate (HK$100 for RMB)	Total Remunerations HKD
Company B - City E	Apr[Note 2]	186,967	83.4964	223,922
	May	186,967	83.8123	223,078
Company D - City F	Jun	186,967	84.1620	222,151
	Jul	215,684	84.6425	254,818
	Aug	186,967	84.8553	220,336
	Sep	186,967	85.0484	219,836
	Oct	208,181	85.3183	244,005
	Nov	186,967	85.6731	218,233
	Dec	186,967	86.0610	217,249

	1,732,634	2,043,628

Note 2: The Assessor accepted that the bonus of RMB324,340 paid in April 2016 was related to the Taxpayer's services rendered for the year 2015 and should be excluded from the calculation.

Note 3: No. of leave days and rest days attributable to services rendered in Hong Kong was calculated as follows:

$$= (\text{Total leave days} + \text{rest days}) \times \frac{\text{Working days (excluding leave days \& rest days) in Hong Kong}}{\text{Total calendar days} - \text{Total leave days \& rest days}}$$

$$= (15 + 94) \times \frac{20.5}{(275 - 15 - 94)}$$

$$= 109 \times \frac{20.5}{166}$$

$$= 13.5$$

22. The Assessor also made the following assessments:

(1) Sum A (ie the 13th month salary) and Sum C (ie the bonus), which were paid by Company J – HK on behalf of Company D - City F, were accepted as income accrued to the Taxpayer for his services rendered in the year 2016, but the portion of these two sums attributable to the Taxpayer's services rendered in Hong Kong during the period from 1 January 2016 to 31 December 2016 should be taxed in the year of assessment 2016/17 pursuant to sections 8(1A)(a), 11B and 11D of the Ordinance:

	Amount (A)	No. of working days in Hong Kong from 1 Jan 2016 to 31 Dec 2016 (B)	No. of leave days and rest days attributable to services rendered in Hong Kong (C)	No. of calendar days from 1 Jan 2016 to 31 Dec 2016 (D)	Taxable amount (E) = (A) x [(B) + (C)] / (D)
Sum A	$181,822	34	21.8 [Note]	366	$27,720
Sum C	$350,000	34	21.8 [Note]	366	$53,360

Note: No. of leave days and rest days attributable to services rendered in Hong Kong was calculated as follows:

$$= (\text{Total leave days} + \text{rest days}) \times \frac{\text{Working days (excluding leave days \& rest days) in Hong Kong}}{\text{Total calendar days} - \text{Total leave days \& rest days}}$$

$$= (15 + 128) \times \frac{34}{(366 - 15 - 128)}$$

$$= 143 \times \frac{34}{223}$$

$$= 21.8$$

(2) For Sum B and Sum D, they should be split into two portions: (i) one attributable to the period of the Taxpayer's non-Hong Kong

employment; and (ii) the other attributable to the period of his Hong Kong employment as follows:

	Grant date	Vesting date	No. of calendar days for the vesting period	No. of calendar days from grant date to 31 Dec 2016[Note]	Value	Value attributable to non-Hong Kong_ employment	Value attributable to Hong Kong employment
			(A)	(B)	(C)	(D) = (C) x (B) / (A)	(E) = (C) – (D)
Sum B	21 May 2015	31 Dec 2016	591	591	$201,174 (ie Sum B)	$201,174	-
Sum D	21 May 2015	31 Dec 2017	956	591	$354,480 (ie Sum D)	$219,140	$135,340

Note: Cessation date of the Taxpayer's non-Hong Kong employment

(3) The Taxpayer's non-Hong Kong employment had ceased on 31 December 2016, and the portion of Sum B and Sum D attributable to the period of his non-Hong Kong employment (ie 21 May 2015 to 31 December 2016) should be taxed on a time apportionment basis in the year of assessment 2016/17 pursuant to sections 8(1A)(a), 11B and 11D of the Ordinance as follows:

	Value attributable to non-Hong Kong employments (A)	No. of working days in Hong Kong from 21 May 2015 to 31 Dec 2016 (B)	No. of leave days and rest days attributable to services rendered in Hong Kong (C)	No. of calendar days from 21 May 2015 to 31 Dec 2016 (D)	Taxable amount (E) = (A) x [(B) + (C)] / (D)
Sum B	$201,174	46.5	29.8 [Note]	591	$25,972
Sum D	$219,140	46.5	29.8 [Note]	591	$28,291

