

**Case No. D18/22**

**Salaries tax** – whether employment under two contracts from two companies be considered as one single employment rendering income chargeable to salaries tax – whether Appellant render services in connection with his employment partly in Hong Kong resulting in part of his income chargeable to salaries tax – sections 8(1), 8(1)(A), 61 and 61A of Inland Revenue Ordinance – totality of facts test – whether the dual employment arrangement was artificial or fictitious – whether the employment was designed for the sole or dominant purpose of enabling him to obtain a tax benefit in Hong Kong – factors should be taken into consideration on whether the transaction was consistent with rational commercial decision-making of each party concerned – proper approach for the apportionment exercise – Day in day out (DIDO) approach in cases considering section 8(1A)(c) and in cases under section 8(1A)(a) – ‘time in time out’ approach – advantage of DIDO Formula – whether any part of a day should be counted as a day – impressionistic exercise of apportionment

Panel: WONG Kwai Huen (chairman), CLARK Douglas Stephen and NG Cheuk Ping Charmaine.

Dates of hearing: 19 January 2022 and 3 October 2022.

Date of decision: 21 November 2022.

The Appellant was employed under two employment contracts with Company C and Company F during the relevant years of assessment. His aggregate remuneration package was essentially determined at a level of Company C group, though noted that the separate roles the Appellant covered and the separate services he rendered in the course of his employment with his two employers. In effect, and as a commercial matter, the variable portion of his remuneration was payable to him as consideration for his performance in both roles, although it was contractually paid to him as a supplement to his employment contract with Company C.

The Assessor considered that the Appellant had one employment located in Hong Kong. His income from Company C and Company F was indistinguishable and wholly chargeable to Salaries Tax. The Appellant objections to the Additional Salaries Tax Assessment.

The issues for the Board to consider in the Appeal:

- (1) Should the Appellant’s employment with Company C and Company F be considered as one single employment rendering the Appellant’s income from Company F chargeable to Salaries Tax under section 8(1)(a) of the IRO?
- (2) If the answer to (1) is in the positive, what should the amount of assessable

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income be? Is the Appellant entitled to the exemption under section 8(1A)(b)(ii) or section 8(1A)(c) of the IRO?

- (3) If the answer to (1) is in the negative, did the Appellant render services in connection with his employment with Company F partly in Hong Kong resulting in part of his Company F income chargeable to Salaries Tax under section 8(1A)(a) of the IRO?
- (4) Further or alternatively, should the Company F employment be regarded as artificial or fictitious, and/or entered into for the sole and dominant purpose within the meaning of sections 61 or 61A of the IRO?

**Held:**

1. The charge to Salaries Tax in section 8(1) applies to Hong Kong sourced income from employment. The ‘Basic Charge’ of Salaries Tax is imposed by section 8(1) on ‘income arising in or derived from Hong Kong from any employment.’ Once a salary falls within the Basic Charge, the entire salary is subject to Salaries Tax wherever the services may have been rendered (subject to any claim for reliefs). There is no provision for apportionment. Section 8(1A)(a) is an extension of the Basic Charge i.e. the ‘Extended Charge’. The extension focuses on the location where the services are provided. It catches income ‘derived from services rendered in Hong Kong’, irrespective of whether it is ‘income arising in or derived from Hong Kong from any employment’. In this appeal, the Board will consider both the Basic Charge and the Extended Charge and decide which, if at all, one should be applicable to this case (CIR v Goepfert (1987) 2 HKTC 210 and CIR v Lo Wa Ming [2021] 2 HKLRD 522 followed).
2. The central question for it to determine is the characterisation of the Company F Contract. The Board will adopt the so-called ‘totality of facts’ test and look further than the external or superficial features of the employment. The Board turns to all the other facts which might help discover the reality of this case (CIR v Goepfert (1987) 2 HKTC 210 and Lee Hung Kwong v CIR [2002] 3 HKLRD 773 followed).
3. The Board has considered the evidence of this case and holds that the Company F Contract and the Company C Contract were two separate and independent employment contracts. The Company F Contract did not have a Hong Kong locality and was not a Hong Kong employment. It follows that the income the Appellant derived under the Company F Contract was not chargeable to Salaries Tax under section 8(1) of the IRO i.e. the Basic Charge. That being the case, the Board does not need to deal with section 8(1A)(b)(ii) or section 8(1A)(c). However, the Board will need to consider whether the Appellant’s income arising from the Company F Contract or part of it may be chargeable to Salaries Tax under section 8(1A)(a) i.e. the

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Extended Charge on the ground that his income or part of it was derived from services actually rendered in Hong Kong.

4. Having considered the evidence of this appeal, the Board accepts that the transaction in this case i.e. the dual-employment arrangement was on its face commercial and was motivated by realistic business considerations, so much so that a ‘well-informed bystander’ would not say that ‘that would not happen in the real world’. There is a fundamental distinction between a tax benefit that is incidental to a given transaction, or a corollary motive, and a tax benefit that is derived from a transaction which is abnormal or appeared to be part of a plan that rendered the whole transaction artificial or fictitious. Only in the latter case is it appropriate for the Respondent to invoke section 61. In this appeal, the Board finds no evidence to support any finding that the dual employment arrangement was artificial or fictitious.
5. The Board considers that the real ‘live issue’ under section 61A was whether the employment with Company F was designed for the sole or dominant purpose of enabling him to obtain a tax benefit in Hong Kong. Having assessed those seven factors that should be taken into consideration on this point under section 61(A)(1)(a)-(g), the Board comes to the conclusion that the transaction in question was consistent with rational commercial decision-making of each party concerned. The Board finds that the Company F Contract irrespective of the putative tax benefit, the sole or dominant purpose of the transaction cannot logically have been obtaining the tax benefit. Section 61A therefore does not apply in this case (Ngai Lik Electronics Company Limited v CIR (2009) 12 HKCFAR 296 followed).
6. While the Board agrees that it is difficult for the Appellant to prove a negative, the Board as the fact-finding tribunal is entitled to draw such inferences as it considers appropriate from the facts to the extent they may be verified by contemporaneous documentation and credible witness evidence. Having heard the evidence of the Appellant and considered his roles and responsibilities, the Board considers that the Appellant must have rendered services to Company F while he was in Hong Kong. The question is how to quantify the services he had rendered. In the absence of any contractual allocation, an exercise of apportionment becomes necessary. The next question is what the proper approach for the apportionment exercise should be.
7. It is not in dispute that if the Board finds that the Appellant did render some services to Company F when he was in Hong Kong, the exercise of apportioning income to those services is to some degree necessarily a matter of impression for the Board. It is also critical that any apportionment should be fair and balanced so that it could not be unduly prejudicial to the Appellant.

8. It should be noted that in the Lo Wa Ming case the CA was asked to rule, *inter alia*, on whether the DIDO Formula was consistent with or in contradiction to and in any event would lead to arbitrary or unjust results under section 8(1A)(a) and section 8(1A)(c). However, having dealt with section 8(1A)(c), the CA did not make any direct ruling on the applicability of DIDO Formula to section 8(1A)(a). The ratio in the Lo Wa Ming case in CFI is that the DIDO approach is arbitrary in cases considering section 8(1A)(c) but not necessarily so in cases under section 8(1A)(a). The two statutory provisions are different. Section 8(1A)(a) is an inclusion imposing the Extended Charge whereas section 8(1A)(c) provides for exclusion from the Basic Charge. The time apportionment method is an acceptable and reasonable basis and has consistently been followed in virtually all cases to which section 8(1A)(a) applies. Further, the Board finds that any part of a day spent in Hong Kong should be counted as a day and the Appellant's submission that any transit day should not be counted is not preferred. While this will cover certain days where the Appellant left Hong Kong early or arrived in Hong Kong late, the fact is the Appellant was in Hong Kong for some of the time each of those days (CIR v Lo Wa Ming [2021] 2 HKLRD 522 considered).
9. In the Lo Wa Ming case both the CFI and CA clearly distinguished the inclusionary approach in section 8(1A)(a) from the exclusionary approach in section 8(1A)(c). To argue that since the DIDO Formula is not supported by the provision in section 8(1A)(c) as its application may lead to arbitrary or unjust results, the same formula should also not be applied to section 8(1A)(a) may be stretching the argument unjustifiably. There is nothing odd that the DIDO Formula may have been held not to apply to section 8(1A)(c) but it may still be applicable to section 8(1A)(a) depending on the facts of the case (CIR v Lo Wa Ming [2021] 2 HKLRD 522 case followed).
10. The Board further finds that given the facts in this case, the Goepfert case is more helpful and relevant and the DIDO Formula should produce the correct result subject to certain adjustments mentioned below. In the present appeal, given the special circumstances, in particular, the split contract arrangements and on a balance of probabilities, the Board finds that the Appellant had rendered some services in Hong Kong to Company F. He was therefore chargeable to Salaries Tax under section 8(1A)(a). The issue is how his time in Hong Kong which had been spent in rendering Company F services should be pro-rated on a fair and reasonable basis. The Board finds that the 'time in time out' approach adopted in the Goepfert case which concerned section 8(1A)(a) should be applicable to this appeal. In so doing, the Board finds no reason why the DIDO Formula which has been applied by the Respondent in the past should not be adopted in this appeal. After all, the DIDO Formula has the advantage of practicality, objectivity and certainty over apportioning income at least for the purpose of computing the Extended Charge under section 8(1A)(a) where the

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circumstances in a case warrant its application.

11. As already mentioned, the exercise of apportionment is, by necessity, to a degree a matter of impression for the Board. It is vital that any apportionment should be fair and balanced, and consistent with the intendment of the provisions in the employment contracts so as not to be unduly prejudicial to the taxpayer. There is no perfect formula to apportion the Appellant's income. However, given that the Company F Contract and Company C Contract were so intertwined in working days and the Appellant was given full flexibility in his work schedules, the impressionistic exercise of apportionment should fairly reflect the nature, importance and value of the Appellant's work which he had rendered for Company F when he was in Hong Kong.

**Appeal allowed in part.**

Cases referred to:

CIR v Goepfert (1987) 2 HKTC 210  
Lee Hung Kwong v CIR [2005] 4 HKLRD 80  
Kwong Mile Services Ltd v CIR (2004) 7 HKCFAR 275  
CIR v Lo Wa Ming (2022) HKCA 710  
CIR v Lo Wa Ming [2021] 2 HKLRD 522  
D19/89, IRBRD, vol 4, 277  
D55/91, IRBRD, vol 6, 424  
Varnam (Inspector of Taxes) v Deeble [1985] STC 308  
D28/04, IRBRD, vol 19, 226  
Seramco Limited Superannuation Fund Trustees v ICT [1977] AC 287  
CTAA v Cigarette Company of Jamaica [2012] STC 1045  
Cheung Wah Keung v CIR [2002] 1 HKLRD 172  
CIR v Tai Hing Cotton Mill (Development) Limited [2008] 2 HKLRD 40  
Ngai Lik Electronics Company Limited v CIR (2009) 12 HKCFAR 296  
Consolidated Press Holdings & Ors v FCT (2001) 47 ATR 229  
IRC v Brebner [1967] 2 AC 18  
Kong Tai Shoes Manufacturing Co Ltd v CIR [2011] 6 HKC 227  
Lee Hung Kwong v CIR [2002] 3 HKLRD 773  
CIR v Douglas Henry Howe, HCIA 1/1977 (unreported, 28 July 1977)  
CIR v HIT Finance Ltd (2007) 10 HKCFAR 717  
D7/19, (2020-21) IRBRD, vol 35, 137  
Lee Fu Wing v Yan Po Ting Paul [2009] 5 HKLRD 513  
Hui Cheung Fai and another v Daiwa Development Limited (unreported HCA 1734/2009, 8 April 2014)  
Northampton Borough Council v Cardoza and others [2019] EWHC 26 (Ch)  
Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439  
Wisniewski v Central Manchester Health Authority [1998] PIQR 324

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South China Securities Ltd v Lam Kwen Yuen [2012] 5 HKLRD 524  
D67/01, IRBRD, vol 16, 574  
D11/05, (2005-06) IRBRD, vol 20, 296  
The Sussex Peerage (1844) 11 C&F 85  
Ajami v Comptroller of Customs [1954] 1 WLR 1405  
Bristow v Sequeville (1850) 5 Exch 275

Stefano MARIANI, Counsel, instructed by Messrs Deacons, for the Appellant.  
Lincoln CHEUNG, Counsel, instructed by the Department of Justice, for the Commissioner  
of Inland Revenue

**Decision:**

**Background**

1. This is an appeal brought by the Appellant in pursuant of Section 66 of the Inland Revenue Ordinance ('IRO') against the determination dated 3 June 2021 ('the Determination') by the Commissioner of Inland Revenue ('the Respondent') dismissing the Appellant's objections to the additional assessments issued by the Respondent on diverse dates for the years of assessment 2007/2008-2018/2019 assessing the Appellant to a total of HK\$1,760,066 of additional Salaries Tax. The Appellant sought an order of the Board to set aside the Determination and to annul the Additional Salaries Tax Assessments.

