

Case No. D3/22

Salaries tax – whether income source in Hong Kong – sections 8(1), 8(1A), 9(1), 66(3), 66(4), 68(4) and 70 of the Inland Revenue Ordinance

Panel: Lo Pui Yin (chairman), Hew Yang Wahn and Vishal Prakash Melwani.

Date of hearing: 25-27 May 2021.

Date of decision: 27 April 2022.

The Taxpayer was the founder and the only employee of Company B which was incorporated in the Cayman Islands.

Company B has only postal boxes addresses in the Cayman Islands with no establishment in Hong Kong and did not register as an overseas company in Hong Kong.

On 1 July 2006, the Taxpayer and Company B entered into the 2006 Agreement in City C.

On 1 January 2007, Company B arranged the secondment of the Taxpayer to perform services for Company P, a subsidiary of Company B, for a term of 5 years.

On 1 January 2012, Company B extended the Taxpayer's secondment to Company P for 10 years.

The remuneration of the Taxpayer was paid by Company B via Company P and deposited into his bank account in Country D.

Company P filed the Employer's Returns on behalf of Company B in respect of the Taxpayer for the years of assessment 2008/09 to 2012/13.

The Taxpayer claimed that he had a non-Hong Kong employment with Company B and his income should be assessed on a time-apportionment basis.

The Deputy Commissioner considered that Company B was resident in Hong Kong and the Taxpayer's employment with Company B was located in Hong Kong.

Held:

1. The Taxpayer was far from being a reliable witness. His testimony was inconsistent and he made mutually conflicting assertions at different times during his testimony.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

2. The 2006 Agreement was to secure the Taxpayer with a base for work in Hong Kong, with the Taxpayer and his family being in Hong Kong and living in Hong Kong.
3. The ‘governing law’ clause for Hong Kong law and non-exclusive jurisdiction of the Hong Kong courts is consistent with the parties’ intention to carry out the 2006 Agreement in Hong Kong.
4. Company B is resident in Hong Kong. The central management and control of Company B was in Hong Kong.
5. The Taxpayer maintained Company B’s corporate activities from the office at the HK Address.
6. The place where the Taxpayer’s salary was paid and the place where the 2006 Agreement was negotiated and entered into are relatively insignificant factors in this case.
7. The source of the Taxpayer’s income from his employment with Company B was Hong Kong.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v Goepfert [1987] HKLR 888 (HC)
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
Pickles v Foulsham [1925] 9 TC 261
Bennet v Marshall [1937] 22 TC 73
Bray v Colenbrander [1953] 34 TC 138
De Beers Consolidated Mines v Howe [1906] 5 TC 198
Insurance Co of the State of Pennsylvania v Grand Union Insurance Co Ltd [1988]
HKC 200
Charter View Holdings (BVI) Ltd v Corona Investments Ltd [1998] 1 HKLRD 469
Hui Yin Sang v Tsoi Ping Kwan [2012] 2 HKLRD 1085
Re Little Olympian Each Ways [1995] 1 WLR 560
Fuchs v Commissioner of Inland Revenue [2011] 14 HKCFAR 74
The Swedish Central Railway Co Ltd v Thompson [1925] 9 TC 342
Egyptian Delta Land and Investment Co v Todd [1929] AC 1
Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation [1940] 64
CLR 15
Unit Construction Co Ltd v Bullock [1960] AC 351
Dicey, Morris and Collins on the Conflict of Law (15th Ed)
ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue
(2007) 10 HKCFAR 417

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

D1/17, (2017-18) IRBRD, vol 32, 474
D55/08, (2009-10) IRBRD, vol 24, 62
D68/06, (2006-07) IRBRD, vol 21, 1194
Esquire (Electronics) Ltd v Hongkong and Shanghai Banking Corp Ltd [2007] 3
HKLRD 439
Hui Cheung Fai v Daiwa Development Ltd (HCA 1734/2009, 8 April 2014)

Barrie Barlow, Senior Counsel, instructed by Messrs Hart Giles, for the Appellant.
Julian Lam, Counsel, instructed by the Department of Justice, for the Commissioner of
Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant/Taxpayer, Mr A against the Determination of the Deputy Commissioner of Inland Revenue dated 7 July 2020 rejecting the Taxpayer's objection to the Salaries Tax Assessment for the years of assessment 2006/07 and 2011/12 and the Additional Salaries Tax Assessments for the years of assessment 2008/09 to 2010/11 and 2012/13 raised by the Assessor of the Revenue, and confirming the Assessor's assessment for the year of assessment 2006/07, the Assessor's additional assessment for the year of assessment 2008/09, the Assessor's additional assessment for the year of assessment 2009/10, the Assessor's additional assessment for the year of assessment 2010/11, the Assessor's additional assessment for the year of assessment 2012/13 and increasing the Assessor's assessment for the year of assessment 2011/12 to Net Chargeable Income of \$62,672,278 with Tax Payable thereon of \$9,405,041 ('the Determination').

2. The Taxpayer's notice of appeal, which was lodged with the Clerk to the Board of Review by his tax representative, states the following grounds of appeal:

- '(1) The Commissioner has incorrectly concluded that Mr A's employment was located in Hong Kong. On the basis of the established law and the facts of the case, Mr A's employment should be considered as located outside Hong Kong.
- (2) Without prejudice to the generality of the foregoing, the Commissioner has incorrectly concluded that the central management and control of Mr A's employer, Company B, was in Hong Kong and, therefore, that that company is resident in Hong Kong. Such a conclusion is incorrect and inconsistent with established law and the facts of the case.
- (3) Without prejudice to the generality of paragraph (1) above, the Commissioner failed to find as a fact that the 2006 Agreement was negotiated, concluded and signed on 1 July 2006 in City C. This fact,

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

which is relevant to establishing the location of Mr A's employment, should have been found on the basis of the evidence provided to the Commissioner.'

3. This Board held the hearing of this Appeal on 25, 26 and 27 May 2021. The Taxpayer attended was represented by Mr Barrie Barlow SC, leading Mr Neil Thomson on the instructions of Hart Giles. The Revenue was represented by Mr Julian Lam on the instructions of the Department of Justice.

4. The Taxpayer and Revenue reached agreement on a set of Agreed Facts.

5. The Taxpayer testified remotely from Country D under affirmation before this Board and was cross-examined by the Revenue. The Taxpayer did not call any other oral evidence. The Taxpayer referred to documents submitted before this Board.

6. The Revenue did not call any oral evidence. The Revenue referred to documents submitted before this Board.

7. Section 8 of the Inland Revenue Ordinance (Chapter 112) ('IRO') is the charging provision for Salaries Tax. It provides:

'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –

(a) any office or employment of profit ...

(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment –

(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong ...

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

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

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

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

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

...

- (1B) *In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.*

...’.

Relevantly, section 9(1) of the IRO defines that:

‘(1) *Income from any office or employment includes:*

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

...

- (b) *the rental value of any place of residence provided rent-free by the employer or an associated corporation;*

...

- (d) *any gain realized by the exercise of, or by the assignment or release of, a right to acquire shares or stock in a corporation obtained by a person as the holder of an office in or an employee of that or any other corporation.’*

8. In the sections of this Decision that follow, this Board shall consider the Determination and the evidence placed before it by the parties to this Appeal and make findings of fact. Then this Board shall consider the submissions of the Taxpayer and the Revenue in the light of the facts found and determine this Appeal.

The Facts

9. The Agreed Facts read as follows:

- (1) The Taxpayer has objected to the assessments for Salaries Tax for the years of assessment 2006/2007 and 2011/12 and the additional assessments for Salaries Tax for the years of assessment 2008/09 to 2010/11 and 2012/13 raised on him. The Taxpayer claims that he

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

had a non-Hong Kong employment and his income for the relevant period should be assessed on a time apportionment basis.

- (2) (a) Company B (currently known as Company E) is a company incorporated in the Cayman Islands in 2006. Its shares were listed on Market AX of the City C Stock Exchange in 2006.
- (b) Company B's principal activities were acting as a holding company and providing financing and management services to its subsidiaries.
- (c) Company B maintained its registered address at either Address F ('the 1st Cayman Address') or Address G ('the 2nd Cayman Address') for the years ended 31 December 2006 to 2013.
- (d) In the Position Ts' Report in the annual reports for the years ended 31 December 2006 to 2008, Company B disclosed that the principal activities were carried on from its principal place of business in Hong Kong. In the Position U's Statement of the same annual reports for the years ended 31 December 2006 to 2008, the Taxpayer, as the Position U, stated that Company B had its headquarters in Hong Kong.
- (e) At the relevant times, Company B's board of Position Ts ('the Board') consisted of one Position AY¹ (i.e. the Taxpayer) and the following non-Position AY:

<u>Name</u>	<u>Date of appointment</u>	<u>Place of residence</u>
Mr J	01-07-2006	Hong Kong
Mr K	01-07-2006	Country L
Ms M	01-07-2006	The Mainland
Mr N	02-10-2012	Country L

- (3) Company P² is an investment holding company incorporated in the Cayman Islands in 1997. On 8 April 2006, Company B acquired 100% equity interest in Company P from the Taxpayer and had become its holding company. Company P registered in Hong Kong as a non-Hong Kong company in 2007 with its principal place of business at Building AR ('the HK Address'). The Taxpayer was Company P's sole Position T since XX December 1998.

¹ Mr H was also a Position AY for the year ended 31 December 2006.

² Company P was incorporated in the name of 'Company Q'. It changed its name to 'Company R', 'Company S' and 'Company P' in 2002 and 2007 respectively.

- (4) On 1 July 2006, the Taxpayer and Company B entered into an Executive Employment Agreement ('the 2006 Agreement') which contained, among other things, the following terms and conditions:

Clause 1 – Employment

- (a) Company B agreed to employ the Taxpayer and the Taxpayer accepted such employment subject to the terms and conditions of the 2006 Agreement. The Taxpayer should serve in the capacity of Position U and Position V of Company B reporting solely to the Board and should perform such functions as the Board should reasonably determine from time to time provided that the Taxpayer's duties should be consistent with the foregoing capacity and with the training, talent and ability of the Taxpayer.

Clause 3 – Term and Termination

- (b) The term of the 2006 Agreement should commence on the admission date of Company B's shares to the City C Stock Exchange (i.e. on XX August 2006) and should continue thereafter unless and until terminated by either party giving to the other not less than twelve months' notice in writing expiring at any time or payment in lieu of such notice.
- (c) The Taxpayer might terminate his employment by notice of termination for 'Good Reason'. For the purpose of the 2006 Agreement, 'Good Reason' meant any of the following:
- (i) the assignment to the Taxpayer of any duties inconsistent in any respect with the Taxpayer's position (including status, offices, titles and reporting requirements), authority, duties or responsibilities as contemplated by the 2006 Agreement, or any other action by Company B which resulted in a diminution in such position, authority, duties or responsibilities;
 - (ii) any failure by Company B to comply with the provisions of salary and executive benefits under Clauses 7 and 8 of the 2006 Agreement;
 - (iii) the requirement of the Taxpayer by Company B that he be based at any office or location other than Hong Kong except for travel reasonably required in the performance of his responsibilities; or

- (iv) any failure by Company B or any successor to comply with and satisfy their obligations under the 2006 Agreement.
- (d) The failure by the Taxpayer to set forth in the notice of termination any fact or circumstance which contributed to a showing of Good Reason should not waive any right of the Taxpayer or preclude him from asserting such fact or circumstance in enforcing his rights under the 2006 Agreement.

Clause 7 – Salary

- (e) Company B should from 1 January 2008 pay the Taxpayer a base salary at the rate of HK\$3,900,000 per annum. Such salary should be reviewed annually by the Remuneration Committee of Company B. For the avoidance of doubt, the Taxpayer should not be entitled to receive a salary until 1 January 2008.

Clause 8 – Executive Benefits

- (f) The Taxpayer should be awarded for each fiscal year during the term of the 2006 Agreement a bonus with the amount being determined by the Remuneration Committee and be entitled to participate in all stock option plans, incentive, savings and retirement plans, practices, policies and programs and welfare benefits plans applicable to other key or peer executives of Company B and its affiliates.
- (g) Company B should pay a housing allowance at the annual rate of HK\$2,000,000 payable in arrears by equal monthly instalments. The benefit was provided with the intention of reimbursing the Taxpayer for the costs of renting accommodation plus rates and management fees and would be adjusted in accordance with the actual costs. For Hong Kong Salaries Tax purposes, the Taxpayer was required to provide Company B with a copy of his lease agreement and relevant receipts from his landlord. If satisfactory documentation was provided to Company B, the sum actually spent would be a reimbursement of housing costs and needed not be reported to the Hong Kong Inland Revenue Department as taxable income.
- (h) Company B should pay for all premiums and make payments to provide the Taxpayer and his dependants with medical, dental and optical insurance, life or other similar coverage under the provision of Company B's various insurance schemes; and provide the Taxpayer with a travel allowance; tax planning

advice; communication equipment; a motor car and a driver.