Note: No. of leave days and rest days attributable to services rendered in Hong Kong is calculated as follows:

$$= (\text{Total leave days} + \text{rest days}) \quad x \quad \frac{\text{Working days (excluding leave days \& rest days) in Hong Kong}}{\text{Total calendar days} - \text{Total leave days \& rest days}}$$

$$= (26 + 205) \quad x \quad \frac{46.5}{(591 - 26 - 205)}$$

$$= 231 \quad x \quad \frac{46.5}{360}$$

$$= 29.8$$

(4) For the value of the Shares attributable to the period of the Taxpayer's Hong Kong employment (ie 1 January 2017 to 31 December 2017) (ie $135,340), it should be fully taxable in the year of assessment in which vesting took place.

23. In the above circumstances, the Assessor revised the salaries tax assessments for the years of assessment 2016/17 and 2017/18 as follows:

Year of assessment	2016/17	2017/18
	$	$
Income		
Salary/wages	564,000	2,000,000
Taxable amount under s. 8(1A)(a)		
The Chinese Mainland Income	252,669	-
Sum A (ie the 13th month salary)	27,720	-
Sum C (ie the bonus)	53,360	-
Value of the Share attributable to non-Hong Kong employment ($25,972 + $28,291)	54,263	-
Value of the Shares attributable to Hong Kong employment	-	135,340
Dividend	-	62,950
	952,012	2,198,290
Add: Value of residence provided ($2,198,290 x 10%)	-	219,829
	952,012	2,418,119
Less Deductions and allowances	364,000	428,000
Revised Net chargeable income	588,012	1,990,119
Revised Tax Payable thereon	67,962	294,820

24. The Assessor also annulled the additional salaries tax assessment for the year of assessment 2017/18 since the revised net chargeable income for the said year of assessment (ie $1,990,119) was less than the amount of $2,355,825 previously assessed in the salaries tax assessment.

C. DISCUSSION

C1. Issues for determination

25. The Taxpayer's objections to the Assessor's revised salaries tax assessments for the year of assessment 2016/17 and 2017/18 and annulment of the additional salaries tax assessment for the year of assessment 2017/18 were dismissed by the Commissioner, the decision of which the Taxpayer appeals to the Board, contending principally that his employment with Company B - City E/ Company D - City F before 1 January 2017[15] should be treated as separate and distinct from his employment with Company J - HK, as his employing entities and the places governing his employment contracts were different, and that:

(1) The Commissioner has disregarded the 60-day rule under section 8(1B) of the Ordinance for the year of assessment 2016/17.

[15] The Taxpayer accepts his liabilities for tax after 1 January 2017.

(2) The Taxpayer had not rendered any services during his stays in Hong Kong. According to the Taxpayer, the purposes of his visits to Hong Kong were as follows:

<table>
<tr><th colspan="3">Arrival
in Hong Kong</th><th colspan="3">Departure
from Hong Kong</th><th rowspan="2">No. of working days</th><th rowspan="2">Purposes of stay</th></tr>
<tr><th>Date</th><th>Time</th><th>Day</th><th>Date</th><th>Time</th><th>Day</th></tr>
<tr><td>6 Apr 2016</td><td>16:00</td><td>Wed</td><td>7 Apr 2016</td><td>08:25</td><td>Thur</td><td>0.5</td><td rowspan="3">- Stopover in Hong Kong for networking with business and personal friends
- Taking part in ad hoc activities with the Hong Kong accounting team, including team building, training and sharing experiences with overseas executives as a favour to corporate accounting team</td></tr>
<tr><td>7 Jun 2016</td><td>21:54</td><td>Tue</td><td>10 Jun 2016</td><td>17:41</td><td>Fri</td><td>1</td></tr>
<tr><td>18 Sep 2016</td><td>14:48</td><td>Sun</td><td>24 Sep 2016</td><td>08:13</td><td>Sat</td><td>5</td></tr>
<tr><td>29 Sep 2016</td><td>00:11</td><td>Thur</td><td>1 Oct 2016</td><td>08:52</td><td>Sat</td><td>2</td><td>University C study</td></tr>
<tr><td>24 Nov 2016</td><td>14:14</td><td>Thur</td><td>24 Nov 2016</td><td>16:37</td><td>Thur</td><td>0.5</td><td>2-hour stopover</td></tr>
<tr><td>5 Dec 2016</td><td>13:41</td><td>Mon</td><td>20 Dec 2016</td><td>18:25</td><td>Tue</td><td>11.5</td><td>- Dec 13 & 14: Company G GSM[16]
- Dec 15 & 16: OSG SMM[17]
- Remaining 7.5 days spent on house-hunting and preparation for relocation</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td>20.5</td><td></td></tr>
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26. The issues for the Board to determine in the Appeal arising from the above are:

(1) Whether the 60-day rule is applicable in the year of assessment 2016/17.