**The Agreed Facts**

2. The Appellant and the Respondent have reached agreement on certain matters of fact and submitted a set of agreed facts ('Agreed Facts') which are reproduced below:

- (1) Mr A ('the Appellant') has objected to the Additional Salaries Tax Assessments for the years of assessment 2007/08 to 2018/19 raised on him.
- (2) (a) Company B was incorporated as a private company in Hong Kong in 1984. During the relevant period (i.e., between 1 April 2007 and 31 March 2019), Company B carried on business in Hong Kong and its principal activities were as follows:

<u>Years of assessment</u>	<u>Principal activities</u>
2007/08 – 2015/16	OEM trading for the leisure and barbecue industries, and other consumer products
2016/17 – 2018/19	OEM trading for the leisure and barbecue industries, and other consumer products and investment holding

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- (b) During the relevant period, Company B was the subsidiary of Company C. The Appellant and Mr D were two of the Position Es of Company B. The Appellant resigned from his directorship of Company B on 5 August 2019.
- (3) (a) Company C was incorporated as a private company in Hong Kong in 2001. During the relevant period, Company C carried on business in Hong Kong and its principal activity in Hong Kong was investment holding.
- (b) During the relevant period, Mr D was one of the Position Es of Company C. The Appellant became a shareholder of Company C on 24 September 2014, when he acquired 2% of its issued share capital.
- (4) Company F, formerly known as Company B – City G Commercial Offshore, is a company incorporated in City G, which commenced its business in 2006. During the relevant period, Company F was a subsidiary of Company C and one of the merchandise sourcing companies of its group of companies.
- (5) Company H was founded in Country J in 1848. During the relevant period, Company B, Company C and Company F were within Company H. Mr D was Position K of Company H. Company H is a multinational enterprise operating across multiple jurisdictions and engaged in the manufacturing and distribution of consumer and industrial goods.
- (6) (a) By an undated contract of employment (‘the Company B Contract’) the Appellant was appointed by Company B as Position L with effect from 1 April 2002. The Company B Contract contained, among others, the following terms and conditions:
  - (i) The Appellant would be paid a salary of \$1,740,000 (\$145,000 x 12) per annum. The total salary of \$145,000 included a housing allowance of \$40,000 per month. He was not entitled to a company car but the company guaranteed him a monthly lease rate for a Toyota Camry 2.4 at \$5,000 per month.
  - (ii) It was agreed that the option to change the fixed salary arrangement to a fixed salary plus a performance based part could be exercised for the fiscal year 2002/03.
  - (iii) The Appellant would be covered by the Mandatory

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Provident Fund ('MPF') Scheme in accordance with the relevant rules and regulations from time to time in force.

- (iv) Twelve months' written notice or payment in lieu of notice should be required for termination of the Company B Contract.
- (b) By a supplementary agreement dated 1 November 2005, the Appellant's remuneration package was changed so that his salary would be \$1,380,000 (\$115,000 x 12) per annum and a housing allowance would be at a maximum of \$45,000 per month on a reimbursement basis.
- (7) (a) By a contract of employment dated 20 September 2006 ('the Company C Contract'), Company C employed the Appellant as Position M with effect from 1 October 2006. The Company C Contract contained, among others, the following terms and conditions:
  - (i) The Appellant would be paid a salary of \$996,000 (\$83,000 x 12) per annum.
  - (ii) Performance bonus after fiscal year-end would be awarded at the discretion of shareholders and the management according to profit situation and individual contribution.
  - (iii) The Appellant would be entitled to a housing allowance of \$35,000 per month on a reimbursement basis.
  - (iv) The Appellant was not entitled to a company car but Company C guaranteed the Appellant a monthly lease rate for a Vehicle N at \$5,000 per month.
  - (v) The Appellant would be entitled to 14 days' leave with pay and 10 days' home leave with pay for each completed year of service.
  - (vi) The Appellant would be entitled to home leave passage and medical benefits.
  - (vii) The Appellant would be covered by the MPF Scheme in accordance with the relevant rules and regulations enforced from time to time.
  - (viii) To terminate the Company C Contract by either party, twelve months' written notice was required.



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- (ix) Except with the prior written consent of Company C, the Appellant should not take up any other employment, either on a full-time or part-time basis, with any other third party or parties and should not engage himself or take part in any personal business or activity during his normal working hours.
- (x) The Appellant should follow the working hours of the local office where he executed his duty. The working days were from Monday to Friday, excluding public holidays in Hong Kong.

The Company C Contract was signed by Mr D as Position E of Company C and by the Appellant.

- (b) By a supplementary agreement dated 20 September 2006, the Appellant's change of employment from Company B to Company C was considered as an internal transfer within a group of companies (i.e., Company H). Company C would count the Appellant's service period as commencing from 1 April 2002. Company C would contribute 5% of the Appellant's total income within the group of companies.
  - (c) By supplementary agreements dated 19 January 2007 and 14 January 2016, some terms and conditions of the Company C Contract including the calculation of the Appellant's performance bonus were changed.
- (8) By an employment contract dated 20 September 2006 ('the Company F Contract'), Company F employed the Appellant as its Position K with effect from 1 October 2006. The Company F Contract contained, among others, the following terms and conditions:
- (a) The Appellant should undertake to serve the position of Position K earnestly, diligently and loyally.
  - (b) The Appellant would be paid a monthly salary of \$42,000.
  - (c) The Appellant was entitled to two days off per week on every Saturday and Sunday.
  - (d) The Appellant was entitled to annual leave of 14 days after completing one year's service. He was also entitled to home leave of 10 days per annum.
  - (e) Any of the two parties could terminate the employment

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relationship by serving twelve months' written notice after probation, or salary in lieu of notice.

- (f) The Appellant was entitled to a performance bonus after fiscal year-end. The bonus payment was equal to 1.5% of the Earning Before Tax per the audited Financial Statement.
- (g) Except with the prior written consent of Company F, the Appellant should not take up any other employment, either on a full-time or part-time basis, with any other third party or parties and should not engage himself or take part in any personal business or activity during the normal working hours.

The Company F Contract was signed by Mr D as Position E of Company F and by the Appellant.

- (9) By a letter dated 20 June 2019 ('the Company C Termination Letter'), Company C notified the Appellant that his employment with it as Position M should be terminated with immediate effect by way of summary dismissal. The Company C Termination Letter was signed by Mr P, who was Position Q of Company C during the relevant period.
- (10) By a letter dated 20 June 2019 ('the Company F Termination Letter'), Company F notified the Appellant that his employment with it was terminated immediately without notice. The Company F Termination Letter was signed by Mr P on behalf of Company F.
- (11) Company C furnished employer's returns of remuneration and pensions for the years of assessment 2007/08 to 2018/19 and a notification by an employer of an employee who is about to depart from Hong Kong in respect of the Appellant reporting, among others, the following particulars:

<u>Year of assessment</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
(a) Period of employment	: 01-04-2007 – 31-03-2008	01-04-2008 – 31-03-2009	01-04-2009 – 31-03-2010	01-04-2010 – 31-03-2011	01-04-2011 – 31-03-2012
(b) Capacity in which employed	: ←	Position M			→
(c) Income –	:	\$	\$	\$	\$
Salary		996,000	931,058	996,000	996,000
Bonus		<u>114,824</u>	<u>113,739</u>	<u>20,000</u>	<u>60,519</u>
		<u>1,110,824</u>	<u>1,026,797</u>	<u>1,016,000</u>	<u>1,056,519</u>
(d) Place of residence provided –	:				
(i) Nature		Flat	Flat	Flat	Flat
(ii) Period covered		01-04-2007 – 31-03-2008	01-04-2008 – 31-03-2009	01-04-2009 – 31-03-2010	01-04-2010 – 31-03-2011
(iii) Rent paid to landlord by employee		\$616,274	\$642,000	\$530,950	\$456,000
				\$492,935	

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<u>Year of assessment</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
(iv) Rent refunded to employee	\$420,000	\$420,000	\$420,000	\$420,000	\$420,000
(v) Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	No	No	No	No	No
<u>Year of assessment</u>	<u>2012/13</u>	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>	<u>2016/17</u>
(a) Period of employment	: 01-04-2012 – 31-03-2013	01-04-2013 – 31-03-2014	01-04-2014 – 31-03-2015	01-04-2015 – 31-03-2016	01-04-2016 – 31-03-2017
(b) Capacity in which employed	: ← Position M →				
(c) Income –	:	\$	\$	\$	\$
Salary	996,000	996,000	996,000	996,000	996,000
Bonus	<u>45,000</u>	<u>50,000</u>	<u>70,000</u>	<u>70,000</u>	<u>70,000</u>
	<u>1,041,000</u>	<u>1,046,000</u>	<u>1,066,000</u>	<u>1,066,000</u>	<u>1,066,000</u>
(d) Place of residence provided –	:	Flat	Flat	Flat	House
(i) Nature		Flat	Flat	Flat	House
(ii) Period covered	01-04-2012 – 31-03-2013	01-04-2013 – 31-03-2014	01-04-2014 – 31-03-2015	01-04-2015 – 31-03-2016	01-04-2016 – 31-03-2017
(iii) Rent paid to landlord by employee	\$516,000	\$516,000	\$600,000	\$563,064	\$540,000
(iv) Rent refunded to employee	\$420,000	\$420,000	\$420,000	\$420,000	\$420,000
(v) Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	No	No	No	No	No
<u>Year of assessment</u>	<u>2017/18</u>	<u>2018/19</u>			
(a) Period of employment	: 01-04-2017 – 31-03-2018	01-04-2018 – 31-03-2019			
(b) Capacity in which employed	: ← Position M →				
(c) Income –	:	\$	\$		
Salary	996,000	996,000	996,000		
Leave pay	-	290,175	290,175		
Bonus	<u>70,000</u>	<u>70,000</u>	<u>70,000</u>		
	<u>1,066,000</u>	<u>1,356,175</u>	<u>1,356,175</u>		
(d) Place of residence provided –	:	House	House		
(i) Nature		House	House		
(ii) Period covered	01-04-2017 – 31-03-2018	01-04-2018 – 31-03-2019			
(iii) Rent paid to landlord by employee	\$547,387	\$552,000			
(iv) Rent refunded to employee	\$420,000	\$420,000			
(v) Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	No	No			

(12) (a) In his Tax Returns – Individuals for the years of assessment 2007/08 to 2018/19, the Appellant declared the same income particulars as per Fact (11)(c).

(b) The Appellant applied for partial exemption from Salaries Tax of his income from employment with Company C for the years

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of assessment 2007/08 to 2015/16 on the grounds that he had paid tax on such income outside Hong Kong. In support of the application, he provided copies of the Individual Income Tax ('IIT') payment certificates (中華人民共和國個人所得稅完稅證明) issued by Bureau R and Bureau S, which showed that IIT was paid in respect of the Appellant's employment income for the period from April 2007 to March 2016.

- (13) (a) The Assessor of the Respondent ('the Assessor') accepted that part of the Appellant's income from Company C for the period from April 2007 to March 2016, which was attributable to his services rendered in the Mainland and had been taxed in the Mainland, could be exempt from Salaries Tax under section 8(1A)(c) of the IRO. Accordingly, the Assessor raised on the Appellant the following Salaries Tax Assessments for the years of assessment 2007/08 to 2018/19:

<u>Year of assessment</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
Income from Company C [Fact (11)(c)]	1,110,824	1,026,797	1,016,000	1,056,519	1,042,304
Less: Income excluded	<u>46,779</u>	<u>50,686</u>	<u>81,543</u>	<u>41,956</u>	<u>88,551</u>
	1,064,045	976,111	934,457	1,014,563	953,753
Value of residence provided	<u>-</u>	<u>-</u>	<u>-</u>	<u>65,456</u>	<u>22,440</u>
	1,064,045	976,111	934,457	1,080,019	976,193
Less: Total deductions	<u>13,600</u>	<u>15,000</u>	<u>12,000</u>	<u>12,000</u>	<u>12,000</u>
	1,050,445	961,111	922,457	1,068,019	964,193
Less: Total allowances	<u>250,000</u>	<u>266,000</u>	<u>266,000</u>	<u>266,000</u>	<u>276,000</u>
Net Chargeable Income	<u>800,445</u>	<u>695,111</u>	<u>656,457</u>	<u>802,019<sup>1</sup></u>	<u>688,193</u>
Tax Payable thereon	<u>100,575</u>	<u>98,168</u>	<u>93,597</u>	<u>118,343<sup>1</sup></u>	<u>92,992</u>
<u>Year of assessment</u>	<u>2012/13</u>	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>	<u>2016/17</u>
	\$	\$	\$	\$	\$
Income from Company C [Fact (11)(c)]	1,041,000	1,046,000	1,066,000	1,066,000	1,066,000
Less: Income excluded	<u>152,941</u>	<u>157,757</u>	<u>215,758</u>	<u>87,365</u>	<u>-</u>
	888,059	888,243	850,242	978,635	1,066,000
Value of residence provided	<u>-</u>	<u>-</u>	<u>-</u>	<u>97,863</u>	<u>106,600</u>
	888,059	888,243	850,242	1,076,498	1,172,600
Less: Total deductions	<u>14,500</u>	<u>15,000</u>	<u>17,500</u>	<u>18,000</u>	<u>18,000</u>
	873,559	873,243	832,742	1,058,498	1,154,600
Less: Total allowances	<u>303,000</u>	<u>310,000</u>	<u>240,000</u>	<u>240,000</u>	<u>364,000</u>
Net Chargeable Income	<u>570,559</u>	<u>563,243</u>	<u>592,742</u>	<u>818,498</u>	<u>790,600</u>
Tax Payable thereon	<u>74,995</u>	<u>73,751</u>	<u>68,766</u>	<u>107,144</u>	<u>102,402</u>

<sup>1</sup> Subsequently, the Appellant claimed a deduction of approved charitable donation of \$18,000 for the year of assessment 2010/11. Accordingly, the Assessor revised the Salaries Tax Assessment for the year of assessment 2010/11. The Net Chargeable Income and the Tax Payable thereon were reduced to \$784,019 and \$115,283 respectively.