- (i) Company B should reimburse the Taxpayer:
 - (i) for all school debentures and educational expenses incurred in relation to the children in the Taxpayer's immediately family living in Hong Kong;
 - (ii) the costs incurred for a full family membership to up to three clubs in Hong Kong;
 - (iii) all costs associated with his employment of up to two maids to work full time at the Taxpayer's home residence in Hong Kong; and
 - (iv) all reasonable employment expenses for travelling, entertainment and other similar out-of-pocket expenses necessarily incurred by the Taxpayer in the proper performance of his duties.
- (j) The Taxpayer should be entitled to an office or offices of a size with furnishings and other appointments as needed, and to exclusive personal secretarial and other assistance.

Clause 14 – Pension

- (k) The Taxpayer would participate in a Provident Fund Scheme as detailed by Company B and in accordance with the Provident Fund terms, as amended from time to time.

Clause 15 – Miscellaneous

- (l) All notices and other communications hereunder should be in writing and should be given by and hand delivery or by post addressed to the Taxpayer at Address W and to Company B at the 1st Cayman Address.
- (m) The 2006 Agreement should be governed by and interpreted in accordance with the laws of Hong Kong. The parties to the 2006 Agreement submitted to the non-exclusive jurisdiction of the Hong Kong courts and tribunal in relation to any claim, dispute, or matter arising out of or relating to the 2006 Agreement.

The 2006 Agreement was signed by Ms M on behalf of Company B in the capacity of its Position T.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

- (5) (a) On 1 January 2007, Company B and Company P entered into a Master Secondment Agreement ('the Master Agreement') and a Supplemental Agreement (Exhibit B to the Master Agreement) in relation to the secondment of the Taxpayer to perform services for Company P for a term of 5 years. To acknowledge the secondment, the Taxpayer submitted a Secondee Consent to Secondment ('the Consent' Exhibit A to the Master Agreement) to Company P and Company B.
- (b) On 1 January 2012, Company B and Company P entered into an Extension Agreement agreeing the extension of the Taxpayer's secondment to Company P for an extension term of 10 years subject to early termination and extension.
- (6) Company P filed the Employer's Returns ('Forms IR56B') in respect of the Taxpayer for the years of assessment 2008/09 to 2012/13 reporting, among other things, the following particulars:

<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
(a) Period of Employment:	01-04-2008– 31-03-2009	01-04-2009– 31-03-2010	01-04-2010– 31-03-2011	01-04-2011– 31-03-2012	01-04-2012– 31-03-2013
<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
(b) Capacity in which employed:	Position V	Position V	Position U & Position V	Position U & Position V	Position U & Position V
(c) Income particulars:	\$	\$	\$	\$	\$
- Salary	3,900,000	3,900,000	4,125,000	4,774,319	4,773,060
- Education benefits	72,050	244,100	157,500	175,331	182,759
- Other allowances	1,783,012	1,712,293	1,775,283	1,218,085	1,550,044
- Share option gain	-	-	-	55,995,770	-
Total	<u>5,755,062</u>	<u>5,856,393</u>	<u>6,057,783</u>	<u>62,163,505</u>	<u>6,505,863</u>
(d) Place of residence provided:	Yes	Yes	Yes	Yes	Yes
<u>Residence (1)</u>					
- Nature	Service Apartment	Service Apartment	Residence	House	House
- Address	<Address W>		<Address X>		
- Period provided	01-04-2008- 31-03-2009	01-04-2009- 30-11-2009	01-04-2010- 31-03-2011	01-04-2011- 31-03-2012	01-04-2012- 31-03-2013
- Rent paid by employer	-	-	\$4,079,526	\$4,066,546	\$4,441,633
- Rent paid by employee	\$2,016,000	\$1,344,000	-	-	-
- Rent refunded to employee	\$2,016,000	\$1,344,000	-	-	-
<u>Residence (2)</u>					
- Nature		House			
- Address		Address X			
- Period provided		08-12-2009- 31-03-2010			
- Rent paid by employee		\$1,752,433			
- Rent refunded to employee		\$1,752,433			
(e) Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	Yes	Yes	Yes	Yes	Yes

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
- Name of overseas company	Company B	Company B	Company B	Company B	Company B

(7) In his Tax Returns – Individuals and the attached schedules for the years of assessment 2008/09 to 2012/13, the Taxpayer reported and claimed that:

- (a) his employer was Company P and the same amount of income as reported by Company P in sub-paragraph (6)(c) was accrued to him;
- (b) he was provided with a place of residence by Company P with the same particulars as those reported by Company P in sub-paragraph (6)(d);
- (c) he was granted a share option on 11 May 2011 and a total of 1,150,625 shares were vested and exercised on the same date resulting a share option gain of HK\$55,995,770 calculated at US\$6.28 per share for the year of assessment 2011/12; and
- (d) he had a non-Hong Kong employment with Company P. As such, his income should be assessed on a time-apportionment basis and the following income attributable to the days he spent outside Hong Kong should be excluded from the assessable income:

<u>Year of assessment</u>	<u>Period covered</u>	<u>Income for the period</u>	<u>No of days in Hong Kong</u>	<u>No of days during the period</u>	<u>Income to be exclude</u>
		[A]	[B]	[C]	$[A] \times [C] - [B] / [C]$
		\$			\$
2008/09	10-04-2008 – 31-03-2009	5,755,062	182.5	365.0	2,877,531
2009/10	01-04-2009 – 31-03-2010	5,856,393	197.4	365.0	2,689,128
2010/11	01-04-2010 – 31-03-2011	6,057,783	192.3	365.0	2,866,245
2011/12	01-04-2011 – 31-03-2012	62,163,505	159.4	366.0	35,090,110
2012/13	01-04-2012 – 31-03-2013	6,505,863	171.2	365.0	3,454,346
Note: income for the period was per sub-paragraph (6)(c)					

(8) (a) The Assessor raised on the Taxpayer the following assessments for Salaries Tax for the years of assessment 2008/09 to 2010/11 and 2012/13 in accordance with his Tax Returns:

<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2011/11</u>	<u>2012/13</u>
	\$	\$	\$	\$
Income [Sub-paragraph (6)(c)]	5,755,062	5,856,393	6,057,783	6,505,863
Less: income to be excluded				

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2011/11</u>	<u>2012/13</u>
	\$	\$	\$	\$
[Sub-paragraph (7)(d)]	<u>2,877,531</u>	<u>2,869,128</u>	<u>2,866,245</u>	<u>3,454,346</u>
Assessable income	2,877,531	3,167,265	3,191,538	3,051,517
Add: Value of place of residence provided	<u>287,753</u>	<u>310,651</u>	<u>319,153</u>	<u>305,151</u>
	3,165,284	3,477,916	3,510,691	3,356,668
Less: Allowances	<u>108,000</u>	<u>108,000</u>	<u>108,000</u>	<u>120,000</u>
Net Chargeable Income	<u>3,057,284</u>	<u>3,369,916</u>	<u>3,402,691</u>	<u>3,236,668</u>
Tax Payable thereon	<u>466,792</u>	<u>515,687</u>	<u>520,603</u>	<u>493,500</u>

The Taxpayer did not object to the assessments of Salaries Tax for the years of assessment 2008/09 to 2010/11 and 2012/13, which have become final and conclusive in terms of section 70 of the IRO.

- (b) The Assessor considered that the number of days including leave attributable to the Taxpayer's services rendered in Hong Kong for the year of assessment 2011/12 should be 167.6 days. Accordingly, the Assessor computed the income attributable to the Taxpayer's services rendered in Hong Kong as \$28,466,129 (i.e. \$62,163,505 x 167.6 / 366 days). The Assessor raised on the Taxpayer the following assessment of Salaries Tax for the year of assessment 2011/12:

	\$
Income	28,466,129
Add: Value of place of residence provided	<u>282,435</u>
	28,748,564
Less : Allowances	<u>108,000</u>
Net Chargeable Income	<u>28,640,564</u>
Tax Payable thereon	<u>4,300,284</u>

- (9) The Taxpayer, through PwC International Assignment Services (Hong Kong) Ltd ('the Representative'), objected to the assessment at Fact (8)(b) on the grounds that the assessment was excessive and incorrect. The Representative claimed that the number of days attributable to the Taxpayer's services rendered in Hong Kong for the year of assessment 2011/12 should be 152.5 days. To support the claim, the Representative supplied the following document:
- (a) A Statement of Travel Records in respect to of the Taxpayer for the period from 1 April 2011 to 31 March 2012 issued by the Immigration Department of Hong Kong.
- (b) A revised computation for the Taxpayer's Salaries Tax

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

liabilities for the year of assessment 2011/12 which showed that the income attributable to services rendered in Hong Kong was \$25,901,460 (i.e. \$62,163,505 x 152.5/366 days).

- (10) The Representative had made, among other things, the following contentions:

Details of the employer

- (a) The Taxpayer was the founder and an employee of Company B.
- (b) Company B was engaged in production, development, distribution and sales of natural gas with its major business and investment activities in the Mainland.
- (c) The administration of Company B was carried out at the 2nd Cayman Address and all its books were kept at the 2nd Cayman Address.
- (d) All Company B's annual general meetings were held in City C while the Board's meetings were held outside Hong Kong via telephone conference. As such, the place of its management and control was considered to be outside Hong Kong.
- (e) The Taxpayer commenced his assignment to Company P in Hong Kong on 1 April 2007. Company P was a subsidiary of Company B and was engaged in the same line of business as Company B. The office of Company P was located at the HK Address which was around 2,500 square feet.
- (f) Company P and Company B were two separate and distinct legal entities. There was no employer-employee relationship between Company P and the Taxpayer. The Taxpayer's directorship in Company P and the residency of Company P should make no relevance to the source of his employment with Company B. It was clearly provided in the Master Agreement that the Taxpayer remained at all times an employee of Company B during his assignment in Hong Kong.
- (g) Company B had complete jurisdiction and control over the Taxpayer's employment and work during his assignment in Hong Kong.

Details of the contract of employment

- (h) In anticipation of the listing of Company B in the City C Stock Exchange in August 2006, the Taxpayer entered into the 2006

Agreement with Company B on 1 July 2006 and the employment was subject to the successful listing of its ordinary shares on the City C Stock Exchange.

- (i) The Taxpayer's employment was negotiated and concluded in City C. Ms M signed the 2006 Agreement on behalf of Company B in the Mainland.
- (j) Hong Kong was chosen as the jurisdiction governing the 2006 Agreement because it had an efficient legal system.

Duties and work base

- (k) Company B's major business and investment activities were in the Mainland. Before the secondment to Hong Kong, the Taxpayer managed Company B's Mainland business at the group's office in City Y. As the business in the Mainland was making progress, it was impractical for him to travel frequently from City Y or City C to the Mainland to carry out his duties and to attend business meetings. Hong Kong was chosen as the Taxpayer place of residence and primary work location because it was closer to the Asian capital markets and had a well-developed international transportation network so that the Taxpayer could travel to the Mainland and other countries conveniently.
- (l) The Taxpayer's connection to Hong Kong in the year of assessment 2006/07 was mainly be with his family and for transit purposes.

Payment of remuneration

- (m) The Taxpayer's remuneration was paid by Company B to Company P and then deposited into his bank account in Country D by Company P.
- (n) The Taxpayer would not draw any salary under the terms of the 2006 Agreement until 1 January 2008. Apart from an accommodation provided by Company B, no remuneration or allowance were paid to the Taxpayer by Company B during the period from 1 July 2006 to 31 December 2007.