(2) Whether the Taxpayer had rendered no services during the 20.5 working days in Hong Kong.

27. Obviously, under section 68(4) of the Ordinance, the burden of proving that the assessment appealed against is incorrect falls on the Taxpayer.

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[16] Company G Global Senior Management Meeting ('**Company G GSM**')

[17] Company G Operating Supporting Group Senior Management Meeting ('**OSG SMM**')

C2. Applicable legal principles

28. First of all, 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**…*

(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; (Amended 69 of 1987 s. 2)

(b) excludes income derived from services rendered by a person who –

…

(ii) renders outside Hong Kong all the services in connection with his employment… (Added 2 of 1971 s. 5 Amended 69 of 1987 s. 2)

(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. (Added 69 of 1987 s. 2)

*(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)**.' (Added 2 of 1971 s. 5)*

29. Section 9(1)(a) of the Ordinance defines '*income from any office or employment*' to include:

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

30. In Commissioner of Inland Revenue v George Andrew Geopfert [1987] HKLR 888, the taxpayer's contract of employment was entered outside Hong Kong. The taxpayer's employer was a company incorporated in New Jersey, the United States. The taxpayer was seconded, during the relevant years, to a Delaware subsidiary registered in Hong Kong as an overseas corporation. The taxpayer's salary was paid in US dollars in the United States. Throughout the secondment, the taxpayer performed all works in Hong Kong out of convenience and those works were for the benefit of the Far East affiliates of the taxpayer's employer.

31. The Board of Review in that case found that the source of the taxpayer's income was New York, not Hong Kong. Macdougall J dismissed the Commissioner's appeal and observed at 901C to G, and 901I to 902F:

> '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)(a) 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.**
>
> That being so, what is the correct approach to the enquiry? The approach that commends itself to me, and which I take to be correct, is that adopted by the English courts in the cases cited by Mr. Flesch.
>
> In my view this is an approach that is entirely consistent with a correct interpretation of s. 8, for although at first sight it might seem somewhat illogical to ignore the place where the services are rendered, it seems to me that to do so is consistent with an acceptance that s. 8(1A)(a) is an extension of the basic charge imposed under s. 8(1).
>
> …
>
> **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 scrutinise all evidence, documentary or otherwise, that is relevant to this matter.

If any authority be needed for this basic proposition one needs only to refer to the words of Lord Normand at p. 155 of **Bray v. Colenbrander**:

'My Lords, in each of these appeals the respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal.'

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) **(emphasis added)**.'

32. As was held in Goepfert (supra)[18]:

(1) If, during a year of assessment, a person's income falls within the basic charge to salaries tax under section 8(1) of the Ordinance, his entire salary is subject to salaries tax, wherever his services may have been rendered, subject only to the so called 60-day rule[19] that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B) of the Ordinance. Once income is caught by section 8(1) there is no provision for apportionment.

(2) On the other hand, if a person, whose income does not fall within the basic charge to salaries tax under section 8(1) of the Ordinance, 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, which is again subject to the 60-day rule.

[18] See 902 I-J

[19] The 60 days rule does not apply to the income derived from services rendered by persons who, by the operation of section 8(1A)(b)(i) are excluded from enjoying the benefit conferred by section 8(1A)(b)(ii) as read with section 8(1B) of the Ordinance (see 902J).

33. Goepfert (supra) was followed in Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80, where Deputy Judge A To (as he then was) observed:

> '24. …Thus, **where the source of income is from an employment, the locality of the source of income is the place where the contract for payment is deemed to have a locality. By 'contract for payment', Lord Normand must mean the contract of employment based on which the employee earned his payment and not necessarily the place where the payments are made.** The place of payment is of course an important indicator of the locality of the contract and is prima facie the locality of the contract. But it is not conclusive: see for example *Bennett v Marshall.* If an employee enters into a contract of employment in Hong Kong with an employer resident in Hong Kong but had his salary paid into his Swiss bank account, it can hardly be doubted that the locality of his contract is in Hong Kong. His income is from a Hong Kong source. In most cases, the place of payment is the locality of the contract. That must be why Lord Normand said that the two *may* mean the same thing, but not that the two mean the same thing.
>
> 25. As for the test for ascertaining the source of income, Sir Wilfrid Greene MR said in *Bennett v Marshall* [1938] 1 KB 591 at p.611:
>
> The language, in [*Foulsham v Pickles* [1925] AC 458], it seems to me, quite clearly establishes the proposition that the place where the work is carried out is not a matter to which attention should be directed. **If I am right in my view as to the effect of *Foulsham v Pickles*, it has the result in this case that the test for ascertaining the source of income is to look for the place where the income really comes to the employee.**
>
> 26. The judgment of Sir Wilfrid Greene MR in *Bennett v Marshall* [1938] 1 KB 591 was approved by the House of Lords. **Thus, the test as to the source of income is to look for the place where the income really comes to the employee. As Sir Wilfrid Greene MR said, regard must first be had to the contract of employment.** This must include consideration as to the place where the employee is to be paid, where the contract of employment was negotiated and entered into and whether the employer is resident in the jurisdiction. But none of these factors are determinative. If the employer is resident in Hong Kong and entered into a contract of employment with an employee in Hong Kong, the employer must be carrying on business in Hong Kong from which the employer's profits in substance arise. The locality of the contract must therefore also be in Hong Kong: see for example, *Foulsham v Pickles* [1925] AC 458. On the other hand, if the employer is not resident in Hong Kong, but came to Hong Kong to recruit employees to work exclusively in China. The locality of the contract is not in Hong Kong. Consideration of these factors shows the very process adopted in ascertaining the locality of the contract. This is perhaps what has been referred to as the totality test **(emphasis added)**.'

34. In Randeep S Grewal v Commissioner of Inland Revenue, HCIA 3/2022 (unreported, 6 December 2023) [2023] HKCFI 3109, Keith Yeung J analysed Goepfert (supra) and Lee Hung Kwong (supra) in details and held, among others:

(1) It is not controversial that section 8(1) of the Ordinance stipulates two pivotal perquisites for the charge, namely '*arising in or derive from Hong Kong*' (ie 'the Geographic Pre-requisite') from '*any office or employment of profit*' (ie 'the Contractual Pre-requisite').

(2) The issue engaged was what the Geographic Pre-requisite entails: whether it means the *situs* of the employment (ie 'the Employment Situs Criterion') or whether it means the place where the services concerned are rendered (ie 'the Place of Services Criterion').

(3) By a proper interpretation of the Ordinance as a whole, and in particular by the wording, structure, context, purpose and legislative history of the provisions, the place where the employee's services are rendered is not relevant to the enquiry under section 8(1) of the Ordinance.

C3. The Chinese Mainland Income and the Sums in question

35. In the present case, prior to the commencement of the 2017 Agreement on 1 January 2017, the Taxpayer was employed by two different Mainland companies:

Period	Employer	Location
1 Jul 2009 to 31 May 2016	Company B - City E	City F
1 Jun 2016 to 31 Dec 2016	Company D - City F	City F

36. In particular, for the months from April 2016 to December 2016, the Taxpayer's remunerations from Company B - City E and Company D - City F were as follows:

Employer	Month 2016	Basic Salary	Bonus	Housing Allowance	Special Allowance	Long Term Incentive Dividend	Total
		RMB	RMB	RMB	RMB	RMB	RMB
Company B - City E	Apr	129,736	324,340	24,000	33,231	-	511,307
	May	129,736	-	24,000	33,231	-	186,967
Company D - City F	Jun	129,736	-	24,000	33,231	-	186,967
	Jul	129,736	-	24,000	33,231	28,717	215,684
	Aug	129,736	-	24,000	33,231	-	186,967
	Sep	129,736	-	24,000	33,231	-	186,967
	Oct	129,736	-	24,000	33,231	21,214	208,181
	Nov	129,736	-	24,000	33,231	-	186,967
	Dec	129,736	-	24,000	33,231	-	186,967
	Total	1,167,624	324,340	216,000	299,079	49,931	2,056,974

37. According to the information provided by Company J - HK, the Taxpayer's entitlement to the 13th month salary (ie Sum A) and bonus (ie Sum C) was paid following his payroll country at the time of payment (ie the Mainland). The Taxpayer has further provided transaction records issued by the Bank of Communications in the Mainland to show that the amounts corresponding to his remunerations were being deposited into his bank account for the period from February 2015.