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<u>Year of assessment</u>	<u>2017/18</u>	<u>2018/19</u>
	\$	\$
Income from Company C [Fact (11)(c)]	1,066,000	1,356,175
Value of residence provided	<u>-</u>	<u>3,617</u>
	1,066,000	1,359,792
<u>Less: Total deductions</u>	<u>18,000</u>	<u>18,000</u>
	1,048,000	1,341,792
<u>Less: Total allowances</u>	<u>364,000</u>	<u>384,000</u>
Net Chargeable Income	<u>684,000</u>	<u>957,792</u>
Tax Payable thereon	<u>72,780</u>	<u>144,824<sup>2</sup></u>

(b) The Appellant did not object to the assessments in Fact (12)(a), which then became final and conclusive under section 70 of the IRO.

(14) The Assessor conducted a review of the Appellant's tax affairs.

(15) In response to the Assessor's enquiries, RSM Tax Advisory (Hong Kong) Limited (formerly known as RSM Nelson Wheeler Tax Advisory Limited) ('the Former Representative') made the following claims:

- (a) The Appellant was the former sourcing Position E of Company F group, a sub-group under the Company H, and was seconded from Country J in Region AB.
- (b) The Appellant was employed by Company B for the period from 1 April 2002 to 30 September 2006. He had then been employed by Company C and Company F since 1 October 2006.
- (c) The Company B Contract and the Company C Contract were negotiated, concluded and enforceable in Hong Kong.
- (d) The Company F Contract was negotiated, concluded and enforceable in City G.
- (e) The Appellant was Position M of Company C who was responsible for strategic planning of Company C and its subsidiaries ('Company C Group') to ensure that Company C Group ran in accordance with the goals and objectives set up by the top management in Country J and reported the market

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<sup>2</sup> Subsequently, the Assessor revised the Salaries Tax Assessment for the year of assessment 2018/19 to grant the tax reduction of \$20,000. The Tax Payable thereon was reduced to \$124,824.

information in Region AB to the management in Country J.

- (f) As the Position M of Company C, the Appellant reported directly to Mr D in Country J. The Appellant's remuneration from Company C was paid to his bank account in Hong Kong via auto pay.
  - (g) The Appellant was the Position K of Company F who was in charge of managing Company F, and negotiating and concluding merchandise sales and purchase contracts on behalf of Company F. He was one of the Position Es of Company F.
  - (h) The Appellant performed his duties for Company F outside Hong Kong including Country T, Country J, City G and the Mainland, with the assistance of other managers or staff in City G. Since the Appellant travelled frequently to the Mainland and overseas, he did not apply for a work permit in City G.
  - (i) As Position K of Company F, the Appellant reported directly to Mr D in Country J. The Appellant's remuneration was paid to his bank account in City G.
  - (j) Company F and Company C were two independent companies focusing on different functions, it was necessary to separate the duties of the Appellant into two employments in order to reflect the actual cost incurred and report to the top management in Country J.
  - (k) The remunerations of the respective employments with Company C and Company F were determined based on the value of the Appellant contributed to the companies and time which the Appellant spent in Hong Kong and overseas during the relevant years. The terms were mutually agreed between the companies and the Appellant.
  - (l) The Appellant's employment with Company F was related to services rendered outside Hong Kong and the remuneration received had been charged to tax in City G which was of substantially the same nature of the Salaries Tax in Hong Kong. Even if the Appellant's income from Company F was treated as income derived from a Hong Kong employment, such income should be exempt from Salaries Tax under section 8(1A)(c) of the IRO.
- (16) The Former Representative provided a copy of the Salaries Tax Income Certificate issued by the City G tax authority on 2 May 2014 in respect of the Appellant, which showed the following particulars:

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<u>Year</u>	<u>Total income</u> <sup>[Note]</sup> (A) \$	<u>Tax paid/withheld</u> <sup>[Note]</sup> (B) \$
2007	519,120	22,141
2008	622,120	26,844
2009	601,520	25,453
2010	537,046	21,101
2011	589,160	22,459
2012	600,696	23,237
2013	636,175	23,925

Note: The effective tax rate for the years 2007 to 2013 was computed as follows:

<u>Year</u>	<u>Effective tax rate</u> (B)/(A) x 100%
2007	4.27%
2008	4.31%
2009	4.23%
2010	3.93%
2011	3.81%
2012	3.87%
2013	3.76%

(17) In response to the Assessor's enquiries, Deacons ('the Representative') made the following claims:

(a) The Appellant was employed under two separate employment contracts with Company C and Company F during the relevant years of assessment. His aggregate remuneration package, however, was essentially determined at a level of Company C Group, though noted that it was without prejudice to the separate roles he covered and the separate services he rendered in the course of his employment with his two employers. In effect, and as a commercial matter, the variable portion of his remuneration was payable to him as consideration for his performance in both roles, although it was contractually paid to him as a supplement to his employment contract with Company C.

(b) The Appellant's income from Company F for the period from 1 April 2007 to 31 March 2019 was as follows:

<u>Year of assessment</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>
	\$	\$	\$	\$	\$
Income from Company F	<u>504,000</u>	<u>684,000</u>	<u>504,000</u>	<u>589,404</u>	<u>564,000</u>

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<u>Year of assessment</u>	<u>2012/13</u>	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>	<u>2016/17</u>
	\$	\$	\$	\$	\$
Income from Company F	<u>579,246</u>	<u>746,375</u>	<u>958,417</u>	<u>1,257,203</u>	<u>1,358,851</u>
 <u>Year of assessment</u>	 <u>2017/18</u>	 <u>2018/19</u>			
	\$	\$			
Income from Company F	<u>1,285,213</u>	<u>1,392,198</u>			

(18) The Representative provided copies of the following documents:

- (a) Payroll records of Company F in respect of the Appellant for the months of April 2007, May 2007, July 2007, September 2007 to January 2008, March 2008 to December 2009, February 2010 to January 2013, March 2013 to May 2018, August 2018, October 2018 and November 2018 and the relevant bank advisory slips, which showed that the Appellant’s remuneration from Company F after withholding tax for those months were deposited into his bank account with Bank U City G Branch.
- (b) A summary of the Appellant’s duties and responsibilities in his employment with Company C (‘the Company C Duties Summary’). His duties included, among others, heading up and managing Company C in Region AB; strategic development planning for new business and products for Company C Group; travelling to Country T for business development and customer meetings; and managing Company F Country T, Company F Country V and Company F Region W.
- (c) A summary of the Appellant’s duties and responsibilities in his employment with Company F. His duties included, among others, defining and deciding on core vendors; production planning for major projects; customer meetings in City G Commercial Offshore office/City X office and in the factories; visiting of trade shows in the Mainland/City G and abroad for sales and sourcing issues; strategic planning for new product lines and increase sales; and identifying new sourcing opportunities by country/region.
- (d) Trip records of the Appellant (‘the Trip Records’) for the period from 1 April 2007 to 31 March 2018 and a letter dated 4 June 2020 (‘the Letter’) issued by the Appellant to the Representative.
- (e) Statements of travel records issued by the Immigration Department in respect of the Appellant covering the period from 1 October 2005 to 30 June 2017.



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(19) The Assessor considered that the Appellant had one employment located in Hong Kong. His income from Company C and Company F was indistinguishable and wholly chargeable to Salaries Tax. Also, the Assessor was of the view that part of the Appellant's income from Company C and Company F, which was attributable to his services rendered in City G and had been taxed in City G, could be exempt from Salaries Tax under section 8(1A)(c) of the IRO for the years of assessment 2014/15 to 2017/18. It was considered that the Additional Salaries Tax Assessments for the years of assessment 2007/08 to 2014/15 should be revised and the Additional Salaries Tax Assessments for the years of assessment 2015/16 to 2018/19 should be confirmed as follows:

<u>Year of assessment</u>	<u>2007/08</u> (Additional)	<u>2008/09</u> (Additional)	<u>2009/10</u> (Additional)	<u>2010/11</u> (Additional)	<u>2011/12</u> (Additional)
	\$	\$	\$	\$	\$
Income from Company C [Fact (11)(c)]	1,110,824	1,026,797	1,016,000	1,056,519	1,042,304
Income from Company F [Fact (17)(b)]	<u>504,000</u>	<u>684,000</u>	<u>504,000</u>	<u>589,404</u>	<u>564,000</u>
	1,614,824	1,710,797	1,520,000	1,645,923	1,606,304
<u>Less: Excludible income in respect of the services rendered and had been taxed in</u>					
– the Mainland [Fact (13)(a)]	46,779	50,686	81,543	41,956	88,551
– City G [Note]	<u>88,241</u>	<u>77,337</u>	<u>41,643</u>	<u>60,876</u>	<u>35,110</u>
	1,479,804	1,582,774	1,396,814	1,543,091	1,482,643
Value of residence provided	-	-	28,731 <sup>3</sup>	118,309 <sup>3</sup>	75,329 <sup>3</sup>
	1,479,804	1,582,774	1,425,545	1,661,400	1,557,972
<u>Less: Total deductions</u>	<u>13,600</u>	<u>15,000</u>	<u>12,000</u>	<u>30,000</u>	<u>12,000</u>
	1,466,204	1,567,774	1,413,545	1,631,400	1,545,972
<u>Less: Total allowances</u>	<u>250,000</u>	<u>266,000</u>	<u>266,000</u>	<u>266,000</u>	<u>276,000</u>
Net Chargeable Income	1,216,204	1,301,774	1,147,545	1,365,400	1,269,972
<u>Less: Amount already assessed [Fact (13)(a)]</u>	<u>800,445</u>	<u>695,111</u>	<u>656,457</u>	<u>784,019</u>	<u>688,193</u>
Additional Net Chargeable Income	<u>415,759</u>	<u>606,663</u>	<u>491,088</u>	<u>581,381</u>	<u>581,779</u>
Additional Tax Payable thereon	<u>70,679</u>	<u>103,133</u>	<u>83,485</u>	<u>98,835</u>	<u>98,903</u>

<sup>3</sup> Value of residence

2009/10: \$1,396,814 x 10% - (\$530,950 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$28,731  
2010/11: \$1,543,091 x 10% - (\$456,000 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$118,309  
2011/12: \$1,482,643 x 10% - (\$492,935 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$75,329  
2012/13: \$1,425,135 x 10% - (\$516,000 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$46,513  
2013/14: \$1,597,789 x 10% - (\$516,000 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$63,778  
2015/16: \$2,197,753 x 10% - (\$563,064 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$76,711  
2016/17: \$2,378,348 x 10% - (\$540,000 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$117,834  
2017/18: \$2,322,226 x 10% - (\$547,387 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$104,835  
2018/19: \$2,748,373 x 10% - (\$552,000 [Fact (11)(d)(iii)] - \$420,000 [Fact (11)(d)(iv)]) = \$142,837

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	\$	\$	\$	\$	\$
Income from Company C [Fact (11)(c)]	1,041,000	1,046,000	1,066,000	1,066,000	1,066,000
Income from Company F [Fact (17)(b)]	<u>579,246</u>	<u>746,375</u>	<u>958,417</u>	<u>1,257,203</u>	<u>1,358,851</u>
	1,620,246	1,792,375	2,024,417	2,323,203	2,424,851
<u>Less: Excludible income in respect of the services rendered and had been taxed in</u>					
– the Mainland [Fact (13)(a)]	152,941	157,757	215,758	87,365	-
– City G [Note]	<u>42,170</u>	<u>36,829</u>	<u>52,690</u>	<u>38,085</u>	<u>46,503</u>
	1,425,135	1,597,789	1,755,969	2,197,753	2,378,348
Value of residence provided	<u>46,513<sup>3</sup></u>	<u>63,778<sup>3</sup></u>	<u>-</u>	<u>76,711<sup>3</sup></u>	<u>117,834<sup>3</sup></u>
	1,471,648	1,661,567	1,755,969	2,274,464	2,496,182
<u>Less: Total deductions</u>	<u>14,500</u>	<u>15,000</u>	<u>17,500</u>	<u>18,000</u>	<u>18,000</u>
	1,457,148	1,646,567	1,738,469	2,256,464	2,478,182
<u>Less: Total allowances</u>	<u>303,000</u>	<u>310,000</u>	<u>240,000</u>	<u>240,000</u>	<u>364,000</u>
	1,154,148	1,336,567	1,498,469	2,016,464	2,114,182
<u>Less: Amount already assessed [Fact (13)(a)]</u>	<u>570,559</u>	<u>563,243</u>	<u>592,742</u>	<u>818,498</u>	<u>790,600</u>
Additional Net Chargeable Income	<u>583,589</u>	<u>773,324</u>	<u>905,727</u>	<u>1,197,966</u>	<u>1,323,582</u>
Additional Tax Payable thereon	<u>99,210</u>	<u>131,465</u>	<u>153,973</u>	<u>203,654</u>	<u>225,008</u>
 <u>Year of assessment</u>	 <u>2017/18</u>	 <u>2018/19</u>			
	(Additional)	(Additional)			
	\$	\$			
Income from Company C [Fact (11)(c)]	1,066,000	1,356,175			
Income from Company F [Fact (17)(b)]	<u>1,285,213</u>	<u>1,392,198</u>			
	2,351,213	2,748,373			
<u>Less: Excludible income in respect of the services rendered and had been taxed in City G [Note]</u>					
	<u>28,987</u>	<u>-</u>			
	2,322,226	2,748,373			
Value of residence provided	<u>104,835<sup>3</sup></u>	<u>142,837<sup>3</sup></u>			
	2,427,061	2,891,210			
<u>Less: Total deductions</u>	<u>18,000</u>	<u>18,000</u>			
	2,409,061	2,873,210			
<u>Less: Total allowances</u>	<u>364,000</u>	<u>384,000</u>			
Net Chargeable Income	2,045,061	2,489,210			
<u>Less: Amount already assessed [Fact (13)(a)]</u>	<u>684,000</u>	<u>957,792</u>			
Additional Net Chargeable Income	<u>1,361,061</u>	<u>1,531,418</u>			
Additional Tax Payable thereon	<u>231,380</u>	<u>260,341</u>			