Basis of the time apportionment claim

- (o) The Taxpayer's time apportionment claim should be allowed because:

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

- (i) he remained an employee of Company B at all times;
 - (ii) Company B's central management and control was outside Hong Kong and should be regarded as a resident outside Hong Kong;
 - (iii) his employment contract was negotiated and concluded in City C; and
 - (iv) his remuneration was ultimately paid by Company B and deposited into his bank account in Country D.
- (11) The Representative provided, among other things, copies of the following documents:
- (a) Notices of annual general meeting ('AGM') which showed that the AGM of the shareholders of Company B were held on 9 July 2007, 1 August 2008, 28 July 2009, 17 May 2010 and 15 June 2011 in City C.
 - (b) The Taxpayer's name cards, which showed that his post title was 'Position U & Position V' with the addresses at City Y, City Z and Hong Kong.
- (12) Company P filed a Form IR56B in respect of the Taxpayer for the year of assessment 2006/07 reporting, among other things, the following particulars:

(a) Period of employment:	01-07-2006 – 31-03-2007
(b) Capacity in which employed:	Position V
(c) Income particulars:	\$
- Education benefits	153,316
- Other allowances	<u>813,225</u>
Total	<u>966,541</u>
(d) Place of residence provided:	Yes
- Nature	Service Apartment
- Address	Address W
- Period provided	01-07-2006 – 31-03-2007
- Rent paid by employee	\$1,425,409
- Rent refunded to employee	\$1,425,409

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

(e) Whether the employee was wholly or partly paid by an overseas company either in Hong Kong or overseas	Yes
- Name of overseas company	Company B

- (13) The Assessor raised on the Taxpayer the following estimated Salaries Tax Assessment for the year of assessment 2006/07 and Additional Salaries Tax Assessments for the years of assessment 2008/09 to 2010/11 and 2012/13:

(a) *Estimated Salaries Tax Assessment for the year of assessment 2006/07*

	\$
Income [Fact (12)(c)]	966,541
<u>Add: Value of place of residence provided</u>	<u>96,654</u>
	1,063,195
<u>Less: Allowances</u>	<u>100,000</u>
Net Chargeable Income	<u>963,195</u>
Tax Payable thereon	<u>155,111</u>

(b) *Additional Salaries Tax Assessments for the years of assessment 2008/09 to 2010/11 and 2012/13*

<u>Year of assessment</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2012/13</u>
	\$	\$	\$	\$
Income [Fact (6)(c)]	5,755,062	5,856,393	6,057,783	6,505,863
<u>Add: Value of place of residence provided</u>	<u>575,506</u>	<u>574,407</u>	<u>605,778</u>	<u>650,586</u>
	6,330,568	6,430,800	6,663,561	7,156,449
<u>Less: Allowances</u>	<u>108,000</u>	<u>108,000</u>	<u>108,000</u>	<u>120,000</u>
Net Chargeable Income	6,222,568	6,322,800	6,555,561	7,036,449
<u>Less: Income previously assessed [Fact (8)(a)]</u>	<u>3,057,284</u>	<u>3,369,916</u>	<u>3,402,691</u>	<u>3,236,668</u>
Additional Net Chargeable Income	<u>3,165,284</u>	<u>2,952,884</u>	<u>3,152,870</u>	<u>3,799,781</u>
Additional Tax Payable thereon	<u>474,793</u>	<u>442,933</u>	<u>472,931</u>	<u>569,967</u>

- (14) (a) The Representative, on behalf of the Taxpayer, objected to the Salaries Tax Assessment and Additional Salaries Tax Assessments in sub-paragraph (13)(a) and 13(b) on the grounds that the Taxpayer held a non-Hong Kong employment with Company B and his income should be assessed on a time-apportionment basis.
- (b) To validate the objection, the Taxpayer furnished his Tax Return – Individuals for the year of assessment 2006/07 in which he

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

declared the same income particulars as reported by Company P in sub-paragraph (12)(c). Against this income, the Taxpayer applied for an exemption of the income of \$658,589 (i.e. \$966,541 x 186.7/274 days) on the ground that he had a non-Hong Kong employment with Company P.

- (15) In pursuance to the Taxpayer's objections, the Representative made the following contentions:

Company B

- (a) The office of Company B was located at the 2nd Cayman Address which was not owned by Company B but shared with its company secretary, Company AA. This was supported by the invoices issued by third parties, such as legal advisers, bankers and other service providers, to Company B at its address in the Cayman Islands.
- (b) Company B had no establishment in Hong Kong and did not register as an overseas company in any other countries including Hong Kong. Apart from the Taxpayer, Company B had no other employee in Hong Kong.
- (c) Company B was holding the equity of its subsidiaries in the Mainland. The subsidiaries' principal activities were the exploration, development and production of Coal Bed Methane and the distribution and sale of gas in the Mainland. For the purpose of maximizing the income and capital appreciation of its subsidiaries, Company B provided supports, such as financing and management services, to its subsidiaries.
- (d) Company B maintained its bank account with Bank AB in Country AC at Address AD.
- (e) The Board had the sole jurisdiction and right to make important decision e.g. business proposal, reappointment of the Taxpayer as the Position U and Position V.
- (f) The board meetings of Company B in the years of assessment 2006/07 to 2012/13 were mainly held in Country L. In most cases, the non-Position AY jointed the board meetings by telephone conference as they were resided in different countries. Other attendees of the board meetings, such as general counsel and bankers, were located outside Hong Kong. Company B's principal business activities were carried out outside Hong Kong.

- (g) As a holding company, Company B was not required to file tax return since no corporate income tax was imposed on corporations in the Cayman Islands. All subsidiaries of Company B had filed tax returns to the relevant tax authorities.

The Taxpayer's employment

- (h) From April 1997 to September 1997, the Taxpayer served as the Position U and Position V of Company AE which had become a subsidiary under the Company AF in September 1997. The Taxpayer acted as president and Position V of Company AF in Country D since September 1997.
- (i) To prepare for the listing, Company B appointed the Taxpayer as its Position U and Position V and entered into the 2006 Agreement with the Taxpayer. The terms of the 2006 Agreement was negotiated, reviewed and finalized between the Taxpayer and Company B represented by Company AG (the corporate Finance), Company AH (the legal advisers) during the period from 11 June 2006 till the signing of the 2006 Agreement on 1 July 2006 in City C.
- (j) Prior to the secondment to Company P in Hong Kong on 1 January 2007, the Taxpayer managed Company AF's and Company B's business at the office located at Address AJ which was around 600 square feet.
- (k) The Taxpayer's duties with Company B focused on managing Company B, with its principal activities in the Mainland, and sourcing funding outside Hong Kong. He had to travel extensively to the Mainland, City Y and City C to carry out his duties as a Position U and Position V of Company B. His duties as a Position T of Company B were governed by the English law.
- (l) The addresses and business contacts in City Y, City Z and Hong Kong shown on the Taxpayer's name cards were commercially sensible as those were his daily contacts for different business purposes.
- (m) As Company B had no presence or other employees in Hong Kong, Company P filed the employer's returns in respect of the Taxpayer on behalf of Company B and carried out the administrative function to rent a quarter for the Taxpayer.
- (n) The Taxpayer's monthly salary and other benefits were paid by Company B or Company P and then charged back to Company

B. The Taxpayer's remuneration was reviewed and approved by the Remuneration Committee of the Board and only which had the authority to adjust the Taxpayer's remuneration while he was on secondment.

- (o) The Taxpayer participated in the 401K plan in Country D during his assignment in Hong Kong for the years of assessment 2006/07 to 2012/13 and Company P was responsible for making the employer's contributions.
- (p) Should there be any claims, disputes or matters arising out of or relation to the employment between Company B and the Taxpayer, both Company B and the Taxpayer could commence legal proceedings in the courts of any jurisdictions under the 2006 Agreement.

The Taxpayer's secondment to Company P

- (q) It was provided in the Consent that the Taxpayer could only claim the compensation and benefits from Company B and not Company P. He was appointed as the Position U and Position V of Company P based on the secondment agreements and would not be appointed to those positions without the secondment.
- (r) There was no remuneration or fringe benefits received by the Taxpayer from Company P or any other group companies as the sole Position T of Company P during the period from 1 April 2006 to 31 December 2006.
- (s) Although the Taxpayer's secondment was in Hong Kong, he had to travel extensively to the Mainland and other countries to perform his duties as the Position U and Position V. The Taxpayer was required by Company B and not Company P to perform certain duties out of Hong Kong.

Place of payment of remuneration

- (t) The actual payments to the Taxpayer were made to his bank account in Country D. It was disclosed in the Form IR56B that the Taxpayer was partly or wholly paid by Company B.
- (16) The Representative provided copies of the following documents:
- (a) Minutes of a meeting of the Board dated 1 July 2006 recording that the Board resolved to approve the 2006 Agreement.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

- (b) A table showing the date, place and the name and location of the Position T s participated of the meetings of the Board during the years of assessment 2006/07, 2008/09 to 2012/13.
- (c) Minutes of meetings of the Board dated 27 November 2006 and 17 January 2012 recording that the Taxpayer as the Position U of the Board reporting the business activities in the Mainland.
- (d) Various letters and invoices issued by third parties to Company B. As shown in those documents, the address of Company B was at the 1st Cayman Address or the 2nd Cayman Address.
- (e) Copies of Company P's bank statement dated 3 April 2008, Company P's application for fund transfer to the Taxpayer dated 28 October 2010, a debit advice for wire transfer on 8 November 2010 and the relevant extract of Company P's and Company B's ledger account.

10. This Board finds as facts the factual matters set out in the Agreed Facts and reproduced in paragraph 9 above.

The Determination

11. The Deputy Commissioner's Determination stated that the issue for determination was 'whether the Taxpayer's employment income for the years of assessment 2006/07 and 2008/09 to 2012/13 should be assessed on a time-apportionment basis'.

12. The Deputy Commissioner considered section 8 of the IRO, the charging provision in the IRO for Salaries Tax. Having referred to the cases of Commissioner of Inland Revenue v Goepfert [1987] HKLR 888 (HC) and Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80 (CFI), the Deputy Commissioner stated that his approach must be considering all the relevant facts and reach a reasoned conclusion on 'the locality of the source of income', so that if the locality of the source of income is Hong Kong, the entire income should be subject to Salaries Tax under section 8(1)(a) of the IRO irrespective of the place where the services are rendered; and if the locality of the source of income is outside Hong Kong, only that portion of the income derived from services rendered Hong Kong is subject to Salaries Tax by virtue of the extended charge in section 8(1A)(a) of the IRO.

13. The Deputy Commissioner stated that he was unable to accept the Taxpayer's contention that the locality of his employment was located outside Hong Kong. Instead, he considered that the Taxpayer's employment with Company B was located in Hong Kong.

14. The Deputy Commissioner determined that Company B was resident in Hong Kong. The Deputy Commissioner considered that the fact that Company B was incorporated in the Cayman Islands and listed in the City C Stock Exchange did not preclude

the possibility that it maintained a presence elsewhere. The Deputy Commissioner reached this determination on the grounds that: (a) Company B had at all material times a principal place of business in Hong Kong, a matter disclosed in its annual reports for the years ended 31 December 2006 to 2008, and supported by the Position U Statements in those annual reports; (b) The Taxpayer's claim that Company B's office was located at the Cayman Islands was not accepted. Both Cayman Islands addresses were postal boxes and this did not necessarily mean that Company B had carried on its principal activities at the registered address. None of the business cards of the Taxpayer bore an address in the Cayman Islands; (c) The Taxpayer, as the Position U, Position V and Position AY of Company B, was based in Hong Kong. He spent about 50% of his time in Hong Kong during his employment with Company B. He attended some of the Board meetings in Hong Kong via telephone conference. It was therefore reasonable to conclude that Company B maintained a business presence in Hong Kong throughout the years; and (d) Company B carried on a business of investment holding, provision of financing and management services to its subsidiaries at its principal place of business in Hong Kong. The exploration, development and production of Coal Bed Methane, distribution and gas sales in the Mainland were carried out by its subsidiaries.

15. The Deputy Commissioner then determined that the Taxpayer's employment was located in Hong Kong, with the consequence that the whole of his income should be assessable to Salaries Tax. The Deputy Commissioner referred to the terms of the 2006 Agreement and considered that they suggested that the Taxpayer's employment was in Hong Kong. Also, the Deputy Commissioner questioned the Taxpayer's claim that the 2006 Agreement was negotiated, concluded and signed on 1 July 2006 in City C, pointing out that there was no reason why Ms M had to sign the 2006 Agreement on behalf of Company B in the Mainland given that she was present in the Board meeting held on 1 July 2006 in City C. The Deputy Commissioner further considered that the factor concerning the place of the negotiation, conclusion and signature of the 2006 Agreement was not determinative; the offer was apparently to take up an employment in Hong Kong and to perform duties in Hong Kong and elsewhere. The Deputy Commissioner furthermore noted that even though remuneration might be paid to the Taxpayer to his bank account in Country D, the bank documents showed that the Taxpayer's other benefits in kind were paid through Company P in Hong Kong. Accordingly, the Deputy Commissioner concluded that all the material facts pointed towards Hong Kong as the place having the strongest nexus with the Taxpayer's employment.

16. The Deputy Commissioner therefore rejected the Taxpayer's objection and confirmed the Salaries Tax Assessment for the year of assessment 2006/07, the Additional Salaries Tax Assessment for the years of assessment 2008/09 to 2010/11 and 2012/13, and revised the Salaries Tax Assessment for the year of assessment 2011/12 to an assessment based on Net Chargeable Income of \$62,672,278 with Tax Payable thereon of \$9,405,041.

The Taxpayer's Evidence

17. The Taxpayer testified before this Board remotely from State AK, Country D. He confirmed and adopted his witness statement as part of his evidence. Because of the

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

time difference between Hong Kong and State AK, his testimony was received in two sessions, each taking one morning in Hong Kong.

18. The Taxpayer stated that he was ‘a second generation oil and gas man’. He was educated in mechanical engineering and had applied his education to oil and gas technology. He developed a patented drilling technique that was capable of overcoming complex geology. This development was done in Country D.

19. The Taxpayer stated that from 1997, there was a business opportunity for utilizing the drilling technique he developed in the Mainland to obtain coal bed methane. This business opportunity was ‘created, negotiated and run’ from office premises in City Y, Country D. Company AF has had staff in the same office premises to the present.

20. In 2004, the Taxpayer came to Hong Kong. His investment visa application was sponsored by a company incorporated in Hong Kong in the name of Company AL. He was issued with a Hong Kong identity card in November 2004. Under cross-examination, the Taxpayer stated that Company AL was established to be a Hong Kong company to authorize a Hong Kong bank account, to enter into leases of Hong Kong properties, to hire Hong Kong employees, to pay Hong Kong local bills. Its purpose was to be an administrative Hong Kong office to pay Hong Kong local bills. Setting up Company AL was one of the matters the Taxpayer and his group of companies did according to advice from the Representative. Company AL was not involved in holding any of Company AF’s business in the Mainland.