38. Turning to Sum B and Sum D, they were calculated as follows:

Year of assessment	Service year	Grant date	No. of the Shares awarded	Vesting date	Market price	Share award gain	
					$	$	
2016/17	2014	21 May 2015	28,000	31 Dec 2016	3.5924	100,587	
	2015		28,000			100,587	
			56,000			201,174	(ie Sum B)
2017/18	2014	21 May 2015	28,000	31 Dec 2017	4.22	118,160	
	2015		28,000			118,160	
	2016		28,000			118,160	
			84,000			354,480	(ie Sum D)

39. In addition, in response to the Assessor's enquiries, Company J - HK also confirmed that:

(1) The Taxpayer was paid the 13th month salary of $181,822 (ie Sum A) for the performance year of 2016, with the amount being calculated based on the Taxpayer's monthly basic salary and Special Allowance. It was paid on behalf of Company D - City F on 13 January 2017.

(2) The bonus of $350,000 (ie Sum C) was defined as a discretionary bonus for the same performance year of 2016 and was paid on 28 April 2017 also on behalf of Company D - City F.

40. On the authority of Goepfert (supra), the consideration material to the enquiry under section 8(1) of the Ordinance is the place where the income really comes to the employee, namely, the location of the employment being the source of income. The Commissioner does not dispute that the Taxpayer's employment with Company B - City E and Company D - City F was located outside Hong Kong. The Commissioner accepts that Sum A and Sum C were paid for the Taxpayer's services rendered for the year ended 31 December 2016 and the source was the Taxpayer's non-Hong Kong employment with Company D - City F. The Commissioner also accepts that the Taxpayer was awarded the Shares on 21 May 2015 during his employment with Company B - City E. The Chinese Mainland Income and the Sums therefore do not fall within the basic charge to salaries tax under section 8(1) of the Ordinance.

41. However, the Commissioner submits that this does not necessarily mean that the Taxpayer is not subject to salaries tax.

42. It is correct that section 8(1A)(a) of the Ordinance is an extended charging section for salaries tax, pursuant to which income of employment derived from services rendered in Hong Kong, including leave pay attributable to such services, shall be chargeable to salaries tax. Therefore, despite the fact that the Taxpayer has derived income from an overseas employment which is not in dispute, if such income is attributable to the services rendered in Hong Kong, the Taxpayer is still caught by section 8(1A)(a), but is subject to relief by way of exemption under section 8(1A)(b)(ii) as read with section 8(1B), of the Ordinance.

43. The Commissioner reminds the Board that the words '*not exceeding a total of 60 days*' in section 8(1B) of the Ordinance qualify the word '*visit*' and not the words '*services rendered*'. It is also important that the express wordings of section 8(1B) refer to visits not exceeding a total of 60 days '*in the basis period for the year of assessment*' (see D30/03, 18 IRBRD 466).

44. In Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174 Mortimer J held that:

> '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 'visit' 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)**.'

45. In light of the above, as the movement records provided by the Immigration Department reveal that the Taxpayer was present in Hong Kong for a total of 111 days[20] during the year of assessment 2016/17, the Taxpayer cannot take the benefit of the 60-day rule in the present case.

46. The Board also accepts the Commissioner's submission that the Taxpayer had rendered services during his employment with Company B - City E and Company D - City F in Hong Kong for 20.5 working days. Most significantly, on the whole, those days were all paid working days during which the Taxpayer was supposed to work. The Commissioner has determined that number of works days after taking into account and based on the following criteria:

(1) All weekends (Saturdays & Sundays), public holidays in Hong Kong and the Mainland and the Taxpayer's leave days are excluded.

(2) The time spent on commuting and immigration clearance is taken into account. If the Taxpayer left Hong Kong before 10:00 am (ie 1 hour after his duty) or arrived in Hong Kong after 4:30 pm (ie 1 hour before he was off-duty), then that working day would not be counted.

[20] Counting part of a day as one day: see D40/07 (2007-08) 22 IRBRD 983

(3) If the Taxpayer only stayed in Hong Kong between 10:00 am (ie 1 hour after his duty) and 4:30 pm (ie 1 hour before he was off-duty), only half day in Hong Kong was counted.