Note: On the other hand, the Assessor now accepts, without prejudice to the arguments put forward by the Respondent in these proceedings, that part of the Appellant's income from Company C and Company F, which was attributable to his services rendered in City G

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and had been taxed in City G, could be exempt from Salaries Tax under section 8(1A)(c) of the IRO for the years of assessment 2007/08 to 2018/19 by reference to his days in City G based on the Trip Records [Fact (18)(d)]. The amount of the Appellant's income to be excluded under section 8(1A)(c) of the IRO for the years of assessment 2007/08 to 2018/19 was computed based on the total amount of income provided by Company C and the Representative [Facts (11)(c) and (17)(b)] and by reference to his days in City G based on the Trip Records [Fact (18)(d)] as follows:

Year of Assessment	Income from Company C [Fact (11)(c)]	Income from Company F [Fact (17)(b)]	Total income	Percentage of income from Company F to total income	Number of business days in City G	Number of days in the year	Income exempted under section 8(1A)(c)
	(A)	(B)	(C)	(D) = (B) / (C) x 100%	(E)	(F)	(C) x (E) / (F)
	\$	\$	\$				\$
2007/08	1,110,824	504,000	1,614,824	31.21%	20.0	366	88,241
2008/09	1,026,797	684,000	1,710,797	39.98%	16.5	365	77,337
2009/10	1,016,000	504,000	1,520,000	33.16%	10.0	365	41,643
2010/11	1,056,519	589,404	1,645,923	35.81%	13.5	365	60,876
2011/12	1,042,304	564,000	1,606,304	35.11%	8.0	366	35,110
2012/13	1,041,000	579,246	1,620,246	35.75%	9.5	365	42,170
2013/14	1,046,000	746,375	1,792,375	41.64%	7.5	365	36,829
2014/15	1,066,000	958,417	2,024,417	47.34%	9.5	365	52,690
2015/16	1,066,000	1,257,203	2,323,203	54.12%	6.0	366	38,085
2016/17	1,066,000	1,358,851	2,424,851	56.04%	7.0	365	46,503
2017/18	1,066,000	1,285,213	2,351,213	54.66%	4.5	365	28,987
2018/19	1,356,175	1,392,198	2,748,373	50.66%	0	365	0

(20) The Appellant, whether through the Former Representative or the Representative, timeously objected to each of the Additional Salaries Assessments for the years of assessment 2007/08 to 2018/19 ('the Objections') claiming that:

- (a) The assessments for the years of assessment 2007/08 to 2013/14 were excessive.
- (b) The sums received by the Appellant and assessed in the assessments for the years of assessment 2014/15 to 2018/19 in Fact (19) were not income from an employment of profit arising in or derived from Hong Kong under section 8(1)(a) of the IRO. Alternatively, those sums were exempt from Salaries Tax by reference to the services rendered by the Appellant in City G and having charged to income tax in City G under section 8(1A)(c) of the IRO.

(21) By a letter dated 16 March 2021, the Assessor issued to the Representative a draft statement of facts of the case and invited for comment about her view that entering into of separate employment contracts with Company C and Company F was a transaction entered into or carried out with the sole or dominant purpose to enable the

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Appellant to obtain a tax benefit as provided under section 61A of the IRO.

- (22) In reply, the Representative made the following claims:
- (a) The Company B Contract was terminated on 30 September 2006.
  - (b) Ms Y, who was Position Z of Company C, approved the Appellant's application for annual leaves and home leaves pursuant to the Company C Contract and the Company F Contract.
  - (c) Under the Company C Contract, Company C made contributions to the Appellant's MPF scheme exclusively with respect to his Hong Kong employment and did not relate to his employment with Company F. The Appellant would expect that Company F made the pension and social security deductions as were mandatory (if any) in City G from the gross salary it paid to the Appellant with respect to his employment.
  - (d) The Appellant was the Position M of Company C and Position K of Company F. As a senior position of each company, he in practice set his own working hours and managed his own schedule on an ad hoc basis, to respond as he saw fit and proper to the business exigencies of both roles.
  - (e) The Appellant was entitled to annual leave of 28 days and home leave of 20 days in aggregate.
  - (f) There was no written consent from Company C authorizing the Appellant to take up employment with Company F and vice versa. The Representative was not in a position to speculate as to the reasons for such omission, but it would expect that to be reasonable and tenable to infer that such formalities were considered redundant as Company C and Company F were comprised in the same group.
  - (g) The Representative had no comment on the application of section 61A of the IRO if the Respondent wished to assert.
- (23) (a) The Assessor maintained the view that the Appellant had one employment located in Hong Kong and his income from Company C and Company F was wholly chargeable to Salaries Tax under section 8(1)(a) of the IRO, subject to any applicable exemption provisions under sections 8(1A)(b)(ii), 8(1B) and 8(1A)(c) and issued his determination under section 64(2) of

the IRO accordingly on 3 June 2021, dismissing the Objections ('the Determination'). The tax payable under the Additional Salaries Tax Assessments for the years of assessment 2007/08 to 2013/14 was reduced and the Additional Salaries Tax Assessment for the years of assessment 2014/15 to 2018/19 was increased.

- (b) The Appellant appealed the Determination to the Inland Revenue Board of Review ('the Board') on 9 June 2021 under section 66(1) of the IRO, seeking to quash the Additional Salaries Assessments in full.
- (c) The Respondent and the Appellant have been unable for the purposes of the said appeal to agree on a methodology to count the number of days he spent: (i) in Hong Kong; (ii) outside of Hong Kong; and (iii) in City G, in each case for Salaries Tax purposes.

### **The Statutory Provisions**

3. The following provisions of the IRO are relevant to the issues of this appeal:
- (a) Section 8(1)(a) provides that Salaries Tax shall be charged for each year of assessment, on every person in respect of his income arising in or derived from Hong Kong from any employment of profit.
  - (b) Section 8(1A)(a) provides that income arising in or derived from Hong Kong from any employment includes all income derived from services rendered in Hong Kong including leave pay attributable to such services.
  - (c) Section 8(1A)(b)(ii) excludes from the charge to Salaries Tax income derived from services rendered by a person who renders outside Hong Kong all the services in connection with his employment. Section 8(1B) further provides that in determining whether or not all services are rendered outside Hong Kong, 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.
  - (d) Section 8(1A)(c)<sup>4</sup> excludes income derived by a person from services rendered by him in a territory outside Hong Kong where by the laws of that territory he has paid tax of substantially the same nature as

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<sup>4</sup> The relief under section 8(1A)(c) of the IRO does not apply to income derived by a taxpayer from services rendered in a territory with which Hong Kong has entered into a comprehensive avoidance of double taxation agreement or arrangement ('CDTA'), i.e. a DTA territory, from the year of assessment 2018/19 onwards.

Salaries Tax under the IRO.

4. The Respondent submits that it has been well settled that if a person derives income from an employment which is located in Hong Kong, the income will be fully chargeable to Salaries Tax under section 8(1)(a) of the IRO. On the other hand, if a person having an employment located outside Hong Kong renders services in Hong Kong, his income derived from such services will be subject to Salaries Tax under section 8(1A)(a) of the IRO, and in general the income will be apportioned and assessed on a time-in time-out basis by using the day-in-day-out formula ('DIDO Formula').

5. Alternatively, the Respondent avers that sections 61 and 61A of the IRO are applicable to this appeal:

- (a) Section 61 provides that where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.
- (b) Section 61A provides that where any transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person and having regard to seven specified matters, it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person to obtain a tax benefit, an assistant commissioner shall assess the person's liability to tax as if the transaction or any part thereof had not been entered into or carried out; or in such other manner as the assistant commissioner considers appropriate to counteract the tax benefit which would otherwise be obtained.

**Authorities Submitted by the Parties**

6. The Appellant submitted and relied on the following authorities:

- (1) CIR v Goepfert (1987) 2 HKTC 210\*
- (2) Lee Hung Kwong v CIR [2005] 4 HKLRD 80\*
- (3) Kwong Mile Services Ltd v CIR (2004) 7 HKCFAR 275
- (4) CIR v Lo Wa Ming (2022) HKCA 710
- (5) CIR v Lo Wa Ming [2021] 2 HKLRD 522\*
- (6) D19/89, IRBRD, vol 4, 277

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- (7) D55/91, IRBRD, vol 6, 424
- (8) Varnam (Inspector of Taxes) v Deeble [1985] STC 308
- (9) D28/04, IRBRD, vol, 19, 226
- (10) Seramco Limited Superannuation Fund Trustees v ICT [1977] AC 287
- (11) CTAA v Cigarette Company of Jamaica [2012] STC 1045\*
- (12) Cheung Wah Keung v CIR [2002] 1 HKLRD 172
- (13) CIR v Tai Hing Cotton Mill (Development) Limited [2008] 2 HKLRD 40\*
- (14) Ngai Lik Electronics Company Limited v CIR (2009) 12 HKCFAR 296\*
- (15) Consolidated Press Holdings & Ors v FCT (2001) 47 ATR 229
- (16) IRC v Brebner [1967] 2 AC 18
- (17) Kong Tai Shoes Manufacturing Co Ltd v CIR [2011] 6 HKC 227

\*Cases also referred to and relied on by the Respondent.

7. (A) The Respondent submitted and relied on the following authorities:
  - (1) Cheung Wah Keung v CIR [2002] 1 HKLRD 172
  - (2) Lee Hung Kwong v CIR [2002] 3 HKLRD 773
  - (3) CIR v Douglas Henry Howe, HCIA 1/1977 (unreported, 28 July 1977)
  - (4) CIR v HIT Finance Ltd (2007) 10 HKCFAR 717
  - (5) D7/19, (2020-21) IRBRD, vol 35, 137
  - (6) Lee Fu Wing v Yan Po Ting Paul [2009] 5 HKLRD 513
  - (7) Hui Cheung Fai and another v Daiwa Development Limited (unreported HCA 1734/2009, 8 April 2014)
  - (8) Northampton Borough Council v Cardoza and others [2019] EWHC 26 (Ch)

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- (9) Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439
- (10) Wisniewski v Central Manchester Health Authority [1998] PIQR 324
- (11) South China Securities Ltd v Lam Kwen Yuen [2012] 5 HKLRD 524
- (12) D67/01, IRBRD, vol 16, 574
- (13) D11/05, (2005-06) IRBRD, vol 20, 296
- (14) The Sussex Peerage (1844) 11 C&F 85
- (15) Ajami v Comptroller of Customs [1954] 1 WLR 1405
- (16) Bristow v Sequeville (1850) 5 Exch 275

(B) The Respondent referred the Board to the following documents:

- (1) Departmental Interpretation and Practice Notes No. 15 (Revised)
- (2) Article 7 of City G's Regulation No. 8/2010 Regulation of the Law for the employment of non-resident workers

### Grounds of Appeal

8. In making this appeal, the Appellant relied on the following grounds:

- (1) The amounts assessed by the Respondent in each of the relevant assessments were excessive and unwarranted in fact and/or law; and/or
- (2) The amounts assessed by the Respondent as chargeable to Salaries Tax in each of the relevant assessments did not constitute income arising in or derived from Hong Kong from an employment within the meaning of section 8(1)(a) of the IRO, as throughout the relevant period the Appellant's employment with Company F was not a Hong Kong employment; and/or
- (3) The amounts assessed by the Respondent as chargeable to Salaries Tax in each of the relevant assessments were in any event exempt from Salaries Tax by virtue of being income derived by the Appellant from his employment with Company F, as he rendered all services in



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connection with that employment outside of Hong Kong within the meaning of section 8(1A)(b); and/or

- (4) The amounts assessed by the Respondent as chargeable to Salaries Tax in each of the relevant assessments were in any event exempt from Salaries Tax by virtue of being income falling within section 8(1A)(c), as such amounts were in each case attributable to services rendered by the Appellant outside of Hong Kong, and with respect to which he duly accounted for City G tax, which is tax of substantially the same nature as Salaries Tax; and/or
- (5) The Appellant was duly employed under a contract of service with Company F, which was in all material respects an employment functionally distinct from the Appellant's employment with Company C, and the said employment was therefore neither artificial nor fictitious within the meaning of section 61; and/or
- (6) Section 61A has no application because the Appellant was duly employed under a contract of service with Company F, which was in all material respects an employment functionally distinct from the Appellant's employment with Company C, and the said employment therefore did nothing more than reflect the commercial reality of the Appellant's role as an employee of Company F, as distinct from Company C, such that it would not be concluded that the Appellant entered into the said employment for the sole or dominant purpose of enabling him to obtain a tax benefit in Hong Kong; and/or
- (7) Each of the relevant assessments was otherwise incorrect.