21. In 2006, Company B, holding some of the assets of Company AL, was listed in Market AX of the City C Stock Exchange for raising funds to develop the business opportunity of obtaining coal bed methane in the Mainland. For the purpose of listing, highly experienced non-Position AY, some of whom were based in City C, were appointed and expert advisers in City C were engaged. The Taxpayer exhibited a Pathfinder Board minute dated 1 July 2006 held in City C and stated that this Board meeting finalized the arrangements of the listing of Company B, set up the listing committee, the remuneration committee and audit committee, and approved the Taxpayer’s employment contract with Company B (i.e. the 2006 Agreement).

22. The Taxpayer stated that although he travelled extensively in the course of his business, he expected to spend much of the time in the Mainland and needed to move closer to the operations in the Mainland. Thus he and his family moved to Hong Kong, which had extensive connections to regional cities in the Mainland and easy connections with City C and City Y. Being in Hong Kong allowed the Taxpayer to avoid taking too many long distance flights. Hong Kong also offered a good lifestyle for his family and excellent schooling for his son. The move enabled him to spend time with his family members on and around weekends and holidays.

23. The Taxpayer recalled that upon his arrival in Hong Kong, he spent a few months in a hotel before he and his family moved into a residence at Address AM. About a year later, he and his family moved into a serviced apartment at Address W. In 2009, he and his family moved into a house at Address X.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

24. The Taxpayer's son was admitted to an international school in Hong Kong. The Taxpayer's family stayed in Hong Kong during the time of the school year. The Taxpayer travelled to the Mainland at the start of the week and returned to Hong Kong at weekends to spend time with his family. As soon as there was a term break in school, he and his family would travel to Country D and other countries.

25. The Taxpayer indicated that while his family was based in Hong Kong, he was certainly in and out of Hong Kong extensively during the time that his family was based in Hong Kong.

26. By the time the 2006 Agreement was made, the Taxpayer and his family were living in Hong Kong. The Taxpayer agreed that Company B and he himself intended that he would be based in Hong Kong at the time of City C listing and the approval of the 2006 Agreement. The Taxpayer agreed that such an intention was evidenced by the terms of the 2006 Agreement relating to termination of employment, salary and executive benefits. The Taxpayer indicated that the discussion on what was being paid for in the 2006 Agreement and not so much on the amount and the point was that for his family to stay in Hong Kong, there was going to be certain costs and the company would cover that.

27. The Taxpayer stressed that Hong Kong had no involvement in his business; it was not a location from where any business was conducted. Company AF was well established in the Mainland long before the Taxpayer and his family came to Hong Kong, having signed the first contract in 1997 and another four contracts in 2003.

28. Company B acted as a holding company. Company B's capital shareholders were based in Region AN and Country AC. All the secretarial matters of Company B were handled in the Cayman Islands.

29. Investment into the business of Company AF came from Company B. The capital that Company B raised through City C listing went through Company AS (a company incorporated in the Netherlands) into the Mainland via the latter's subsidiaries.³ The operational business of Company AF was based in City Z and City AP in the Mainland, with City AP being the operation centre. The management team in the Mainland had a role of determining what to develop, how to develop and where to develop the gas resources. Quarterly meetings took place in City AP on the strategy and planning for the business. The gas wells were located in six places in the Mainland.

30. Company B also provided financing and management services to its subsidiaries.

31. Company B's Board held meetings in City C or by conference calls to discuss and approve proposals initiated in the Mainland and evolved into plans in City Y, and this was always after extensive discussion with Company B's advisers in City C. These

³ The Taxpayer stated that investment funds flowed through Company AS into the Mainland in reliance of the bilateral investment treaty between the Netherlands and the People's Republic of China.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

Board meetings ‘reviewed the performance of the [Company AF] and formulated the central policy of the business, choosing business financing and performance of management of the business operations based upon the operational needs identified by the management team in [City AP].’ The Board’s role was to decide on the capital available to execute the proposals from the Mainland. It did not get involved in the technical decisions. The Taxpayer exhibited a list of dates of a number of Board meetings of Company B, which appeared to show that all except one Board meetings were held outside Hong Kong or by telephone conference. The Taxpayer was in Hong Kong for Board meetings on three occasions, ‘on each occasion for family reasons’. The Taxpayer stated that the business decisions ‘emanated from City Y and City C’. All shareholder meetings were held in City C.

32. After the Board had agreed on the capital for a proposal (such as by issuance of equity), it would require the management team in the Mainland to execute the proposal within the budget and parameters the Board had defined. Thus the independent Board was the ultimate authority.

33. The Taxpayer indicated during cross-examination that on any given day, wherever he was, he would be conducting from there all his businesses. If his management team in Company AP needed instruction or direction from him, they would get it from him when he was travelling by videoconferencing or conference call.⁴ There were also extensive videoconferencing with Country D and Country L. He was not able to recall how many of the working days he claimed to have spent in Hong Kong were spent working for Company B, or one company of Company AF versus another company of Company AF.

34. The Taxpayer was asked about the information about Board meetings attached to his witness statement. He was unable to recall where he was at some of the meetings, including one stated to have been held in City AQ and one stated to have been held in Hong Kong. He later indicated that the said information about Board meetings attached to the witness statement was prepared by looking at the actual Board minutes and a summary was made of what took place during the meeting. It was shown to the Taxpayer that the Representative provided a longer list of Board meetings with more information and that the list provided by the Representative did not include information about one meeting that he provided in his witness statement. The Taxpayer responded that he was not familiar with the list that the Representative provided. On the other hand, he agreed that the locations of the meetings listed on the list provided by the Representative were the locations where he was travelling to conduct business. He disagreed with the suggestion that the location of the Board meetings was wherever he was at the time. Instead, he expressed that the location of the Board meeting was where there were more physical members of the Board. He explained that in most cases, it would be where he was, but there could be a case where everyone was together and he was dialing in.

35. The Taxpayer was shown the minutes of several Board meetings provided to the Revenue. It was pointed out to him that the minutes recorded that he, Position U,

⁴ The Taxpayer responded to cross-examination made by reference to a reply of the Representative to the Revenue ‘as instructed by our above-named client’, which included a statement that prior to the secondment to Hong Kong, the Taxpayer managed the business of Company AF and Company B at the office in City Y.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

updated the Board in relation to developments of transactions. The Taxpayer, in response, emphasized that the Board, with its independent Position Ts, made its decisions independently, with him and the independent Position Ts contributing to the decision making, from the perspective of whether it was good for the shareholders, in respect of the proposals from the operating management team in the Mainland which ran the real business of Company AF. He disagreed with the suggestion that he was the person who decided the strategic direction of Company B.

36. The Taxpayer disagreed with the suggestion that during the time he spent in Hong Kong he was working for Company AF. He reiterated the point that even when he was in Hong Kong, he was on videoconferencing with State AK, City Y, City C, City Z and City AP; and that the business of Company AF was in the Mainland and operation management team of the business was in the Mainland. Therefore, he stated that he conducted the real business in the Mainland regardless of where he was.

37. The Taxpayer stated that there was no business necessity for the office at Building AR (i.e. the HK Address). This Hong Kong office existed primarily for the convenience of his family arrangements at the time; it was ‘mainly set up to pay my family’s local bills’. It never made any of the business decisions of Company AF and was principally ‘a contact point’ that ‘purely dealt with administrative and some banking matters’. The Taxpayer also stated that ‘[no] person from Hong Kong was ever involved in the plans evolved in [City AP] or in developing the Budget presentations made each year’; that Company B had no employees in Hong Kong; that Company B’s Board did not meet in Hong Kong; and that no management decisions were made in Hong Kong.

38. When the Taxpayer was cross-examined in relation to the office at the HK Address, he stated that there was an office room for him, a conference room and an office space for two or three members of staff. The Taxpayer was shown the reply of the Representative which stated that the office at the HK Address had a floor size of around 2,500 square feet. He commented that he did not think that the size of the office determined the business that he ran.

39. Company B had no bank account in Hong Kong. The Taxpayer’s remuneration was paid by Company P in City Y. Company P’s payments were then posted back to the account of Company B. The Taxpayer stated that Company B was the only source of cash; it raised capital in City C and paid all his costs. The Taxpayer also stated that while the duty to pay his costs was assigned to the Hong Kong office where his family resided, his duties continued to be owed to Company B and they were exercised in the Board meetings. He emphasized that he would not take employment on a small administrative office that had zero revenue and zero means of revenue. He took the employment with Country L-listed company because that was where all the capital was.

40. During cross-examination, the Taxpayer was shown the Master Agreement related to his secondment. He indicated that the Master Agreement did not change anything in terms of where his family were living. On the other hand, he accepted that under the Master Agreement, Company B agreed to provide his services to Company P.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

41. The Taxpayer was also shown during cross-examination the Consent exhibited with the Master Agreement. He commented that while it was stated in the document that the primary venue of secondment would be Hong Kong, it ended up with him spending most of his time in the Mainland on operations and also in Country L on raising capital. There was a consideration of listing the business in Hong Kong. But it did not happen.

42. The Taxpayer was also shown the requests by the Revenue for ledger accounts and documentary evidence on how the salaries and other benefits of the Taxpayer were ultimately borne by Company B. It was pointed out to him that the reply of the Representative provided the journal accounts that showed a recharge for his salary and that the reply provided no record of any recharge of the benefits. The Taxpayer disagreed with the suggestion that there were in fact no documents showing Company P recharging Company B for the benefits. He also disagreed with the suggestion that Company P in fact did not recharge Company B for the benefits.

43. The Taxpayer was also shown the Tax Returns filed on his behalf which showed that his employer was Company P. He explained that the advice from the Representative was to second his Company B employment in Hong Kong and Company B followed the advice. The Tax Returns filed referred to the secondment.

44. The Taxpayer was also shown a letter issued by Company AL to the Hong Kong Immigration Department and signed by him, dated 23 October 2007. The contents of the letter were to confirm that the Taxpayer was ‘currently assuming the position of [Position U] & [Position V] of the Company in Hong Kong’; that Company AL had continued its investments in the energy market under the Taxpayer’s leadership and the investments made to date was ‘in excess of HK\$16 million’; and that the Taxpayer would ‘continue in the above position based in Hong Kong for at least another ten years’, so that the Director of Immigration would extend the Taxpayer’s employment (investment) visa. The Taxpayer explained that Company AL was the locally incorporated company that the Company AF used to invest before Company B was incorporated. After Company B was incorporated and listed, Company AL did not come within Company B as one of its subsidiaries and continued its own activity. The Taxpayer stated that the letter was accurate as to what Company AL did. The operations of this company were distinct from those of Company B.

45. The Taxpayer was also shown a letter issued by Company AL to the Hong Kong Immigration Department and signed by him, dated 26 May 2008, applying for a change of sponsor to Company S. This letter stated that the Taxpayer was still the sole Position T of Company AL, would continue his investments in Hong Kong, and continued to be based in Hong Kong. The Taxpayer rejected any suggestion of inconsistency, making the point that the letter made no specific statement of the amount of investment and simply stated continuation of doing things in Hong Kong, such as hiring a driver and paying rent.

46. The Taxpayer was also shown a visa extension application form signed by the Taxpayer dated 2 February 2009 and a letter issued by Company S to the Hong Kong Immigration Department dated 2 February 2009. Both the application form and the letter

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

stated that the Taxpayer's employer was Company S. The Taxpayer explained that the visa extension application and this letter were made following advice.

47. The Taxpayer was also shown a visa extension application form signed by the Taxpayer dated 3 March 2011. The application form stated that the Taxpayer's employer was Company S. The Taxpayer explained that the visa extension application was made following advice of the Representative, which also advised on the secondment. He further explained that there was no conflict between the said statements made to the Immigration Department and the statements made by the Representative to the Revenue that his employer was Company B. He continued to explain: 'My employer, as demonstrated in all the annual reports, continues to be [Company B], and then I'm seconded to [Company P] for the activities I would be conducting, which is predominantly them, or [Company B], paying for my family's residency in Hong Kong.'

48. The Taxpayer, in his evidence, referred to the Position U's Statement in each of the annual reports of Company B between 2006 and 2008 that stated that Company B was 'headquartered' in Hong Kong. The Taxpayer explained that those statements were drafted by 'an adviser' and no special attention was paid to it by him and his advisers. The Taxpayer stated that those statements were 'correct in the sense that the Building AR office is the contact point for our Group companies regionally' but they did not mean that Company B was controlled from Hong Kong. The Taxpayer added during cross-examination that for the 2009 annual report, the matter received consideration since by that time Company B was no longer a speculative exploration company on Market AX and there was discussion of a listing on the main board. The due diligence review was expanded. A correction was made as a result.