47. The Taxpayer fails to satisfy the Board that, given those 20.5 days were working days, he did not need to carry out any duties in Hong Kong. On the contrary, it can be seen from the evidence that the Taxpayer had rendered services in Hong Kong during those days when he was in the employment with Company B - City E and Company D - City F in the following manner:

(1) The Taxpayer occupied a senior managing position (Position M - Finance, Greater China) with Company B - City E and Company D - City F, and the training program provided by University C was tailored for senior managing personnel across the Group. The training program aimed at exploring new technologies and business ideas, particularly covering areas such as AI, robotics, autopilot technologies, and the technical and ethical issues related to these advancements, with the objectives of enhancing the skillset and knowledge of those in higher roles, leaders and teams to benefit the entire organization of the Group. The Taxpayer was nominated by his manager to attend the training program in Hong Kong, which included provisions for hotel accommodation, reimbursement, airfare and transportation, etc., because of his seniority in Company B - City E and Company D - City F. The Taxpayer agreed to participate *qua* his capacity as Position M - Finance, Greater China, well recognizing that the training program was business-related and after considering that the training program was beneficial for the growth of his employers and the Group, meaning that it would be advantageous to his overall position and employment. It is also worth pointing out again that the training program took place during office hours (from 9:00 am to 5:00 pm / 5:55 pm) and on working days. Hence, attending the training program constitutes services rendered by the Taxpayer in connection with his employment with Company D - City F.

(2) Regarding Company G GSM and OSG SMM, the purposes of these meetings were to facilitate discussions and collaborations on ideas impacting the Group's business. The Group's Chief Executive Officer himself invited the Taxpayer to participate some of them. The Taxpayer attended the meetings in his capacity as an employee, and the meetings were also held during office hours (from 9:00 am / 9:30 am to 5:30 pm / 6:00 pm) on working days. Taken collectively, these matters should support that the Taxpayer's attendance at these meetings constituted services rendered by him. It is difficult for the Board to accept the Taxpayer's argument that the integral parts of the meetings – speeches from industry leaders, fine-dining, cocktails, and team-building activities – would indicate that the Taxpayer had not rendered services during these meetings. Considering the overall context,

particularly the opportunities provided for networking and collaboration with leaders within and outside the Group, etc., as well as the fact that some meetings were annual events for accounting and operations leaders, the Taxpayer's argument seems unconvincing. The Taxpayer's other argument that the level of participation in the meetings was optional for leaders, and that the social events and presentations involved would indicate that he had not rendered services, overlooks the point that his presence at these meetings was of itself part of the services rendered by him.

(3) The Taxpayer's mention of networking with business associates and participating in ad hoc activities with Hong Kong accounting team, including team building, training, and sharing experiences with overseas executives as a favour to the corporate accounting team, all occurred during working days. These activities were undertaken by the Taxpayer in his capacity as an employee and in the position of Company D - City F (Position M - Finance, Greater China, who had supervisory and coaching duties in his senior management role. These activities were work-related and in accord with his role.

(4) Given that the days in question were working days, and the Taxpayer's role was to oversee Group's financial matters in the Mainland, it was neither unusual nor unexpected for the Taxpayer to make business decisions and manage overall financial operations. Unlike staff assigned to performance of routine works, the Taxpayer, as a senior management executive, was not limited to working from a physical office. Rather, the Taxpayer was expected to and could also efficiently handle these responsibilities from anywhere with electronic devices. The Taxpayer indeed also accepteds the necessity of answering calls during this period. In addition, the Taxpayer had reporting duties and also functionally reported to the Group's Chief Financial Officer from 1 January 2014 to 31 December 2016. If the Group's Chief Financial Officer was based in Hong Kong during this period, it would further support that the Taxpayer was rendering services throughout this period.

(5) Finally, regarding the Taxpayer's claim that during his stay in Hong Kong, he had spent some days handling personal matters (such as housing hunting, meeting friends etc.) without rendering services, it is insufficient for the Taxpayer to simply allege this. Considering that these days were working days, and in fact, the Taxpayer came to attend the training program and the meetings, etc., it is reasonable to expect that the Taxpayer would have discharged his role and duties as a senior management executive during this period. While the Taxpayer may have used working days and work hours for his personal purposes, this however does not mean the Taxpayer was relieved from his obligations. It also cannot be excluded that the Taxpayer had rendered services during these days, as they were working days after all.

48. For these reasons, the Taxpayer has failed to discharge the onus of proving that the Assessments being appealed against are excessive or incorrect, and the Appeal is accordingly dismissed. The Board further orders the Taxpayer to pay costs of $10,000 pursuant to 68(9) of the Ordinance.