**Issues for the Board to consider**

9.
  - (1) Should the Appellant's employment with Company C and Company F be considered as one single employment rendering the Appellant's income from Company F chargeable to Salaries Tax under section 8(1)(a) of the IRO?
  - (2) If the answer to Q9(1) is in the positive, what should the amount of assessable income be? Is the Appellant entitled to the exemption under section 8(1A)(b)(ii) or section 8(1A)(c) of the IRO?
  - (3) If the answer to Q9(1) is in the negative, did the Appellant render services in connection with his employment with Company F partly in Hong Kong resulting in part of his Company F income chargeable to Salaries Tax under section 8(1A)(a) of the IRO?
10. Further or alternatively, should the Company F employment be regarded as artificial or fictitious, and/or entered into for the sole and dominant purpose within the

meaning of sections 61 or 61A of the IRO?

### **The Appellant's Testimony**

11. The Appellant adopted his witness statement as part of his evidence in this appeal and was cross-examined by Counsel for the Respondent. The Appellant gave his evidence via video conferencing.

12. The Respondent submitted that the Appellant's evidence was neither credible nor reliable. It was given 'in a defensive, inconsistent, self-serving and incredible manner'. During cross-examination, the Appellant's answers were 'evasive, argumentative with tangential speeches avoiding the questions'.

13. The Board's overall impressions of the Appellant were less harsh and negative. The Appellant appeared sincere and frank. It should be borne in mind that over 15 years had elapsed since the Appellant executed the Company F Contract and Company C Contract. It is only to be expected that there may have been a hiatus here and there in his evidence. The fact that he was giving evidence via video conferencing facilities also did not affect in any way our observation of his demeanor and attitude. We found the Appellant reasonably helpful and forthcoming in his testimony although he could have been more candid in answering the questions relating to his time management and time apportionment in the execution of his duties under the Company C and Company F employment contracts. We will deal with this issue in detail below.

14. We accept the Appellant's submission that appropriate allowance should be given to the Appellant's evidence at the hearing given the considerable lapse of time since his tax affairs were first investigated by the Respondent back in 2013. However, the Board does not find that the argument relating to 'reasonable time' under section 64(2) of the IRO and the case in Kong Tai Shoes Manufacturing Co Ltd v CIR [2011] cited by the Appellant would advance his case in any way. This issue was neither mentioned in the Grounds of Appeal nor sufficiently canvassed at the hearing. In any event, the Board did not find any ground to criticise the Respondent for failing to deal with the Appellant's objection within a reasonable time given the complexity of this case both in fact and in law, coupled with the protracted investigation as well as correspondence with the Appellant's representatives over the years. There was certainly no inordinate delay on the part of the Respondent as in the Kong Tai Case.

### **Absent Witness**

15. The Respondent submitted that Mr D's evidence would be 'both central and controversial' in the hearing. It would be crucial for the Board to understand the strategic consideration and the commercial reason behind the business restructuring of Company H in Region AB, the job duties of the Appellant in Company C and Company F which were assigned by Mr D to the Appellant. The Respondent argued that adverse inference should be drawn against the Appellant by reason of the absence of Mr D as a witness. The Respondent further submitted that the Appellant relied heavily on his hostile terms with his former employer(s) to avoid retrieving or tendering any relevant documentary evidence.

16. The Board agrees that Mr D's appearance at the hearing would have greatly assisted it in better understanding the circumstances surrounding the making of both employment contracts and details of the Appellant's duties in the two companies. However, the Appellant's employment with Company C and Company F was indeed terminated 'with immediate effect by way of summary dismissal without notice'. This fact was included in the Agreed Facts. This, coupled with the fact that the Appellant's assertion that he was dismissed on hostile terms by Company H, was not contested by the Respondent. There was obviously some degree of animosity between the two parties. The Board therefore will not draw any adverse influence on the absence of Mr D as a witness. Nor will the Board read too much into the Appellant's failure to produce documents relating to the business restructuring of Company B at the time the two employment contracts were entered into. The Appellant had given his explanation which was plausible and acceptable. The evidence showed that the dismissal came with very little notice and the Appellant would not have anticipated the necessity of gathering documentary evidence for a future review by the Respondent on his tax position two years after his departure from Company H. Understandably, it would also be difficult for the Appellant to seek assistance from his former employers in producing documents for use at the present hearing given his summary dismissal and animosity between the parties.

#### **One Single Employment – the Source Issue**

17. As mentioned above, one of the main issues in this appeal is to ascertain whether the Appellant's income from Company F constituted an income arising in or derived from his concurrent Hong Kong employment with Company C rendering the Company F income chargeable to Salaries Tax under section 8(1)(a) of the IRO.

18. Section 8(1)(a) provides that:

*'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...'*

19. Under section 8(1A), *'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;'*

*(paragraph (b) deals with exclusion of income of all services rendered outside Hong Kong)*

20. The charge to Salaries Tax in section 8(1) therefore applies to Hong Kong sourced income from employment. The leading authority on the interpretation of section

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8 is CIR v Goepfert in which MacDougall J held that:

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

21. For the purpose of this appeal, it is also useful to refer to the first instance decision in CIR v Lo Wa Ming in which Keith Yeung J summarised the interpretation and elaborated on the broad structure of section 8 made by MacDougall J in Goepfert. According to Yeung J, the ‘Basic Charge’ of Salaries Tax is imposed by section 8(1) on ‘*income arising in or derived from Hong Kong from any employment.*’ Once a salary falls within the Basic Charge, the entire salary is subject to Salaries Tax wherever the services may have been rendered (subject to any claim for reliefs). There is no provision for apportionment.

22. Yeung J further held that section 8(1A)(a) is an extension of the Basic Charge i.e. the ‘Extended Charge’. The extension focuses on the location where the services are provided. It catches income ‘*derived from services rendered in Hong Kong*’, irrespective of whether it is ‘*income arising in or derived from Hong Kong from any employment*’.

23. In this appeal, the Board will consider both the Basic Charge and the Extended Charge and decide which, if at all, one should be applicable to this case.

24. In Goepfert, it was held that:

- (a) *‘...the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.’*
- (b) *‘...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 ....regard must first be had to the contract of employment.’*
- (c) *‘...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.’* That is the ‘totality of facts’ test.
- (d) *‘...in deciding the crucial issue, the Commissioner may need to look*

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*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.....’*

- (e) ‘...sometimes when reference is made to the so-called “totality of facts” test ...’

25. The ‘totality of facts’ test is further elucidated in Lee Hung Kwong case:

- (a) ‘...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...’
- (b) ‘...the test as to the source of income is to look for the place where the income really comes to the employee ....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.’

### **The Respondent’s Submissions on the Source Issue**

26. The crux of the Respondent’s case is that the Company F Contract and Company C Contract together constituted the same employment.

27. The Respondent submitted that in this case despite the Appellant’s assertion that the Company F Contract was negotiated, concluded and enforced in City G, following the decision in Lee Hung Kwong, the location or jurisdiction where the contract of employment was negotiated and entered into is not determinative. By the same token, the fact that the Company F’s remuneration was paid to the Appellant’s bank account in City G was also not a decisive factor. Instead, the Board was asked to adopt the ‘totality of facts’ test and to look behind the ‘external or superficial features’ of the Company F employment and discover the reality of the matters.

28. The Respondent highlighted the following facts for the attention of the Board:

- (i) the Appellant was first employed by Company B for the period from 1 April 2002 to 30 September 2006;
- (ii) on 20 September 2006, the Appellant entered into two separate but

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concurrent contracts of employment with Company C and Company F effective on 1 October 2006;

- (iii) under the Company B Contract, the Appellant was entitled to a monthly salary and housing allowance in the sum of \$160,000 (i.e. \$115,000 + \$45,000). As a matter of coincidence, the Appellant earned exactly the same amount of aggregated remuneration under the two concurrent contracts i.e. under the Company C Contract a monthly salary of \$83,000 and a housing allowance of \$35,000 together with the salary under the Company F Contract in the sum of \$42,000 totalling \$160,000 per month;
- (iv) not only that both the Company F Contract and Company C Contract were effective on the same date and signed by Mr D, both contracts were terminated on the same day i.e. 20 June 2019 by a letter signed by the same person, one Mr P, Position Q of Company C;
- (v) both employment contracts required the Appellant to work the same number of hours and number of days in a week, which obviously overlapped with each other;
- (vi) both employment contracts contained a clause which required the Appellant not to take up other remunerated employment without prior written consent from the employer; no record of such written consent having been given;
- (vii) Under the Company C Contract, the Appellant was entitled to fringe benefits including housing allowance, car rental and medical benefits; obviously 'inherited' from the Company B's employment; however, no such benefits were offered under the Company F Contract, presumably to avoid giving the Appellant's 'double benefits';
- (viii) the Appellant did not apply for a work permit or obtain any permission to stay for work purpose in City G; whereas Article 7 of City G's Regulation No.8/2010 required a non-resident to obtain a 'worker's stay permit' before commencing work in City G;
- (ix) during the relevant assessment periods, the Appellant spent only an average of 9.3 days in City G but 229 days in Hong Kong per year; and
- (x) during the relevant assessment periods, the Appellant paid his City G tax but the average effective tax rate on his Company F income was around 3 to 4%.

29. The Respondent argued that the Board should look closely at the Appellant's concurrent employment with the two companies. Company C, of which the

Appellant was Position M, was the parent company of Company F. It should therefore be reasonably expected that the Appellant's duties in Company C would include taking on a management and supervisory role of its subsidiary Company F. It is supported by the fact that the Appellant spent a substantial amount of time in Hong Kong during the relevant tax years. It is difficult to accept the Appellant's assertion that he had not done any work for 'or literally cut off' from Company F whenever he was in Hong Kong.

30. The Respondent relied on D67/01 in which the Board determined a similar case and concluded that the dual contracts (one entered in and the other outside Hong Kong) must be considered as one-single employment in Hong Kong. The two contracts of employment consisted with both being signed by the same person and dated the same. The duties within the two companies were also similar save for the locality of performance of those duties.

31. The Board was asked to consider the similarities between the facts in D67/01 and those in this appeal including the dates and signatories of the two contracts; their total package being the same of the Company B Contract; the duties of the Appellant as Position M of Company C and Position K of Company F and their 'centrality and inter-connectivity' save for the locality of performance of those duties. Even the Appellant's leave applications under both employment were approved by the same Position Z of Company C.

32. The Respondent disagreed with the Appellant's argument that 'to disregard the Company F Contract as a contract having a separate vitality for the purposes of the charge to Salaries Tax is tantamount to saying that it is not a real employment contract at all'.

33. Based on the above submissions, the Respondent urged the Board to find that the Appellant was in reality under one employment i.e. with Company C and that the Company F income arose in and derived from the concurrent Company C employment and should therefore be chargeable to Salaries Tax under section 8(1)(a) of the IRO.

### **The Appellant's Submissions on the Source Issue**

34. The Appellant submitted that the Company F Contract was a contract of employment separate from the Company C Contract. It did not have a Hong Kong locality for the following reasons:

- (i) Company F was incorporated in City G and centrally managed and controlled from either City G, where it had its principal place of business, or Country J, where Mr D was ordinarily resident;
- (ii) The Appellant was paid remuneration under Company F Contract in City G. This points to a City G situs;
- (iii) The Company F Contract was concluded and executed by each of the Appellant and Company F outside of Hong Kong i.e. in City G; and

- (iv) The Appellant further averred that the Company F Contract was an arrangement in essence imposed upon him by Mr D and Company H generally, and that it originated from decisions and discussions essentially taken at the Company H management level in Country J. That account is consistent with the Agreed Fact that Mr D was Position K of Company H.

35. It should follow from the foregoing that no aspect of the Company F Contract had a Hong Kong nexus sufficient for it to be characterised as a Hong Kong employment and it should, therefore, be treated as a non-Hong Kong employment for the purposes of section 8(1) of the IRO.

### **The Board's Finding in the Source Issue**

36. The Board accepts the Appellant's submission that the central question for it to determine is the characterisation of the Company F Contract. The Appellant stated under cross-examination that he was neither the architect nor the instigator of the restructuring of Company H and the Company F Group in Hong Kong and City G resulting in his entering into two employment contracts. The Board accepts this evidence.