49. The Taxpayer was referred to the Position Ts' Report and the notes forming part of the audited financial statements in the 2006, 2007 and 2008 annual reports of Company B, which all stated that the principal place of business of Company B was in Hong Kong or located in the HK Address. The statements in the Position Ts' Report in those annual reports stated that Company B 'acts as a holding company and provides financing and management services to its subsidiaries, from its principal place of business in Hong Kong, where it is centrally managed and controlled.' The Taxpayer responded that the Position Ts approved the filing of the annual reports, the statements were drafted by 'junior administrators', and it was not necessary for him to approve every line in the document. The Taxpayer was later drawn to the assertion on the same matter referred to in the Determination of 'mistake of the previous CFO'. The Taxpayer responded that it was Mr H who drafted the paperwork and no one paid attention to the matter at the time; it was not material for the Market AX regulation. After Mr H left there was no reason to go back to restate. He confirmed that all the references were to the work of the same person, Mr H.

50. The Taxpayer was referred to the notes forming part of the audited financial statements in the 2010 annual report of Company B, which stated that the principal place of business was located at the HK Address. The Taxpayer responded that the statement was a paragraph that the accountants seemed to have been using in the notes from the beginning. He disagreed that this statement was deliberately put back in the 2010 annual report on the basis that it was true.

51. The Taxpayer was asked during cross-examination whether Company B was ‘resident’ in Country L.⁵ He answered that most of the activities, including auditing, communications, and meetings with advisers, were in Country L. On the other hand, the actual business was in the Mainland and the management team of the actual business controlled it in the Mainland.

52. The Taxpayer was asked where the central management and control of Company B was and his answer was that ‘[they] were dynamically in three locations’, namely, City AP, City C and Hong Kong. He also added that when he was in Country D, he would be joining the Board meetings from Country D, and so it could also have been Country D. He emphasized that the business was always in development. He did not think that there was a time when there was only one location where everything was controlled from. It was impossible for that to happen. He disagreed with the suggestion that the central management and control of Company B was wherever he was based.

53. The Taxpayer disagreed with the suggestions that the 2006 to 2008 annual reports of Company B were correct in the statement that Company B was headquartered in Hong Kong; in the statement that Company B’s principal place of business was Hong Kong; and in the statement that Hong Kong was the place where Company B was centrally managed and controlled.

54. The Taxpayer said during cross-examination that Company B had an office in City C that had a couple of members of staff over different periods of time. He could not remember the address of the City C office and which entity signed the lease. He stated it was certain that Company B had staff based in City C conducting business from that office and that such business included managing communications with shareholders.

The Issue in this Appeal

55. It is common ground that the issue for determination in this Appeal is whether the Taxpayer’s employment in the material years of assessment was a ‘Hong Kong employment’ so that all of the Taxpayer’s income in those years of assessment was assessable for Salaries Tax. If it is not, only the services rendered in Hong Kong were assessable for Salaries Tax, applying section 8(1B) of the IRO.

56. Section 66(3) of the IRO provides that save with the consent of the Board of Review and on such terms as the Board of Review may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given to the Board of Review in accordance with section 66(1). Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

⁵ Towards the end of the cross-examination, the Taxpayer was asked to agree that Company B was ‘resident’ in Hong Kong.

The Taxpayer/Appellant's Submissions

57. Mr Barlow's principal submission for the Taxpayer was that on the established law and on the facts, the Taxpayer's employment was outside Hong Kong. Therefore, the Taxpayer was only liable to Salaries Tax on the time apportionment basis, that is, in respect of the period during which he was providing services in Hong Kong.⁶

58. Mr Barlow referred to the Determination and underlined the Deputy Commissioner's acceptance that throughout the years of assessment in question, the Taxpayer was employed by Company B; that since 1 January 2007, Company B had seconded the Taxpayer to perform his employment services by assisting Company P; and that the Taxpayer's principal remuneration was paid offshore.

59. Mr Barlow asked this Board to consider the case of Goepfert (above), which the Deputy Commissioner and the Representative had both relied on. Macdougall J stated at pages 901-902 that section 8(1) of the IRO must be construed in the light of and in conjunction with section 8(1A) and that section 8(1A)(a) was an 'extension' to the basic charge under section 8(1). So it followed that '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. Mr Barlow submitted that the 'totality of facts' test was at best an alternative argument that the court did not adopt. The correct approach, which Macdougall J accepted, is that adopted by the English courts in the cases of Pickles v Foulsham (1925) 9 TC 261; Bennet v Marshall (1937) 22 TC 73 and Bray v Colenbrander (1953) 34 TC 138. It is 'to look for the place where the income really comes to the employee'. 'The locality of the source of income is the place either where the contract for payment is deemed to have a locality or where the payments for employment are made, which may mean the same thing.' In this inquiry, the Commissioner 'is not bound to accept as conclusive, any claim made by an employee' and 'is entitled to scrutinize all evidence, documentary or otherwise, that is relevant to this matter'. The English caselaw also dealt with the situation where the place of payment may be 'nominal or intended', which required the identification of the country of the employer's residence. The Commissioner 'may need to look further than the external or superficial features of the employment. ... He may need to examine other factors that point to the real locus of the source of income, the employment.' Macdougall J summed up the position in these terms: 'If during a year of assessment a person's income falls within the basic charge to salaries tax under section 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called '60 days rule' that operates when the taxpayer can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

60. Mr Barlow also referred to Lee Hung Kwong (above) and made the point that Deputy Judge To read Goepfert (above) and also adopted the test based on the three English authorities.

⁶ Originally, the Taxpayer had been taxed on Salaries Tax assessed on the 'time in, time out' formula and he paid the tax originally assessed.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

61. Where the employer is a company, its residence is determined by the place the employer's real business is carried on, namely, where the central management and control actually abides; see De Beers Consolidated Mines v Howe (1906) 5 TC 198; Insurance Co of the State of Pennsylvania v Grand Union Insurance Co Ltd [1988] HKC 200 (CA); Charter View Holdings (BVI) Ltd v Corona Investments Ltd [1998] 1 HKLRD 469 (CFI); and Hui Yin Sang v Tsoi Ping Kwan [2012] 2 HKLRD 1085 (CA). Particularly, Mr Barlow referred to the Court of Appeal's endorsement in Hui Yin Sang (above) of Lindsay J's propositions in Re Little Olympian Each Ways [1995] 1 WLR 560 as applied in Hong Kong in Charter View (above). This meant that in the consideration of the location of the central management and control, the issue has to be answered from the primary facts (and not from any assertion that any one made about the primary facts); and according to the eight factors identified.

62. Mr Barlow submitted that applying Goepfert (above), as the Taxpayer's remuneration as distinct from reimbursement for expenses expressly paid by him was paid offshore, the employment income did not come within section 8(1)'s basic charge because it did not arise in or derive from a source in Hong Kong. This meant consideration would need to be given as to whether liability arises under section 8(1A). That process had been done already in original assessments made by the Revenue. On the evidence, the real business of Company B, the Taxpayer's employer, was not carried out in Hong Kong and Hong Kong was not the location where its central management and control abided. The legal consequence was that the Revenue had no authority to raise the assessments that are under appeal.

63. Mr Barlow considered that Goepfert (above) is a decision that could be described as controversial. This was because one could see that section 8, section 8(1A) and section 8(1B) are all part of the charge to Salaries Tax, with subsection (1A) capable of being described as an inclusive definition enacted to remove doubt or debate about the scope of the charge of income arising in or derived from Hong Kong. Thus it was debatable whether it was correct to characterize subsection (1A) as an 'extension' of the charge. Mr Barlow considered this to be of significance since this seemed to have been the fulcrum of Macdougall J's analysis. Also, it was debatable since the wording of subsections (1A) and (1B) do incorporate the place where the services are rendered as a defining issue within the charge. Mr Barlow then put before this Board submissions that questioned whether Goepfert (above) has been impliedly overruled by the Court of Final Appeal's judgment in Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74, bearing in mind the importance the Court of Final Appeal attached to assessments being made based upon the wording of the statutory charging provision. Mr Barlow further submitted that the Taxpayer's case is that whether one applies Goepfert (above) or Fuchs (above) the result would be the same because of the primary facts relied upon.

64. Mr Barlow submitted on the issue of whether a company could have residence for tax purpose, understood as central management and control, in more than one country. The House of Lords decision of The Swedish Central Railway Co Ltd v Thompson (1925) 9 TC 342 was, as Lord Chancellor Cave's conclusion indicated, that there was nothing in the authorities to justify overruling the decision made below, which was based

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

upon findings that the company in question was still incorporated in England, dividends were paid in England, and share transfers were registered in England. This decision was subsequently criticized and distinguished; see Egyptian Delta Land and Investment Co v Todd [1929] AC 1; Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation (1940) 64 CLR 15; Unit Construction Co Ltd v Bullock [1960] AC 351; and Dicey, Morris and Collins on the Conflict of Law (15th Ed), Vol 2, rule 173(2), paragraphs 30-005, 30-006. A related point is that the acts of the agent are the acts of the principal and if the acts of the agent are done in another jurisdiction, then that is the principal doing those acts in that jurisdiction; see ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 417 (CFA) (paragraphs 135-141). But, in any event, Mr Barlow submitted that Swedish Central Railway (above) is irrelevant to this Appeal because Goepfert (above) and the English cases relied on in Goepfert (above) all show that the issue is where the employer's central management and control abides, and in this Appeal, it is submitted, that is clearly not Hong Kong.

65. Turning to the facts, Mr Barlow made the following submissions:⁷

- (1) The Taxpayer is a Country D educated oil and gas engineer. He founded the group of companies now headed by Company B in 1997. Since then, he has been developing Company AF's investments in the Mainland that use drilling technologies to find coal bed methane gas.
- (2) Initially, Company AF was headquartered in City Y, where it still has an office with staff of Company AF. This was where most of the planning (before listing) of Company AF's investments in the Mainland was done.
- (3) From the beginning, all the investments of Company AF in the Mainland were made through Company AS, due to the advantages that accrued under the investment treaty between the People's Republic of China and the Netherlands.
- (4) The Taxpayer first came to Hong Kong in 2004. At that time, Hong Kong was being considered as a possible listing venue.
- (5) Both before and since 2004, the Taxpayer was travelling extensively mainly in the Mainland but also in Country D, Country AZ and Region AN.
- (6) By early 2006, due to the planned listing in Market AX in City C, Company AF's main base shifted to City C, where the advisers were located, where two members of Company B's Board were located, and where all the shareholders meetings were held.

⁷ These submissions on the facts drew on the testimony of the Taxpayer, his witness statement (that he adopted as part of his evidence), the statement of agreed facts, and documents before this Board.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

- (7) In March 2006, Company B was incorporated in the Cayman Islands for the purpose of being the Market AX-listed group parent company.
- (8) At around that time, the Taxpayer and his family were considering relocating his wife and son to Hong Kong, primarily for the logistics, convenience and saving of time for the Taxpayer's regular flights to secondary cities in the Mainland; for the quality of life for his wife and son; and for the Taxpayer being able to spend time with his family during school holidays and long weekends.
- (9) In July 2006, Company B and the Taxpayer entered into the 2006 Agreement, albeit that it expressly provided that it would only become effective upon Company B's successful listing at Market AX in City C.
- (10) At that time and since, Company B had no presence in Hong Kong and the Taxpayer had no intention of changing his work and travel routines, other than in the manner mentioned in (8) above.
- (11) On 1 January 2007, Company B seconded the Taxpayer to Company P, a company incorporated in the Cayman Islands, to provide group administrative services in Hong Kong (including by leasing the office at the HK Address).
- (12) Company B is the 100 per cent owner of the key subsidiaries of Company AF, namely Company P, Company AS and Company AT, which own all of Company AF's investments in the Mainland.
- (13) Throughout the relevant years, all of Company AF's funding had come from rounds of (mostly equity) financing of Company B and none of the subsidiaries had any revenue streams.
- (14) All of the Taxpayer's remuneration and benefits have been met by his employer, Company B, which was the sole source of funding of Company AF during the relevant years.
- (15) Throughout the relevant years, Company B's corporate responsibilities in its place of incorporation, the Cayman Islands, have been undertaken by Company B's agents there, assisted when required by Company BA, a law firm.
- (16) Throughout the relevant years, Company B's Market AX-listing responsibilities have been managed in City C either by Company B's agents and professional and other advisers, including its nominated adviser.
- (17) Throughout the relevant years, Company B has had a strong

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

independent Board of Position Ts. Although the Position Ts are geographically spread, the largest grouping of Position Ts is in City C. Company B's Board, who regarded themselves as stewards entrusted with their responsibilities by Company B's shareholders, have had and have exercised ultimate control over all Company AF's strategic plans, investment funding decisions and major business decisions, *inter alia*, by setting and requiring adherence to parameters within which the management team work.