37. The Board will adopt the so-called 'totality of facts' test referred to in Goepfert and Lee Hung Kwong and look further than the external or superficial features of the employment. That said, the Board finds that the following facts are still relevant to this case:

- (1) Company F was incorporated in City G in 2006 whilst the Appellant's appointment as Position K was on 20 September 2006;
- (2) the Company F Contract was negotiated, concluded and enforced in City G;
- (3) Company F's remuneration was paid to the Appellant's bank account in City G; and
- (4) the Appellant had paid his City G tax on his Company F income.

38. The Board now turns to all the other facts which might help discover the reality of this case. Firstly, the Board finds that there were plausible and sound commercial reasons for Company H and the Company F Group to restructure their Region AA trading business by allocating their sourcing and trading functions to Company F thus migrating their buying office and trading functions from Hong Kong to City G. Further, there is evidence to show that the business of Company F in City G had increased quite significantly in the years subsequent to 2006. This reinforced the credibility of the original decision to shift the trading business to Company F in City G.

39. The Respondent submitted that the Appellant having been offered the



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position as Position E of Company B, he should have been given a sufficient degree of decision making power in the management of Company B. For that reason, the Appellant must have been consulted before the restructuring plan of Company H in Region AA was put in place. The Board cannot see how this submission would assist the Respondent's case in any way. It would be very far-fetched to speculate that the Appellant must have a part to play in devising the restructuring of Company H's Region AA business, and in so doing, he would come up with a plan which would allow him to pay less tax on his total income. Whilst the Appellant might be holding a relatively senior position in the field, the evidence was clear that the ultimate authority over Company H's business rested with Mr D.

40. The contents of the Company F Contract and Company C Contract appear to deal with two sets of separate and distinct arrangements with two separate legal entities located in two jurisdictions. Each of them contemplated discernible and different duties and responsibilities of the employee who would have well-defined roles to play in his respective positions. The Board does not accept the submission that just because the Appellant was Position M of Company C, which was the parent company of Company F, he should be expected to take on the management and supervising role as Position K of Company F as well.

41. As mentioned in paragraph 28 above, the Respondent brought to the attention of the Board certain features in the two employment contracts. The Board has considered the evidence of this case and states below its findings on whether these features point towards there being in fact only one single contract or two concurrent but separate and distinct contracts.

42. Firstly, the Board does not find the said features of the two contracts particularly dubious or extraordinary. Turning to the two contracts being executed simultaneously, it should be borne in mind that as Mr D appeared to be in a position to exercise a real and peremptory control over the business structuring of Company H in Region AA, it was only natural that he would execute the dual employment contracts making them effective on the same date during his trip to Region AB. Although the Appellant was required to take on more responsibility by working for two companies in two locations, he would only have 24 hours in a day; hence, it was understandable that Company H would not immediately offer a substantial increase of his remuneration. The available evidence showed that the base salary under the Company C Contract (HK\$83,000 per month) and the Company F Contract (HK\$42,000 per month) did not appear to be arbitrary. They seemed to be broadly consistent with the time spent by the Appellant respectively in and outside of Hong Kong at least at the initial stage during the relevant tax years. This situation changed in subsequent years and more will be discussed later in the matter of this finding.

43. Further, the combined remuneration packages under the Company F Contract and the Company C Contract were not exactly the same as those under the Company B employment. Apart from some changes in the housing allowance, the two contracts had each built in a bonus mechanism so that the Appellant would earn a higher aggregate remuneration on a performance-related basis. The Company C Contract offered

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a performance-based bonus which was payable at the discretion of the shareholders and management. The bonus was later agreed to be 1.25% of the global consolidated profit of Company F and Company C. In contrast, the bonus under the Company F Contract was fixed at 1.5% of the Earning Before Tax (EBT) of the company. The documentary evidence showed that whilst the total remuneration from Company C remained constant with a very modest increase during the subsequent twelve years, the remuneration from Company F had increased by more than 100% during the same period. The Board does not accept that this fact can be dismissed as ‘nothing but red herring’ as submitted by the Respondent.

44. The Board is convinced that there were distinct business objectives for Company C and Company F and that the Appellant’s position as Position M of the former and Position K of the latter carried discernible and distinct duties and responsibilities. There was no apparent overlapping of these duties and responsibilities in the two roles played by the Appellant.

45. As regards the fact that there was no written consent given to the Appellant to take up other remunerated employment, the Board notes that as Mr D was the ultimate controller of the business of Company C and Company F and the person who executed both contracts on the same date, it can easily be inferred that the Appellant would need Mr D’s written consent only if he took up any employment outside Company H. Any written consent for the Appellant to work for Company C as an employee of Company F and vice versa must be considered mere formalities and were dispensed with. Or, looking at it another way, the fact that Mr D executed both contracts was implied consent to take up other remunerated employment under each of the contracts he had signed.

46. The Board does not consider the fact that the Appellant did not obtain a work permit in City G to be of much relevance. He explained in his witness statement that his understanding of City G law was that if he was resident in City G for less than 45 days per year he did not need a work permit. It is not for the Board to make a decision as to whether under City G law he needed a work permit. The Board accepts the Appellant did treat his Company F Contract as a City G employment. Probably more importantly, income tax was paid in City G on his income there with no apparent objection being raised by the City G authorities as to the basis on which this income was earned.

47. In view of the Board’s findings above, the Board holds that the Company F Contract and the Company C Contract were two separate and independent employment contracts. The Company F Contract did not have a Hong Kong locality and was not a Hong Kong employment.

48. It follows that the income the Appellant derived under the Company F Contract was not chargeable to Salaries Tax under section 8(1) of the IRO i.e. the Basic Charge. That being the case, the Board does not need to deal with section 8(1A) (b)(ii) or section 8(1A)(c). However, the Board will need to consider whether the Appellant’s income arising from the Company F Contract or part of it may be chargeable to Salaries Tax under section 8(1A)(a) i.e. the Extended Charge on the ground that his income or part of it was derived from services actually rendered in Hong Kong. This issue will be dealt with

in detail below.

### **Anti-Avoidance Issue**

49. As mentioned in paragraph 5 above, as an alternative to the Source Issue, the Respondent considers that sections 61 and 61A of the IRO are applicable to this appeal.

### **Section 61**

50. The Respondent's position is that the Appellant's employment with Company F was artificial within the meaning of section 61.

51. The Respondent averred that the essence of artificiality in a transaction might encompass features that was abnormal and appeared to be part of a plan, in which a well-informed bystander might, on an objective basis, say that it 'simply would not happen in the real world'. The Respondent further contended that the following features of the Company F Contract evidently established the essence of artificiality:

- (1) There were no fringe benefits such as housing allowance, car rental, medical or retirement benefits under the Company F Contract. It would be highly abnormal that the Appellant being Position K of the company would not bargain for such benefits if the Company F Contract was genuinely a separate and independent contract from the Company C Contract.
- (2) Although the Company F Contract was concluded in City G and Company F was a company incorporated in City G, the Appellant did not apply for a work permit or permission to stay for work purpose in City G.
- (3) The Appellant being Position K of Company F had only spent an average of 9.3 days per year in City G. This period was abnormally short compared to his period of stay in Hong Kong.
- (4) The split contracts of Company C and Company F were part of a plan that was purposed for the avoidance of taxation. But for the split contracts, the Appellant would have to pay for a progressive tax rate which would amount to 17% in Hong Kong for his entire income aggregated from the Company F Contract and Company C Contract.
- (5) During cross-examination, the Appellant stated that most of his duties as the Position L of Company B were transferred to him as Position K of Company F, yet the Appellant's starting salary in Company F was substantially lower than before but for his concurrent employment under the Company C Contract.
- (6) The Respondent repeated his submission that the Appellant was one

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of the two Position Es of Company B, he could not claim that only Mr D was the 'big boss' and that he was not that influential to engineer the dual employment structure within Company H.

- (7) There was no documentary evidence or any formal records to prove that the business restructuring was for cost-saving purpose. There was nothing to prevent the Appellant from keeping records and evidence to support his contention to the Respondent and this Board.

52. The Respondent submitted that commercial realism could be a relevant consideration for deciding artificiality. In the Cheung Wah Keung case, the Court of Appeal noted that the Board was entitled to conclude that a transaction was artificial because but for the avoidance of taxation, there was no commercial sense in the transaction.

53. The Respondent further submitted that although a part of the transaction might be real, the transaction as a whole might still be held as artificial. The Respondent referred to the Departmental Interpretation and Practice Notes No.15 (Revised) which stated, *inter alia*, '...that although a part of the transaction may be real, the transaction as a whole may be held as both artificial and fictitious. When the Assessor is considering whether or not a transaction as a whole is artificial or fictitious, he would take into consideration all the surrounding circumstances to form an opinion'. The Respondent therefore contended that as the Appellant had spent a minimal period of time i.e. 9.3 days per year in City G, and even assuming that the Appellant had been fully committed to the duties as Position K of Company F during that short period of time, the transaction as a whole might still be held artificial.

54. The features of the Company F Contract stated in paragraph 51 above were similar to those mentioned in paragraphs 28 and 41, which have already dealt with by the Board. In addition, the Board accepts the following submissions made by the Appellant:

- (1) It is not tenable for the Respondent to assert that the Company F Contract was, from the perspective of the Appellant, motivated by and grounded in tax avoidance. The Appellant was not in a position to require that either Company H or the Company F Group do anything principally for his benefit.
- (2) If the Company F Contract had been a device to avoid tax, it was not very effective. It was because the income the Appellant derived from Company F in the first full year of the dual-employment arrangement i.e. the year of assessment 2007/08 was less than one-third of his aggregate income from both Company C and Company F employments.
- (3) This situation remained the same for the first six to seven years. In fact, it was not until the year 2015/16 when the Appellant's income from Company F had increased significantly then there were some meaningful savings in his Salaries Tax liability. If tax avoidance had

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indeed been a motive of the dual-employment arrangement, one would have expected most of the Appellant's aggregate remuneration to be allocated to Company F from its inception rather than paving the way to avoid tax seven years later.

- (4) The Appellant contends that the Company F Contract was just as real and with substance as the Company C Contract. The Board is asked to take into consideration the following three factors:
- (i) There was a credible commercial reason for the restructuring of the Region AA affairs of Company H; principally cost saving and diversifying and expanding its business into the Mainland and other offshore markets. It would be unlikely that a multinational corporate group with substantial turnover would restructure its business solely or primarily to provide a modest tax benefit to an employee.
  - (ii) It was the Appellant's understanding that he needed to be employed by a City G entity in order to work legally in City G. What is relevant is the subjective state of mind of Company H and the Appellant for entering into the Company F Contract. It was upon this understanding of his legal position in City G that the Appellant declared his lawful employer to be Company F and paid tax on his income on a withholding basis.
  - (iii) The Respondent had placed much reliance on the fact that the Appellant's contractual remuneration under the Company F Contract was, at least initially, less than what he had previously earned under the Company B Contract. However, it should be noted the Appellant was given the opportunity to earn a higher aggregate remuneration on a performance-related basis by building in a bonus payment mechanism in the Company F Contract. In fact, the Appellant eventually almost doubled his aggregate income from his Company F employment.

55. Having considered the evidence of this appeal, the Board accepts that the transaction in this case i.e. the dual-employment arrangement was on its face commercial and was motivated by realistic business considerations, so much so that a 'well-informed bystander' would not say that 'that would not happen in the real world'.

56. There is a fundamental distinction between a tax benefit that is incidental to a given transaction, or a corollary motive, and a tax benefit that is derived from a transaction which is abnormal or appeared to be part of a plan that rendered the whole transaction artificial or fictitious. Only in the latter case is it appropriate for the Respondent to invoke section 61. In this appeal, the Board finds no evidence to support any finding that the dual employment arrangement was artificial or fictitious.

## Section 61A

57. For section 61A to apply, there must be a transaction, a tax benefit and proof that the acquisition of the tax benefit was the sole or dominant purpose of the transaction. As Ribeiro PJ noted in Ngai Lik Electronics Co Ltd ('Ngai Lik') that 'the three interlocking conditions of transaction, tax benefit, and dominant purpose must be properly aligned with a degree of precision'.

58. 'Transaction' is defined under section 61A of the Ordinance as following:

*'transaction (交易) includes a transaction, operation or scheme whether or not such transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings.'*

59. In this appeal, the Respondent has clarified that the transaction in question was the Company F Contract and the 'relevant person' referred to in section 61A was the Appellant.

60. As for the putative 'tax benefit', the Respondent submitted that in ascertaining the existence and quantum of the benefit, it is essential to first adopt a counterfactual and thereafter, compare the tax status of the taxpayer. In the Tai Hing Cotton case, Lord Hoffmann NPJ held that the counterfactual was what the evidence suggested was most likely to have been the transaction if the taxpayer had not been able to secure the tax benefit. In other words, a comparison should be made between the transaction actually carried out and some other appropriate hypothetical transaction and if the taxpayer's tax position under the actual transaction was more favourable than under the hypothetical transaction, a tax benefit had arisen. The counterfactual hypothetical transaction taken as a comparison is the transaction most likely to have been carried if taxpayer had not been able to secure the tax benefit.

61. The same test was adopted, albeit qualified, in HIT Finance Ltd case, where Lord Hoffmann NPJ held that the counterfactual is a hypothetical transaction without the terms or features which reduce a taxpayer's liability.

62. In this appeal, the Respondent averred that the 'tax benefit' was the lower effective rate of tax in City G charged on the income he derived from Company F.

63. However, the Appellant contended that for section 61A to apply, it must be the case that it would necessarily be concluded (but not that it might or that it could be concluded) that the sole or dominant purpose of the Appellant entering into the Company F Contract was to enable the Appellant himself to obtain a tax benefit. The Appellant further contended that section 61A was not intended to apply to commercial transactions having substantial economic consequences for the parties thereto in cases where the transaction is consistent with rational commercial decision-making of each party. It does not, therefore, apply to transactions where a tax benefit is incidental and not the dominant purpose.

64. It is the Appellant's case that any putative tax benefit he derived from the

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Company F Contract was incidental, being a function of the tax laws prevailing in City G, and that the sole or dominant purpose of the Company F Contract was to reflect the restructuring of the Company F Group and Company H, and not to procure that the Appellant would obtain any personal tax benefit. The Appellant and Company F would have entered into the Company F Contract irrespective of the putative tax benefit that would arise to the Appellant.

65. The Appellant averred that there would only have been two plausible counterfactuals:

- (i) continued employment by Company B; or
- (ii) sole employment by Company C.

66. However, according to the Appellant, none of the above two counterfactual alternatives was in practice viable or could in any realistic sense have been implemented. It was because:

- (i) the buying office function previously allocated to Company B had been migrated to Company C and Company F and there was nothing for the Appellant to do at Company B; and
- (ii) Company C was not authorised to carry on a trading business.

67. In short, the Appellant was told by his superior that the dual-employment arrangement was how Company H and Company F Group had envisaged conducting their business. Short of declining to acquiesce in that new structure, there was nothing else the Appellant could have done. That the Appellant might have obtained an actual tax benefit from the arrangement was not relevant to the application of section 61A.

68. Having considered the above submissions made by both parties, the Board tends to agree with the Respondent that the transaction and the putative tax issues were not the live issues. In this appeal the real 'live issue' under section 61A was whether the employment with Company F was designed for the sole or dominant purpose of enabling him to obtain a tax benefit in Hong Kong.

69. Section 61(A)(1)(a)-(g) list out seven factors that should be taken into consideration on this point :

*'...having regard to-*

- (a) the manner in which the transaction was entered into or carried out;*
- (b) the form and substance of the transaction;*
- (c) the result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the transaction;*

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- (d) *any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction;*
- (e) *any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction;*
- (f) *whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question; and*
- (g) *the participation in the transaction of a corporation resident or carrying on business outside Hong Kong,*

*it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.'*

70. Both parties averred that examining the above seven factors was not a mechanical tick-box exercise. Rather, all factors should be taken into account in a global assessment of purpose. In Ngai Lik, it was stated that:

*'While it is necessary to have regard to each of the seven matters, this does not mean that they should be approached as boxes to be mechanically ticked off in every single case, an approach which has sometimes led to inapt attempts to force the facts into one pigeon-hole or other.'*

71. Below are the submissions of both parties in relation to the seven factors. It should be noted that most, if not all, of the contentions have already been dealt with elsewhere in this finding.

- (a) (i) The Respondent pointed out that the Appellant entered into Company F Contract and Company C Contract on the same day right after his contract with Company B was terminated. The total remuneration packages under the two new contracts were the same as those provided in the contract with Company B.
- (ii) The Appellant contended that the dual-contract arrangement was in direct response to the internal restructuring of Company H and Company F Group. It would be incredible to suppose that a multinational enterprise would engage in a corporate reconstruction with the sole or dominant purpose of assisting an employee to pay less tax.



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- (b) (i) The Respondent contended that since the Appellant was Position M of Company C and Company F was its subsidiary, he had to travel frequently between Hong Kong, the Mainland and other overseas countries. It is devoid of common and commercial sense that the Appellant would only attend to Company F's business affairs when he was outside Hong Kong. Further, the Appellant had not obtained a City G work permit.
- (ii) The Appellant averred that the Company F Contract was real contract in force under the law of City G. It was not a sham. Company F and Company C carried on separate businesses and the two contracts contemplated separate roles and duties with separate remuneration structures. There was a good commercial reason for the Appellant not being authorised to conduct the business of Company F in Hong Kong because to do so would have exposed Company F to the risk of constituting a taxable presence in Hong Kong.
- (c) (i) The Respondent contended that if the Company F Contract and Company C Contract were accepted on their face value, the Appellant's remuneration from Company F, which represented a proportion ranging from 31% to 56% of his total income, would not be chargeable to Salaries Tax in Hong Kong.
- (ii) The Appellant however agreed that the Appellant's receipt of two streams of income is consistent with the fact that he had two separate employments with two separate employers. That fact does not in and of itself point to the purpose of obtaining a tax benefit.
- (d) (i) The Respondent submitted that the Appellant only paid 3-4% salaries tax in City G compared to the progressive tax rate of up to 17% in Hong Kong, whilst there was no immediate increase of the Appellant's aggregate income. Thus, the split contracts brought about no change to the Appellant's position but they produced a tax benefit.
- (ii) The Appellant argued that the fact that he was taxed at a lower effective rate in City G relative to Hong Kong was a function of the City G tax code. It did not in and of itself import a sole or dominant purpose of obtaining a tax benefit.
- (e) (i) The Respondent further submitted that the Company C/Company H had not incurred any additional outgoings and expenses arising from the transaction in so far as the remuneration paid to the Appellant was concerned. This had

resulted in an unchanged financial position for the Company H as a whole but in the conferment of a tax benefit on the Appellant.

- (ii) The Appellant did not comment on this factor.
- (f) (i) The Respondent contended that both the Company F Contract and Company C Contract prohibited the Appellant from taking up employment with other third parties and there were overlapping working days in the two contracts, yet no prior consent had ever been obtained by the Appellant. Nor was there any indication that either Company C or Company F would hold the Appellant liable for breach of the two contracts. Further, the remunerations from the two employments were arbitrary and not based on the value of the Appellant's service provided to the companies. The putative tax benefit derived from the Company F Contract could not be incidental.
- (ii) The Appellant averred that dual-employment arrangements are evidently most likely to arise in scenarios where both employers are related parties. Further, the Appellant refuted the contention that the basis of allocation of remuneration was arbitrary. There was a direct and positive correlation between the number of days the Appellant spent outside of Hong Kong and his aggregate remuneration from Company F.
- (g) Neither party commented on this factor.

72. Having assessed the above factors qualitatively by following Ribeiro PJ's remarks in Ngai Lik, the Board comes to the conclusion that the transaction in question i.e. the dual-employment arrangement did stem from the restructuring of the businesses of Company H and Company F Group. The transaction was consistent with rational commercial decision-making of each party concerned. The Board is satisfied that the Appellant was not in a position to challenge the decisions of his superior regarding the restructuring of Company H and Company F Group's businesses, he had no other viable option but to acquiesce in the Company F Contract. That being the case, the Board finds that the Company F Contract irrespective of the putative tax benefit, the sole or dominant purpose of the transaction cannot logically have been obtaining the tax benefit. Section 61A therefore does not apply in this case.

### **The Applicability of Section 8(1A)(a)**

73. The Board having found that the Company F Contract was a separate and distinct employment contract and the Appellant's employment was in fact a City G employment, what is left for the Board to consider is whether the Appellant had rendered any service to Company F in Hong Kong in the relevant years of assessment rendering him liable to Salaries Tax in Hong Kong under the Extended Charge in section 8(1A)(a) of the

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IRO.

74. Upon examination of the facts in this appeal, it seems obvious that as a result of the restructuring of the Company H and Company F Group, the Appellant was offered two employments in two localities each with its distinctive duties and responsibility and with differing remuneration packages, the Appellant must have been expected to allocate his time appropriately between the jobs. Both employment contracts required the Appellant to work from Monday to Friday in a week. Deducting all the leave days, home leave and public holidays in Hong Kong and City G, the Appellant was required to work well over 200 days under each contract. There were simply not enough days in a year for the Appellant to fulfil his working days under each contract. Mr D must be fully aware of this anomaly as he dictated the terms of and signed the two contracts on the same date.

75. As stated by the Appellant, the split contract arrangement which offered him the positions of Position M of Company C and Position K of Company F was an ‘overall package’ and that he was given ‘the trust and flexibility’ from the board to ‘work the way he needed’.

76. The Appellant repeatedly claimed that he had not done any work for Company F while he was in Hong Kong, or for Company C while in City G. He was ‘literally cut-off’ from Company F when he was in Hong Kong and vice versa. When asked whether he was working full time in Company F during weekdays, the Appellant answered ‘I have my working hours according to the job intensity. I do not work from 9 a.m. to 5 p.m. as a [Position K]. I can work the way I needed. There is no one marking my record. There is a great deal of flexibility and trust from the board.’

77. The Appellant agreed that his contractual role and duties with each employer were distinct. Since he was Position M of Company C and Position K of Company F, he had separate job descriptions and performance objectives. Company F did not have a fixed business presence or permanent establishment in Hong Kong and he was not authorised to render any services to Company F in Hong Kong because he had been advised that to do so would have given rise to a risk that Company F establish a taxable presence by virtue of carrying on a business in Hong Kong through him. For his reason, the Appellant claimed that he would not communicate with the staff of Company F while he was in Hong Kong and he had reliable staff at his disposal in City G to manage the day-to-day running of Company F. It should be noted in this respect, that although the Appellant did not spend many days in City G each year, his travel records show he was regularly in the Mainland and also travelled frequently to other countries.

78. The Appellant further averred that he could not prove a negative, that is, he could not reasonably be required to show that he never rendered any services under the Company F Contract in Hong Kong. Nothing in the IRO would suggest that an employee be required to keep a detailed record of his daily work routine with a view to discharging his burden of proof of showing an assessment in Salaries Tax to be excessive. He also said he did not have access to his work records to assist in proving the work he had done (or not done) under the Company F Contract.

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79. While the Board agrees that it is difficult for the Appellant to prove a negative, the Board as the fact-finding tribunal is entitled to draw such inferences as it considers appropriate from the facts to the extent they may be verified by contemporaneous documentation and credible witness evidence.

80. Firstly, as a C-suite executive of Company C and Company F, the Appellant was able to set his own working hours, manage his own schedules and allocate his time appropriately on an ad hoc basis to respond as he saw fit and proper to the business exigencies of his two roles in the companies. Further, as the Respondent quite rightly pointed out, the Appellant was occupying the senior positions of Position K and Position M in the two companies, he would be expected to make important business decisions, set goals and oversee the business on a daily basis. His roles were not the same as attending to routine day-to-day administrative and operational functions which could be delegated to other staff in the office.

81. As already alluded to above, the Board finds that the Appellant could have been more candid in his evidence relating to his work schedules in his roles both as a Position M of Company C and Position K of Company F. The Board does not accept the evidence of the Appellant that when he was in Hong Kong he would never communicate with the staff of Company F because everybody knew that there was a very clear separation between Company F and Company C. This is quite implausible. However, with regard to Company C, given the limited time he was in City G each year, it is possible he would not deal with matters relating to Company C while there, but the question the Board must determine is if he did work for Company F in Hong Kong. Having heard the evidence of the Appellant and considered his roles and responsibilities, the Board considers it to have been impossible for there to be a rigid demarcation of duties which was strictly observed by the Appellant and his staff in the two companies. We consider it impossible that the Appellant could really mentally switch himself off from Company F business as soon as he physically arrived in Hong Kong. The Board is not convinced that he would not address his mind to Company F business during the entirety of any stay in Hong Kong. Further, there was no specific provision in the Company F Contract which prohibited the Appellant from attending to Company F business while he was in Hong Kong. The alleged risk of exposing Company F to Hong Kong tax appears to be an afterthought. The Board therefore does not accept the Appellant's evidence in that he did not think about or handle any Company F work at all when he was in Hong Kong.

82. The Board accepts the Respondent's submission that the Company F Contract and Company C Contract were heavily overlapped and intertwined in terms of the Appellant's work schedules. According to the Respondent's records, the Appellant spent 269 days in Hong Kong in 2007/2008. Even by adopting the number of days the Appellant considered himself spent in Hong Kong, which was 214 days, it only left with a balance of 151 days when he was outside Hong Kong.

83. As analyzed in paragraph 74 above, the Appellant was required to work over 200 days in each location under the two contracts. Given there are only 365 or 366 days in a year, it was impossible for the Appellant to work full time 400 days in a year. The Appellant averred that in relation to the total working hours, one could not read the

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Company F Contract and Company C Contract as two full-time contracts because there were not enough hours in the day to do so. Instead, it should be understood that Mr D would say to the Appellant that ‘Mr A, 365 days a year between leave and working days are all there are, and this is what your labour on a full-time contract in aggregate is worth. Agnostic as to whom the employer is, this is how much we think you’re worth to us, and this is how much we’re going to pay you.’

84. The Board acknowledges that because the contracts were signed on the same date, it can be inferred that it was intended by both parties there would be flexibility in the arrangement, however, the requirements that the Appellant work 200 days for each company shows clearly he was required to give full attention to the businesses of both Company C and Company F and not simply switch off from the work of Company F when he was in Hong Kong.