- (18) Throughout the relevant years, Company AF was engaged in oil and gas exploration, drilling and processing in the Mainland. The Group has had a large management team based in City AP (primarily) and City Z. They have managed the Group's investments and workforce of about 1,000 employees operating six gas operations in the Mainland. The management team held quarterly meetings each involving two days of intensive discussions, which the Taxpayer would usually attend (either in person or by videoconferencing) and head up as the Position V. Originally, the operations were mostly based in City Z, but as time went on, the major base of the Group's businesses has been in City AP. As the Position V of the Group, wherever he was in the world, including during his visits to Hong Kong to see his family, the Taxpayer would participate in overseeing the Group's business operations, which did not include Hong Kong, since there was no Group business here, including his interactions with Board Position Ts, the Group's advisers and the management team, usually by videoconferencing.
- (19) Throughout the relevant years, Company AF's presence in Hong Kong involved administrative services largely for the convenience of the Taxpayer and his family.
- (20) Throughout the relevant years, Company P paid the Taxpayer's monthly salary into his bank account in City Y and was reimbursed by his employer, Company B. The Revenue has not challenged the genuineness of the place of payment both within the Determination and during cross-examination.
- (21) The Taxpayer asserted in his Tax Returns that his employment was not a Hong Kong employment and that he should be assessed on a time-apportionment basis. The Revenue's original assessments were made on that basis and those original assessments have become final and conclusive.

66. Mr Barlow referred to the Court of Appeal's judgment in Hui Yin Sang (above) and following the propositions endorsed in that judgment, submitted that the erroneous assertion in the annual reports of Company B between 2006 and 2008 was 'unsatisfactory' and is displaced by the 'primary facts' submitted in paragraph 64 above. As

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

to the circumstances in which Company B carries on its business, the following were submitted on the ‘factors’:

- (1) The company’s objects clause: There was nothing relevant in Company B’s ‘objects’ clause.
- (2) The place of incorporation: Company B was incorporated (and therefore domiciled) in the Cayman Islands.
- (3) The place where the company’s real trade and business is carried on: Company B’s real trade and business is carried on in City AP in the Mainland.
- (4) The place where the company’s books are kept: Company B’s books and accounts are kept in City C. Company B’s accounts were kept and audited in City C by Company BB.
- (5) The place where the company’s administration is carried out: Company B’s ultimate administration is carried out in City C due to the primary facts that: (a) it is a listed company there; (b) City C is where its regulators and therefore its primary professional advisers are located; (c) City C is the interface between the listed company’s shareholders (who have ultimate control, through their ability to replace the Board) as they meet at shareholders meetings where they are able to question the Board; (d) City C is where a ‘majority’ of its Board members live; (e) City C is the location where its listed-related public announcements are made.
- (6) The place where the Position Ts with power to disapprove of local steps or to require different ones to be taken themselves meet or are resident: Although members of Company B’s Board are geographically spread and the Taxpayer himself was always on the move, two reside in City C. Board meetings are commonly held or based there.
- (7) The place where the company’s chief office is or where the company secretary is to be found: Company B’s chief office is in City C. The company secretary is in the Cayman Islands.
- (8) The place where the company’s most significant assets are: Company B’s most significant assets are in the Mainland.

On this analysis, Mr Barlow made the point that Hong Kong is not the relevant place in respect of any of these factors. He then invited this Board to find that the central management and control of Company B is in City C.

67. For the above reasons, Mr Barlow submitted that this Board should allow this Appeal and annul all the assessments confirmed and revised in the Determination.⁸

The Revenue/Respondent's Submissions

68. Mr Lam for the Revenue submitted that this Board should find that the location of the Taxpayer's employment is Hong Kong, upon the application of the totality of facts test that Goepfert (above) and Lee Hung Kwong (above) have established. The totality of facts test is one that considers all relevant evidence, not limited to a list of factors but excluding the place where services were actually rendered,⁹ to ascertain the locality of the employment contract or the location of the employment. Mr Lam underlined that this exercise involves actually identifying a place and it is not sufficient for the Taxpayer to suggest that his employment was located somewhere other than Hong Kong.

69. On the circumstance or factor of the residence of the employer, Mr Lam submitted that the Revenue's position was not suggesting that Company B had two places of 'residence'. The Revenue's submission was that Company B's residence was in Hong Kong, applying the propositions endorsed in Hui Yin Sang (above). In relation to those propositions, Mr Lam submitted that looking into all the circumstances was not a mechanical process and one should adopt an evaluative approach bearing on the significance of a particular factor to the administration of the company. The test does involve taking all of the circumstances into account and identifying the weight to be applied to them. Further, Mr Lam emphasized the distinction in terms of position between a holding company and a trading company. Furthermore, Mr Lam submitted that if the offshore and Hong Kong elements are equal on the balance, then the burden may be determined against the Taxpayer appellant. This can be illuminated by the requirement on the Taxpayer to identify one single jurisdiction of residence of Company B (as opposed to referring to offshore elements outweighing the Hong Kong element) and establish that this is the residence and by the consideration that the more difficult it is to identify the residence of Company B, the less weight one should place on this factor for the purpose of deciding the location of the employment.

70. Mr Lam submitted that the evidence of the Taxpayer was unreliable.¹⁰ He also asked this Board to reject the Taxpayer's assertions where there is no documentary evidence in support.¹¹

⁸ Mr Lam for the Revenue provided this Board with details of the revisions to the assessments in question in this Appeal in the event that this Board allows the Appeal, bearing in mind that the Determination in fact involved two original assessments.

⁹ Mr Lam submitted that the place where the Taxpayer actually rendered services should be distinguished from the intended base of his employment. What is irrelevant is where the Taxpayer in fact rendered services. What is relevant is the intended location under the contract of employment where the Taxpayer was supposed to be based. This is supported by the decisions of D1/17, (2017-18) IRBRD, vol 32, 474; D55/08, (2009-10) IRBRD, vol 24, 62; and D68/06, (2006-07) IRBRD, vol 21, 1194.

¹⁰ Related to the Revenue's submissions on the Taxpayer's evidence is Mr Barlow's indication, towards the end of Mr Lam's cross-examination, that he would not object or criticize Mr Lam for not putting each and every point of the Revenue's case to the Taxpayer.

¹¹ Mr Lam had in mind particularly the assertions made during testimony in respect of which the Revenue asked the Representative to provide documentary evidence or an answer but none was given.

71. Mr Lam submitted that adopting the totality of facts test in this Appeal involved the consideration of the following factors:

- (1) The employment contract: The Taxpayer's employer was Company B. The employment contract was the 2006 Agreement.
- (2) Where the Taxpayer was paid: By reference to section 9 of the IRO, the whole of the employment income of the Taxpayer should be considered. The Taxpayer's salary under the 2006 Agreement was paid in Country D. The executive benefits and other allowances under the 2006 Agreement were all provided to him in Hong Kong and the value of those benefits and allowances often exceeded his salary. There was an item of share option gain but the Taxpayer appeared to be not relying on this as a particular factor. Mr Lam submitted that the alleged re-charge by Company P to Company B (as to which there was not documentary evidence to prove) did not change the fact that the benefits were paid for and provided to the Taxpayer in Hong Kong. Thus Mr Lam submitted that the payment of the salary in Country D was a neutral factor and that the payment of substantial benefits in Hong Kong 'reflects the fact that the centre of gravity of [the Taxpayer's] employment was in Hong Kong'.
- (3) Where the employment contract was negotiated and entered into: The 2006 Agreement was negotiated in City C. It was signed in the Mainland and in City C. Mr Lam submitted that the fact that the 2006 Agreement was entered into in the Mainland 'shows that no particular importance was given to the place of signing'.
- (4) Residence of the employer: Mr Lam submitted that the Taxpayer had failed to discharge his burden of showing that Company B had a place of residence other than Hong Kong in the years of assessment in question. Firstly, the Taxpayer's evidence was that he could not say there was any location where Company B was controlled from at any particular time and the matter was dynamic between locations. Secondly, having considered the factors in Hui Yin Sang (above) and all the relevant circumstances, and the weight to be applied to each factor, the evaluation should come towards Hong Kong being the one place where Company B could be said to be based. Here, Mr Lam took issue with the Taxpayer's consideration of the circumstances in these matters: (i) The objects clause of Company B was not in the evidence; (ii) Company B's trade and business should not be conflated with the activities of its subsidiaries. Company B's activities were the provision of management services by the Taxpayer; (iii) Company B's books were kept in the Cayman Islands; (iv) Company B's administration was carried out in City Y, City C and Hong Kong; (v) The place where the Position Ts met was in different

locations around the world, and in any event, this should be a factor of limited weight; (vi) There was no chief office of Company B; (vii) The Taxpayer's case of the place of the most significant assets of Company B was unclear; and (viii) Company B's activities were predominantly led and directed by the Taxpayer, who was based in Hong Kong. Company B's Board gave the Taxpayer extensive space and discretion to conduct the affairs of Company AF; the Taxpayer on occasions updated the Board and informed the Board of what he decided. The Taxpayer was the 95.2% shareholder of Company B at the time of the listing and while this was subsequently diluted to 64.68%, he remained the majority shareholder. Thirdly, the weight to be given to the factor of residence of the employer in the totality of facts test should be less where it is difficult to identify a place of residence other than Hong Kong.

- (5) Base of the employment/employee: Mr Lam submitted that Hong Kong was the Taxpayer's intended and actual base and this was borne out by the Taxpayer's evidence of his and his family's moving to Hong Kong in 2004 and 2005; the terms of the 2006 Agreement and the documents associated with the secondment (which were drafted with the intention that the Taxpayer would be based in Hong Kong); the intention from the 2006 Agreement and the documents associated with the secondment was for the continuation of the Taxpayer's work for the business, based in Hong Kong; and the Taxpayer's conducting of work for Company B from the HK Address in the number of days in Hong Kong. The place he was the most during the years of assessment in question was Hong Kong.

72. Mr Lam therefore submitted that while the factors relied on by the Taxpayer pointed to different places in the world, the one place that his Taxpayer had the strongest connection with in the years of assessment in question was Hong Kong. He also commended the language used by the Deputy Commissioner in the Determination of Hong Kong as 'the place having [the] strongest nexus' with the Taxpayer's employment. Mr Lam added that there was no other place where the employment had a stronger connection. Alternatively, the factors were evenly balanced. This at least meant that the Taxpayer had failed to discharge his burden of proof.

Discussion

73. From the competing submissions of the parties, it appears to this Board that the first issue to resolve is the test to be applied in the determination of the source of income for the purpose of section 8 of the IRO in the case of employment. Mr Barlow and Mr Lam have made submissions on what Goepfert (above) adopted as the test. While Mr Lam said that the test is one of 'totality of facts' and provided three previous Board of Review

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

decisions in support,¹² Mr Barlow contested this and contended that the correct test was to be found in what Macdougall J in fact adopted in Goepfert (above).

74. This Board read in Goepfert (above) at page 901I-J that Macdougall J identified, in the light of the charging provision of section 8(1) of the IRO (construed together with section 8(1A)) of ‘income arising in or derived from Hong Kong from ... (a) any office or employment of profit’, the issue to be determined is ‘where the source of income, the employment, is located. As Sir Wilfrid Greene said, regard must first be had to the contract of employment’. In determining this issue, the Commissioner ‘is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinize all evidence, documentary or otherwise, that is relevant to this matter’ (pages 901J-902A). The Commissioner ‘may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to examine other factors that point to the real locus of the source of income, the employment’ (page 902D). These statements led to the Macdougall J’s summary of his construction of charge of Salaries Tax under section 8 at page 902I that Mr Barlow quoted in paragraph 59 above. Deputy Judge To explained in Lee Hung Kwong (above) at [23] his concurrence with Macdougall J and underlined that ‘the question which falls to be decided in any particular case is whether the income which is sought to be charged is income from a Hong Kong source and the place where the services are rendered is irrelevant. If the income is from a Hong Kong source, it is subject to the charge whether the services are rendered in or outside Hong Kong, unless it falls within the exception under s.8(1A)(b).’ Deputy Judge To then considered the English cases that Macdougall J had adopted in Goepfert (above) and discussed the factors that usually would be relevant to the determination of the source of income from employment, including the contract of employment, the place where the employee is to be paid, whether the employer is resident in Hong Kong and the place where the contract of employment was negotiated and entered into, at [24] to [26], and underlining that ‘none of these factors are determinative’. These statements, in the opinion of this Board, are better guide to the determination that this Board now undertakes than the expression ‘totality of facts’.

75. Next, this Board considers the evidence of the Taxpayer.

76. This Board adopts the established approach of testing the testimony of the witness (including the assertions made in the witness statement) by reference to contemporaneous documentation where it exists, or to its absence where one could expect it to have created, as well as to inherent improbabilities, having regard to all the facts that are known; see Esquire (Electronics) Ltd v Hongkong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439 (CA) at 481. This Board also refers to the judgment of Deputy High Court Judge Eugene Fung SC in Hui Cheung Fai v Daiwa Development Ltd (HCA 1734/2009, 8 April 2014) (CFI) at [77] to [82], which, apart from stating the established approach above, underlined the importance of the consistency of the witness’s evidence with undisputed or indisputable evidence, and the internal consistency of the witness’s evidence.

¹² I.e., of D1/17 (above); D55/08 (above); and D68/06 (above).