85. Given all the evidence available, in particular, the substantial number of days the Appellant was present in Hong Kong during the relevant years of assessment, it is an inescapable conclusion that the Appellant must have rendered services to Company F while he was in Hong Kong. The question is how to quantify the services he had rendered. In the absence of any contractual allocation, an exercise of apportionment becomes necessary. The next question is what the proper approach for the apportionment exercise should be.

86. It is not in dispute that if the Board finds that the Appellant did render some services to Company F when he was in Hong Kong, the exercise of apportioning income to those services is to some degree necessarily a matter of impression for the Board. It is also critical that any apportionment should be fair and balanced so that it could not be unduly prejudicial to the Appellant.

87. The Appellant submitted that the Board should reject a DIDO approach to the extent that this was arbitrary such as entailing the unwarranted assumption that the Appellant spent every single day in Hong Kong rendering services to Company F for the purposes of section 8(1A)(a).

### **Lo Wa Ming Case**

88. Since both parties relied heavily on the first instance and Court of Appeal decisions in the Lo Wa Ming case in their submissions, it is necessary for the Board to examine the applicability of that case in the present appeal.

89. In the Lo Wa Ming case, the Board rejected the DIDO Formula and applied its own formula. The CIR appealed. The Court of First Instance (‘CFI’) also rejected the DIDO Formula on the ground that the language of section 8(1A)(c) does not justify a test based only on presence in or out of Hong Kong. It is because presence outside Hong Kong is not statutorily linked to performance of overseas duties. Such an exercise may lead to arbitrary or unjust results.

90. The case was heard in the Court of Appeal (‘CA’) where it was held that the

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Board erred in law by apportioning income by identifying the number of days the taxpayer rendered service in Hong Kong, then deducting these days from the total number of days during the relevant period. The difference was considered days work in the Mainland i.e. the ‘reverse method’. The CA further held that the DIDO Formula was not supported by the provisions in section 8(1A)(c) and its application might well lead to arbitrary or unjust results.

91. It should be noted that in the Lo Wa Ming case the CA was asked to rule, *inter alia*, on whether the DIDO Formula was consistent with or in contradiction to and in any event would lead to arbitrary or unjust results under section 8(1A)(a) and section 8(1A)(c). However, having dealt with section 8(1A)(c), the CA did not make any direct ruling on the applicability of DIDO Formula to section 8(1A)(a).

92. The Respondent averred that while the DIDO Formula might not be applicable in certain cases, time apportionment was not impermissible if the facts and evidence justified its adoption. The ratio in the Lo Wa Ming case in CFI is that the DIDO approach is arbitrary in cases considering section 8(1A)(c) but not necessarily so in cases under section 8(1A)(a). The two statutory provisions are different. Section 8(1A)(a) is an inclusion imposing the Extended Charge whereas section 8(1A)(c) provides for exclusion from the Basic Charge. The time apportionment method is an acceptable and reasonable basis and has consistently been followed in virtually all cases to which section 8(1A)(a) applies. Further, the Board finds that any part of a day spent in Hong Kong should be counted as a day and the Appellant’s submission that any transit day should not be counted is not preferred. While this will cover certain days where the Appellant left Hong Kong early or arrived in Hong Kong late, the fact is the Appellant was in Hong Kong for some of the time each of those days. The Board considers that the ultimate formula that it has adopted of reducing the number of days the Appellant was in Hong Kong to a maximum of 211 working days counterbalances any possible unfairness in this respect. For details, see paragraph 103 below.

93. The Board accepts the Respondent’s submission and finds that the following passage in the CA judgement in the Lo Wa Ming case particularly relevant:

*‘...There may be cases where the application of the Day in, Day out Formula will, fortuitously, produce the correct result, in which case there can be no valid objection to the assessment. We appreciate a simple method is desirable, not least for facilitating the efficient discharge of the Revenue’s functions...’*

94. The Appellant submitted that section 8(1A)(a) and section 8(1A)(c) were just mirror images of one another as they both contained the operative words ‘income derived from services rendered in Hong Kong’ in subparagraph (a) and ‘income derived from services rendered ....outside Hong Kong’ in subparagraph (c). The Appellant further argued that it would seem odd if the DIDO Formula were to apply to subparagraph (c) or subparagraph (a), and not vice versa. The Board does not accept such an argument.

95. As analyzed in paragraph 92 above, in the Lo Wa Ming case both the CFI

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and CA clearly distinguished the inclusionary approach in section 8(1A)(a) from the exclusionary approach in section 8(1A)(c). To argue that since the DIDO Formula is not supported by the provision in section 8(1A)(c) as its application may lead to arbitrary or unjust results, the same formula should also not be applied to section 8(1A)(a) may be stretching the argument unjustifiably. There is nothing odd that the DIDO Formula may have been held not to apply to section 8(1A)(c) but it may still be applicable to section 8(1A)(a) depending on the facts of the case.

96. The Board further finds that given the facts in this case, the Goepfert case is more helpful and relevant and the DIDO Formula should produce the correct result subject to certain adjustments mentioned below. In Goepfert, the taxpayer had a non-Hong Kong employment but he performed much of his work in Hong Kong although for 41 days in the relevant year he had rendered his services outside Hong Kong. It was held that the taxpayer was liable for Salaries Tax under the Extended Charge in section 8(1A)(a) in relation with his income derived from services he rendered in Hong Kong. The income from the 41 days' overseas services was not chargeable to tax and had to be excluded. For this purpose, the apportionment was done on a 'time in time out' basis.

97. In the present appeal, given the special circumstances, in particular, the split contract arrangements and on a balance of probabilities, the Board finds that the Appellant had rendered some services in Hong Kong to Company F. He was therefore chargeable to Salaries Tax under section 8(1A)(a). The issue is how his time in Hong Kong which had been spent in rendering Company F services should be pro-rated on a fair and reasonable basis. The contractual framework under the Company F Contract did not shed any light on the allocation of the Appellant's remuneration for his duties outside City G.

98. The Appellant admitted in his evidence that his remunerations of Company C and Company F were determined based on the value of the Appellant's effort contributed to the two companies and the time which he spent in Hong Kong and overseas during the relevant tax years. The Board therefore finds that the 'time in time out' approach adopted in the Goepfert case which concerned section 8(1A)(a) should be applicable to this appeal. In so doing, the Board finds no reason why the DIDO Formula which has been applied by the Respondent in the past should not be adopted in this appeal. After all, the DIDO Formula has the advantage of practicality, objectivity and certainty over apportioning income at least for the purpose of computing the Extended Charge under section 8(1A)(a) where the circumstances in a case warrant its application.

99. However, the Board is also mindful of the Appellant's contention that the DIDO approach would necessitate the assumption that the Appellant spent every single day in Hong Kong rendering services to Company F. That is unfair to the Appellant who clearly spent time rendering services to Company C during his time in Hong Kong as well.

100. As already mentioned, the exercise of apportionment is, by necessity, to a degree a matter of impression for the Board. It is vital that any apportionment should be fair and balanced, and consistent with the intentment of the provisions in the employment contracts so as not to be unduly prejudicial to the taxpayer. In this appeal, any apportioned income derived from the Company C and Company F employments should reflect the value

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and the gravity of the Appellant's duties and demand for his energy and focus devoted to his two distinctive jobs. After all, the Appellant was offered two distinctive jobs by the same ultimate employer, he must allocate his time to each job reflecting the compensation he received.

101. In this appeal, the working days of the Appellant under the Company C and Company F employments were inextricably intertwined, and the remunerations under both employment contracts were determined by the value of the work carried out by the Appellant for the two companies. On the facts in this case, the Board concludes that whilst there is no perfect formula to apportion the Appellant's income between Company C and Company F on each day he spent in Hong Kong, the value of his work he rendered can be reflected by his remuneration in each employment over the total income he derived from both employments. In this connection, the Board finds that a table produced by the Respondent which is reproduced below is relevant:

<u>Year of Assessment</u>	<u>Income from Company C</u>	<u>Income from Company F</u>	<u>Total income</u>	<u>Percentage of income from Company F to total income</u>
	(A)	(B)	(C)	(D) = (B) / (C) x 100%
	\$	\$	\$	
2007/08	1,110,824	504,000	1,614,824	31.21%
2008/09	1,026,797	684,000	1,710,797	39.98%
2009/10	1,016,000	504,000	1,520,000	33.16%
2010/11	1,056,519	589,404	1,645,923	35.81%
2011/12	1,042,304	564,000	1,606,304	35.11%
2012/13	1,041,000	579,246	1,620,246	35.75%
2013/14	1,046,000	746,375	1,792,375	41.64%
2014/15	1,066,000	958,417	2,024,417	47.34%
2015/16	1,066,000	1,257,203	2,323,203	54.12%
2016/17	1,066,000	1,358,851	2,424,851	56.04%
2017/18	1,066,000	1,285,213	2,351,213	54.66%
2018/19	1,356,175	1,392,198	2,748,373	50.66%

102. In the table above, Column D is the percentage of Company F's income over the total income derived by the Appellant in both Company C and Company F employments. Hence, for each working day in the year of assessment 2007/08, if the Appellant did work for both companies in Hong Kong, it can be inferred that the value of the Company F work would be 31.21% of the total income he earned from both jobs.

103. The Board then expands the table by adding Columns E, F, G, H and I. The number of days the Appellant spent in Hong Kong as stated in Column E is adopted from that provided by the Respondent. The maximum number of working days under the Company F Contract will be 211 after deducting weekends, City G public holidays, leave pays and home leave. This number should be further reduced by the actual number of days the Appellant spent in City G as stated in Column F. Column H shows the Company F income attributable to services rendered in Hong Kong by the Appellant by adopting the



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DIDO approach. Since the Appellant might not have been rendering services exclusively for Company F on every day he was in Hong Kong, the Company F income should be proportionate to his Company F income over his total income in both Company C and Company F. The results are that only the income stated in Column I will be subject to the Extended Charge under section 8(1A)(a). It should also be noted that the table does not take into account the Appellant's leave days. This is because under the section 8(1A)(a) inclusionary approach, and for the purpose of this apportioning exercise, only working days are counted. Further, there is no evidence of how many days the Appellant spent in Hong Kong were leave days.

<u>Year of Assessment</u>	<u>Income from Company C</u>	<u>Income from Company F</u>	<u>Total Income</u>	<u>Percentage of income from Company F to Total Income</u>	<u>Number of days the Appellant spent in HK subject to maximum of 211 days</u>	<u>Number of days in Hong Kong less days spent in City G</u>	<u>Number of days in the year</u>	<u>Company F Income attributable to services rendered in HK on a DIDO basis</u>	<u>Company F Income subject to section 8(1A)(a) on a DIDO basis and proportionate to Total Income</u>
(A)	(B)	(C)	(D) = (B) / (C) x 100%	(E)	(F)	(G)	H = (B) x ((F)/(G))	(I) = (D) x (H)	
	\$	\$	\$				\$	\$	
2007/08	1,110,824	504,000	1,614,824	31.21%	269 -> 211	211-20 = 191	366	263,016.39	82,089.60
2008/09	1,026,797	684,000	1,710,797	39.98%	262 -> 211	211-16.5 = 194.5	365	364,487.67	145,727.15
2009/10	1,016,000	504,000	1,520,000	33.16%	237 -> 211	211-10 = 201	365	277,545.21	92,028.15
2010/11	1,056,519	589,404	1,645,923	35.81%	257 -> 211	211-13.5 = 197.5	365	318,924.08	114,206.51
2011/12	1,042,304	564,000	1,606,304	35.11%	245 -> 211	211-8 = 203	366	312,819.67	109,836.18
2012/13	1,041,000	579,246	1,620,246	35.75%	254 -> 211	211-9.5 = 201.5	365	319,775.53	114,321.34
2013/14	1,046,000	746,375	1,792,375	41.64%	248 -> 211	211-7.5 = 203.5	365	416,129.62	173,283.35
2014/15	1,066,000	958,417	2,024,417	47.34%	239 -> 211	211-9.5 = 201.5	365	529,098.70	250,490.48
2015/16	1,066,000	1,257,203	2,323,203	54.12%	199	199-6 = 193	366	662,951.31	358,756.58
2016/17	1,066,000	1,358,851	2,424,851	56.04%	173	173-7 = 166	365	617,997.99	346,317.03
2017/18	1,066,000	1,285,213	2,351,213	54.66%	189	189-4.5 = 184.5	365	649,648.76	355,109.06
2018/19	1,356,175	1,392,198	2,748,373	50.66%	178	178-0 = 178	365	678,934.92	343,916.87

104. There is no perfect formula to apportion the Appellant's income. However, given that the Company F Contract and Company C Contract were so intertwined in working days and the Appellant was given full flexibility in his work schedules, the above impressionistic exercise of apportionment should fairly reflect the nature, importance and value of the Appellant's work which he had rendered for Company F when he was in Hong Kong.

105. The Board will leave it to the parties to work out the exact amount of Salaries Tax under section 8(1A)(a) by referring to Column I in the table.

106. As the Appellant is successful, at least partially, in this appeal, there will be no order as to costs.