77. This Board has heard and observed the Taxpayer's testimony. This Board considers that the Taxpayer was far from being a reliable witness. While the Taxpayer was not expected to be able to recall accurately all facts that occurred and that he experienced more a decade ago, several assertions the Taxpayer made particularly during his testimony were inconsistent with his witness statement, the statement of agreed facts and contemporary documentary evidence, and he had also made mutually conflicting assertions at different times during his testimony. They included:

- (i) Company AL: The Taxpayer, during cross-examination, at first stated that Company AL was established, on advice, for the purpose to be an administrative Hong Kong office to pay Hong Kong local bills. Later, when he was shown a letter issued by Company AL that referred to that company continuing to make investments in the energy market under the leadership of the Taxpayer, he sought to explain that Company AL was the company incorporated in Hong Kong for the Company AF to invest before Company B was incorporated. Finally, when he was shown another letter issued by Company AL that referred to continuing of investment in Hong Kong, he sought to suggest that continuing investment in Hong Kong did not involve an amount and simply continuing of doing things like hiring a driver and paying rent in Hong Kong.
- (ii) The office at the HK Address: The Taxpayer stated in his witness statement that '[there] was never any business necessity for the Hong Kong office' located at the HK Address at Building AR, the office at the HK Address was 'principally a contact point where banking and some administrative activities are carried on', was 'mainly set up to pay my family's local bills', and 'existed primarily for the convenience of my family arrangement at the time'. The Taxpayer took issue with the correctness of the statements under the Position U's Statement in Company B's annual reports between 2006 and 2008 that stated Company B was headquartered in Hong Kong and under the Position Ts' Report of the same annual reports that stated Company B had 'its principal place of business in Hong Kong, where it is centrally managed and controlled'.¹³ Those statements, he added in testimony, were correct only to the extent that the HK Address was 'the contact point for our Group companies regionally'. He also claimed that Mr AV 'who has the title of Vice-President was briefly based in Hong Kong' and also that his work was concerned with 'seeking capital investment'. During cross-examination, the Taxpayer stated that the Hong Kong office had an office room for him, a conference room and an office space for members of staff. He was on videoconferencing when he was in Hong Kong with business colleagues in various parts of the world such as State AK, City Y, City C, City Z and City AP. He said he did not remember, or know, the size

¹³ The penultimate page of the said annual reports stated under 'principal place of business' the HK Address.

of the Hong Kong office, which the Representative stated in reply to the Revenue to be 2,500 square feet. In addition, it was agreed by parties that the Taxpayer's name cards showed that his post title was 'Position U & Position V' with addresses at City Y, City Z and Hong Kong. Further, the Representative provided the Revenue on or about 20 March 2020 with Company B's Announcement, dated 22 March 2010, of the annual results for the year ended 31 December 2009 (Appendix XIII) ('2010 Announcement'), which advised readers to contact Company B's 'Mr AV/Ms AW' at the Hong Kong telephone number of '+XXX XXXX XXXX' for further information.¹⁴ The same individuals and telephone number also appeared on the Notice of Annual General Meeting of Company B issued on 22 April 2010 ('2010 Notice of AGM') as one of the contacts for 'further information' about Company B and its activities. Furthermore, the back cover of the annual reports of 2006, 2007, 2008, 2009 and 2012 lists under 'Company B' the HK Address, the Hong Kong telephone number of 'XXX XXXX XXXX' and the Hong Kong fax number of 'XXX XXXX XXXX'. In the light of these pieces of evidence, the Taxpayer's claims that the office at the HK Address was 'principally a contact point where banking and some administrative activities are carried on', was 'mainly set up to pay my family's local bills', and 'existed primarily for the convenience of my family arrangement at the time' cannot be accepted.

- (iii) The City C office: The Taxpayer claimed in his witness statement that Company B 'has offices in Grand Cayman, [City Y] and [City C]'. During cross-examination, he was unable give the address of Company B's office in City C and which entity signed the lease of the office. He sought to claim that the office in City C had staff conducting the business of communicating with shareholders. On the other hand, it was agreed by parties that the Taxpayer's name cards showed that his post title was 'Position U & Position V' with addresses at City Y, City Z and Hong Kong. Further, whereas those name cards listed the names of other cities at the bottom, none of those cities was City C. Accordingly, there is at least a reasonable and significant doubt regarding whether Company B had an office in City C.

Further, with respect to extensive travelling, the Taxpayer stated in his witness statement that he travelled extensively, spending 'most of my time in the Mainland, Country D, Country AZ and Region AN', for business and

¹⁴ Mr AV is listed as a member of the management team located or based in Hong Kong at least between 2009 and 2013. The Taxpayer's team at the hearing of this Appeal included one 'Ms AW' whose title was 'Position T of Company AL, Corporate Affairs'. And the Representative sent the Revenue on or about 21 June 2013 a sponsor's certificate for the Taxpayer's visa application in October 2004 signed by '[Ms AW], [Position BD] & [Position BE]', for Company AL.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

claimed that his travel records show that he spent most of his time outside of Hong Kong. He also testified that he travelled to the Mainland at the start of the week and returned to Hong Kong at weekends to spend time with his family; and that he spent most of his time in the Mainland on operations and also in Country L on raising capital. These claims contrast with the Taxpayer's Tax Returns filed with the Revenue for the years of assessment in question that, on the other hand, show that between 1 July 2006 and 31 March 2007, he spent 73 working days inside Hong Kong, that between 1 April 2008 and 31 March 2009, he spent 182.5 working days inside Hong Kong, that between 1 April 2009 and 31 March 2010, he spent 178.5 working days inside Hong Kong, that between 1 April 2010 and 31 March 2011, he spent 167.5 working days inside Hong Kong, that between 1 April 2011 and 31 March 2012, he spent 145 working days inside Hong Kong, and that between 1 April 2012 and 31 March 2013, he spent 144.5 working days inside Hong Kong.¹⁵ The duration of the trips to the Mainland varied between half a day to 6 days, but it appears that the majority of them were between 2 to 4 days. This matter impacts adversely upon the weight this Board may give to the Taxpayer's claim of spending most of his time outside Hong Kong himself and his claim that while his family members were based in Hong Kong, he was not. Instead, it must be fairly stated that the Taxpayer was resident in Hong Kong in the years of assessment in question.

78. The Taxpayer had claimed and explained in his witness statement and testimony that the statements under the Position U's Statement in Company B's annual reports between 2006 and 2008 that stated Company B was 'headquartered' in Hong Kong and under the Position Ts' Report of the same annual reports that stated Company B had 'its principal place of business in Hong Kong, where it is centrally managed and controlled' were erroneously drafted and/or included by an 'advisor', 'junior administrator' or 'the previous CFO' and this was rectified in 2009 when attention was paid to the matter. The Taxpayer had also claimed and explained that the statements made by the auditors in the notes to the financial statements incorporated into the annual reports that Company B's 'registered office and principal place of business ... are located at [1st Cayman Address] and [the HK Address] respectively' were a paragraph that the auditors seemed to have used from the beginning. This Board rejects all these claims and explanations. Company B had appointed the same auditors throughout the years of assessment in question. The auditors had stated in the notes forming part of the financial statements that the principal place of business of Company B was the HK Address since 2007 and such a statement was in the notes for the succeeding years up to and including 2013 (except 2009). It would have been straightforward to also inform and instruct the auditors to change the statement in the notes had the matter been found to require rectification in 2009 as the Taxpayer had claimed.¹⁶

¹⁵ There was a signature of the Taxpayer on each of the sheets of travel schedule for the relevant time period made to approve the contents.

¹⁶ This Board notes that Company B seemed to have changed its company secretary and by that reason, its registered office at the Cayman Islands, from 2010 onwards. Yet, the auditors had continued to state the registered office's address as the 1st Cayman Address. This Board makes a similar observation here.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

Additionally, even though the 2009 annual report had removed the references that Company B was 'headquartered' in and 'centrally managed and controlled' from Hong Kong, its back cover continued to give the HK Address as the address of Company B together with Hong Kong telephone and fax numbers. The back cover of the 2012 annual report likewise continued to give the HK Address as the address of Company B together with Hong Kong telephone and fax numbers.

79. For the purpose of ascertaining where the Taxpayer's source of income, i.e. his employment, was located, this Board first looks to the Taxpayer's contract of employment, i.e. the 2006 Agreement. This Board reads the 2006 Agreement against these primary facts that this Board does find:

- (i) The Taxpayer was the Position U and Position V of Company AF in Country D. He founded a business that involved using drilling technology to obtain coalbed methane gas. This business had by 2004 extended to a number of sites in the Mainland.
- (ii) The Taxpayer stated in 2004 that his residential address was a penthouse at Address AU of City Y.
- (iii) The Taxpayer was living in Hong Kong as early as late 2004 on an investment visa.
- (iv) Company AL was incorporated in Hong Kong at an earlier time in 2004 and it acted as the Taxpayer's sponsor of his visa application.
- (v) The Taxpayer had since his arrival in Hong Kong been living at an address in Address W (save and except a short initial period, where he lived in a hotel).
- (vi) The Tax Returns filed on behalf of the Taxpayer indicate that the Taxpayer's wife was issued with a Hong Kong Identity Card and living in Hong Kong at least within the year of assessment 2006/07.
- (vii) Company B was incorporated in the Cayman Islands on 28 March 2006.
- (viii) The Taxpayer held at the beginning 95.2% of the shareholding of Company B; and
- (ix) Company B had three non-Position AYs at the beginning and two of them, Mr J and Mr K, had had long business experience in Hong Kong and strong business connections with Hong Kong.¹⁷

¹⁷ See, for example, the biographies of the non-Position AYs in the annual report of Company B for the year 2006.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

80. The 2006 Agreement was agreed between Company B and the Taxpayer for the employment of the Taxpayer as Company B's Position U and Position V. Under the 2006 Agreement, the Taxpayer was to 'devote the time and attention reasonable to run a coalbed methane production company'. For the purpose of determining the Taxpayer's responsibility for presenting corporate opportunities to the Board of Company B, the business of Company B was defined as 'the coalbed methane production business', though the Taxpayer had permission 'on his own time to engage in other business and can be rewarded for presenting opportunities to the Board outside of the current corporate opportunities which are approved and acted upon by [Company B]'.

81. This Board has read the 2006 Agreement carefully. This Board finds the 2006 Agreement as one that was negotiated by the parties concerned with the intention to secure the Taxpayer with a base for work, and provide the Taxpayer with a remuneration and benefits package, as well as provisions and services, that were all associated with the Taxpayer and his family being in Hong Kong and living in Hong Kong at a high standard of living. The first aspect of securing the Taxpayer to be based from Hong Kong for work is indicated from –

- (i) the 'good reason' that the Taxpayer can have to terminate the employment by notice if Company B requires him that 'he be based at any office or location other than [Hong Kong] except for travel reasonably required in the performance of the [Taxpayer's] responsibilities';
- (ii) the obligation of Company B to reimburse the Taxpayer upon termination of the employment for whatever reason, *inter alia*, 'relocation costs for the [Taxpayer's] personal effects from Hong Kong to a place of [the Taxpayer's] choosing' and 'costs imposed by the [Taxpayer's] landlord for any early termination of housing agreements'; and
- (iii) one of the executive benefits is the entitlement to 'an office of a size and with furnishings and other appointments as needed, and to exclusive personal secretarial and other assistance', and pursuant to the secondment to Company P as Company P's Position U and Position V to perform functions as determined from time to time by the Board of Company B, the primary venue of the secondment was Company P's operating office in Hong Kong at the HK Address.

The second aspect of providing the Taxpayer with a remuneration and benefits package, as well as provisions and services, that were all associated with the Taxpayer and his family being in Hong Kong and living in Hong Kong at a high standard of living is indicated from –

- (iv) the estimated amount of US\$325,000 per annum (or HK\$2,535,000) of the part of the executive benefits to be enjoyed by the Taxpayer and his family members;

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

- (v) the housing allowance at the annual rate of HK\$2,000,000 ‘provided with the intention of reimbursing the [Taxpayer] for the cost of renting accommodation plus rates and management fees’, so that it ‘shall be adjusted in accordance with and in the amount of any increase in rent, rates and/or management fees imposed upon the [Taxpayer] by the landlord of the said housing occupied by [the Taxpayer] during the term of the Agreement’, with provision requiring the Taxpayer to provide Company B with a copy of the lease agreement and landlord’s receipts for Hong Kong Salaries Tax purposes;
- (vi) the reimbursement of ‘all school debentures and educational expenses incurred in relation to the children in the [Taxpayer’s] immediately family living in Hong Kong’;
- (vii) the reimbursement of ‘the costs incurred for a full family membership (including joining fees, annual and monthly subscriptions) to up to three (3) clubs in Hong Kong (nominated by the [Taxpayer] from time to time) whether for business or marketing and/or personal use, and all expenses incurred in such clubs’;
- (viii) the advance travel allowance for the Taxpayer and his dependants for four round trip flights in first class each year to any destination chosen by the Taxpayer;
- (ix) the reimbursement of all costs ‘associated with [the Taxpayer’s] employment of up to two (2) maids to work full time at [the Taxpayer’s] home residence in Hong Kong’;
- (x) Provision of laptop computer, mobile telephone, Blackberry for business and personal use by the Taxpayer and the payment of all related bills; and
- (xi) Provision of a motor car (S500 Mercedes or similar type) for the Taxpayer’s business and personal use together with a driver chosen by the Taxpayer and covering all costs and operating expenses connected with the use of the motor car.

Last, but not least, this Board finds the ‘governing law’ clause for Hong Kong law and non-exclusive jurisdiction of the Hong Kong courts to be consistent with the parties having intended to cater for the carrying out of the 2006 Agreement in Hong Kong.

82. This Board finds the effect of the 2006 Agreement not only enabled the Taxpayer to continue his residence in Hong Kong for business and family union but also ensured that he and his family members would be fully provided by Company B in their living in Hong Kong at a high standard of living, presumably one that was consistent with,

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

if not more advantageous than, an entrepreneur and corporate Position U and Position V who had already been living in a serviced apartment at Address W at the time of the negotiation of the details of the employment.

83. This Board finds that the Taxpayer was able to negotiate successfully for the advantageous terms of the 2006 Agreement with Company B plainly due to his position as the founder of the business and the entrepreneur for maintaining and expanding the business that Company B was about to embark as the holding vehicle of the business.¹⁸

84. This Board assesses the factor of the intent, terms, and effect of the employment contract, when considered together its background, to be not only highly relevant but also substantially material to the determination of the source of the Taxpayer's income, the employment.

85. This Board next considers whether the employer, i.e. Company B, is resident in Hong Kong. For this exercise, this Board applies the propositions the Court of Appeal endorsed in Hui Yin Sang to ascertain Company B's central management and control upon finding the relevant primary facts.

86. This Board's consideration of all the circumstances in which Company B carried on its business, including the factors discussed in Hui Yin Sang, is as follows:

- (1) The company's 'objects' clause: The Taxpayer submitted that there was nothing relevant in 'objects' clause. The Revenue submitted that the 'objects' clause is not in the evidence. This Board does not take this factor into account.
- (2) The place of incorporation: Company B was incorporated in the Cayman Islands. This Board follows the Court of Appeal's rejection at [44] of Hui Yin Sang the submission that the purpose of an offshore non-trading investment holding company is a factor of unique significance that should take precedence over other factors, since this submission suggested that the place of incorporation is where it is ordinarily resident. Rather, the concept of residence of a company is entirely different from that of domicile.
- (3) The place where the company's real trade and business was carried on: The Taxpayer submitted that Company B's real trade and business was carried on in the Mainland (particularly in City AP). The Revenue submitted that Company B, being a holding company, should not have its trade and business conflated with the activities of its subsidiaries and instead made the point that one of Company B's activities was

¹⁸ This Board has read from the subsequent Board minutes that the Taxpayer presented to the Board business opportunities not confined to coalbed methane gas extraction and both the Board minutes and the audited financial statements show that Company B had expanded its business from the 'upstream' of exploration and extraction of gas to the 'downstream' of distribution of gas.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

the provision management services by the Taxpayer. This Board notes the agreed fact that Company B's principal activities were acting as a holding company and providing financing and management services to its subsidiaries, as well as the agreed fact that Company B was listed at Market AX of the City C Stock Exchange. Insofar as it is asked where Company B did business, the places were: (i) City C and Hong Kong¹⁹ in relation to the raising of financing to provide to its subsidiaries and (ii) the residence of the subsidiary in question in relation to the provision of management services.

- (4) The place where the company's books were kept: Insofar as registration related books were concerned, Company B's books are kept in the Cayman Islands. Insofar as accounts were concerned, Company B's accounts were kept in City C, where its auditors were located.
- (5) The place where the company's administration was carried out: This Board associates this factor with the question of the corporate activities or 'keeping house'. The Taxpayer had submitted on City C being the place where the regulatory activities associated with Company B's listing (including announcements) were carried out, through the professional advisers located there, and the place where the shareholders' meetings were held, using the services of the professional advisers there. While this Board accepts this submission, this Board finds that some administration for Company B was carried out in Hong Kong as evidenced by the 2010 Announcement referred to in paragraph 77(ii) above; the 2010 Notice of AGM referred to in paragraph 77(ii) above; the minuted attendance/participation of Ms AW in three Board meetings held between September 2006 and March 2007; and the statements made in the 2006, 2007, 2008, 2009 and 2012 annual reports of Company B that the HK Address was the principal place of business of Company B.
- (6) The place where the Position Ts with power to disapprove of local steps or to require different ones to be taken themselves met or were resident: Company B's Board met in various locations around the world and also by telephone conference. The format of the minutes appears to be that if the meeting was recorded as having been held at a location, it was by reason of the location of the Position U of the

¹⁹ Mr AV, who had the responsibility of seeking capital investment, was based in Hong Kong between 2009 and 2013.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

meeting.²⁰ The Representative provided the Revenue with a list of 21 Board meetings said to have been held within the years of assessment in question and the Taxpayer was recorded as being in Hong Kong for 3 such meetings.²¹ Regarding the place of residence of Position Ts, the agreed facts indicate that they were geographically spread. It was only from October 2012 that there were two non-Position AYs residing in Country L. And the Taxpayer himself was resident in Hong Kong for not insubstantial periods in the years of assessment in question. Hence it would be an overstatement to regard that this factor favours City C at the material times.

- (7) The place where the company's chief office is or where the company secretary is to be found: This Board also associates this factor with the question of corporate activities or 'keeping house'. The Taxpayer had submitted that the relevant place was City C. Here, this Board rejects the Taxpayer's submission that Company B had an office in City C; there was no evidence, apart from the unsatisfactory assertions and attempts in elaborations of the Taxpayer in his testimony (to which this Board places no weight), to substantiate this submission. Instead, from the statements made in the 2006, 2007, 2008, 2009 and 2012 annual reports of Company B that the HK Address was the principal place of business of Company B and the notes forming part of the financial statements of Company B prepared by the auditors for all years between 2007 and 2013 (except 2009), this Board finds that Company B did have or maintain an office in Hong Kong. On the other hand, Company B's company secretary, this Board accepts, was and is in the Cayman Islands.
- (8) The place where the company's most significant assets were: The Taxpayer submitted that Company B's most significant assets were in the Mainland. The Revenue submitted that this was unclear. This

²⁰ There are six examples from the Board minutes supplied by the Representative to the Revenue: (i) A meeting of the Board was held on 9 July 2011 in City C and Taxpayer was recorded as physically present and chairing the meeting and the other participants were also physically present; (ii) A meeting of the Board was held on 12 August 2011 in City AQ, State AK and the Taxpayer was recorded as physically present and chairing the meeting and the other participants joined the meeting by telephone; (iii) A meeting of the Board was held on 17 January 2012 at the office of Company AG, the nominated adviser, in City C and the Taxpayer was recorded as physically present and chairing the meeting and three of the four other participants joined the meeting by telephone; (iv) A meeting of the Board was held on 17 September 2012 at the office of Company AG in City C and the Taxpayer was recorded as physically present and chairing the meeting and three of the four other participants joined the meeting by telephone; (v) A meeting of the Board was held on 2 November 2012 in City AP and the Taxpayer was recorded as physically present and chairing the meeting and all the other participants joined the meeting by telephone; and (vi) A meeting of the Board was held on 16 January 2013 at the office of Company AG in City C and the Taxpayer was recorded as physically present and chairing the meeting and two of the four other participants joined the meeting by telephone.

²¹ This Board has cross-checked the dates of the meetings with the Taxpayer's travel records submitted with his Tax Returns and found them to be accurate.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

Board considers that in the light of Company B's principal activities

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- (i) in relation Company B being a holding company, its most significant assets were the shareholding of the subsidiaries that it wholly or partly owned. This in turn requires determination of the residence of Company B itself; (ii) in relation to Company B providing finance to its subsidiaries, its most significant assets would seem to be the funds it had. This in turn suggests Country AC, the place where Company B maintained a bank account; and (iii) in relation to Company B providing management services to its subsidiaries, the most significant factor was the Taxpayer himself (as human capital was also an asset), who was being seconded by Company B to be the Position U and Position V of Company P. This suggests at least in part Hong Kong.

87. The Court of Appeal in Hui Yin Sang underlined in [39] to [43] that there is no hierarchy of factors and the weight to be given to a factor in a given case is a matter of judgment in the circumstances of the case. The inquiry is to determine what is being centrally managed and controlled, in order to determine where it is being so managed and controlled. Having examined all the circumstances of Company B as disclosed in the evidence before this Board, this Board is unable to accept the Taxpayer's submission that the central management and control of Company B was City C, since the matters that took place in City C were: (i) activities performed by nominated/appointed advisers and professionals, including regulatory compliance, accounts and audit; (ii) Board meetings that were recorded as taking place there because of the physical presence of the Taxpayer, who chaired the meetings, there;²² and (iii) meetings of shareholders, which were organized by the nominated/appointed advisers and held at their offices.²³

88. On the other hand, this Board accepts the Revenue's submission that the central management and control of Company B was Hong Kong. This is because: (i) Company B's physical office was in Hong Kong at the HK Address at Building AR; (ii) At Company B's office at the HK Address, corporate activities in the nature of 'keeping house' were carried out by staff including Mr AV and Ms AW; (iii) It was publicized that Company B's principal place of business was in Hong Kong, as this is shown in the annual reports, the audited financial statements, and the 2009 Announcement and the 2010 Notice of AGM; (iv) Insofar as the two principal activities of Company B were concerned, on the evidence before this Board, Hong Kong was the location where part of the financing services for the subsidiaries and the provision of management services to the subsidiaries were carried out; (v) The Position AY, Position U and Position V of Company B, the Taxpayer, was resident in Hong Kong. His residence was also decisive of the ascertainment of the location of Company B's most significant assets, the entrepreneur or Position AY who sought business opportunities and presented them to the Board and the provider of management services of

²² By reference to the list of 21 Board meetings, that would be at most 8 out of 21.

²³ See the Notices of Annual General Meeting the Representative provided to the Revenue.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

Company B to its subsidiaries; (vi) The contention that the central management and control of Company B was City C was rejected for the reasons stated in paragraph 87 above; (vii) It has not been contended that the central management and control of Company B was in another location, such as the Cayman Islands, the place of incorporation and the place of the location of the company secretary. This is realistic having regard to Company B having been established at this offshore jurisdiction to function as a holding company of the business group founded and run by the Taxpayer; and (viii) It has not been contended that Company B was a company that had two places of residence.

89. This Board considers that both the place where the employee was to be paid, and the place where the contract of employment was negotiated and entered into, are relatively insignificant factors in the exercise. In relation to the place of payment of the Taxpayer's salary, which was City Y, this Board notes that the salary, albeit substantial in amount, was one part of the package of remuneration, benefits, provisions and services that the 2006 Agreement provided for the Taxpayer, with other parts of that package concerned with the Taxpayer and his family being in Hong Kong and living in Hong Kong at a high standard of living. Thus this factor is not one that this Board can assess in separation from the contract of employment. In relation to the place where the contract of employment was negotiated and entered into, which was City C (and if Ms M's signature did play a part, the Mainland), this Board considers that given the formation of Company B and the process of Market AX listing had involved persons residing in many locations,²⁴ this Board accepts the Revenue's submission that the place that the Board of Position Ts of Company B met to discuss and approve the draft of the 2006 Agreement and the place(s) of the signing of the 2006 Agreement were not of particular importance in the assessment.

90. Although Mr Lam for the Revenue made submissions that this Board should consider 'the base of the employment/employee' as an additional factor, this Board is of the view that in the circumstances of this Appeal, the matters underlying his submission on 'the base' are part and parcel of the background, intent, terms and effect of the contract of employment that this Board has considered above.

91. Lastly, this Board has taken account of the matter that the Taxpayer was paid presumably from funds located outside Hong Kong since the Master Agreement provided for Company B to be reimbursed by Company P, which was a holding company and a subsidiary of Company B.

92. In summary, the assessment of the factors conducted above by this Board leans strongly towards Hong Kong. In descriptive terms, this Board considers that the circumstances of this Appeal established that the Taxpayer, an entrepreneur and founder, leader and chief executive of a substantial business, established Company B as a corporate vehicle to hold the business and raise capital, utilized Company B (and with the approval of its Board) to fund the life of himself and his family in Hong Kong at a high standard of living, and maintained Company B's corporate activities from the office at the HK Address, in the years of assessment in question.

²⁴ The Taxpayer, a Position AY, was residing in Hong Kong at the material time. According to the agreed facts, the non-Position AY were residing in Hong Kong, Country L and the Mainland at the material time.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS
(PUBLISHED IN MARCH 2023)

93. Having scrutinized all the evidence, given consideration to the primary facts found, and examined the relevant factors in the context of the question of whether the income which is sought to be charged is income from a Hong Kong source, this Board finds that the source of the Taxpayer's income from his employment in the years of assessment in question was Hong Kong. It follows that the Taxpayer's income from his employment in the years of assessment in question was chargeable for Salaries Tax under section 8(1) of the IRO.

Decision

94. This Board determines that the Taxpayer has failed to discharge the burden of proof he has under section 68(4) of the IRO to show that the Salaries Tax assessment for the year of assessment 2006/07, the Additional Salaries Tax Assessment for the years of assessment 2008/09 to 2010/11 and 2012/13 and the revised Salaries Tax assessment for the year of assessment 2011/12 imposed on him were excessive or incorrect. The Taxpayer's appeal is dismissed.