

Case No. D6/21

Salaries tax – whether the two employment contracts actually constituted one employment based on income sourced in Hong Kong – ‘test of totality’ – section 8(1)(a) & (b), 8(1A)(a) and (b)(ii), (1B) of the Inland Revenue Ordinance

Panel: Anita H K Yip SC (chairman), Fung Chih Shing Firmus and Yuen Hoi Ying.

Date of hearing: 16 March 2021.

Date of decision: 26 July 2021.

The Appellant was engaged in two employment contracts: Contract J with Company J and Contract M with Company M. Contract J was a holding company established in Country C and it is represented by its director, Mr B. Company M is a Hong Kong subsidiary company of Company J, which focuses on the operation in Asia.

The Appellant entered into Contract J with Company J in 2011 in Country H with these material terms: (1) the Appellant be responsible for the Non-Asia Operation from 1 July 2012 to 31 December 2015; (2) the Appellant is to report to Mr B; (3) Annual fixed salary of HK\$1,752,000; (4) 21 paid working days vacation and (5) Country C governing laws.

The Appellant entered into Contract M with Company M in 2012 in Hong Kong with these material terms: (1) the Appellant be responsible for Asia Operation from 1 July 2012; (2) Annual fixed salary of HK\$3,000,000; (3) Fringe benefits include annual leave of 21 working days, pension, and medical and housing allowances; (4) the Contract was addressed to the Appellant’s address in Hong Kong and (5) Company M sponsored the Appellant’s working visa.

Held:

1. The starting point is section 8 of the Inland Revenue Ordinance, which provides that all incomes derived from services rendered in Hong Kong are chargeable unless all services are rendered outside Hong Kong. The leading case dealing with the statutory interpretation of section 8 is CIR v George Andrew Goepfert [1987] HKLR 888. It clarified that that if a person derives income from a HK employment, then income will be fully chargeable to Salaries Tax under section 8(1)(a) no matter the place of services being rendered (at 902I). In determining the source of incomes the Board is to apply the test of ‘totality of factors’ (901J to 902E).

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2. In ascertaining the commercial reality and the arrangement between the Appellant and Mr B to decide whether Contract J and Contract M in fact constitute one single employment, the Board considers the factors of: (1) Requirement of Hong Kong Working Visa; (2) Remuneration and Job Duties; (3) Fringe Benefits and those exercised under Contract J and Contract M; and (4) the Appellant role for the Asia Operation. Considering the whole circumstances of the case, which is case-specific, there was a lack of a commercially sound basis to formulate the contractual structure as the Appellant presented. The only clear inference is that the contractual structure was to aim at deflecting a portion of the Appellant's potential tax liabilities to the Commission of Inland Revenue since it is found that Contract M represents the predominant contract.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888

Kei, Carmen, Counsel, and Li, Karen, Counsel, instructed by Toullec Solicitors, for the Appellant.

Ryan Law, Counsel, instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This Decision concerns the outcome of the Appeal by the Appellant ('Mr A') against the determination of the Commissioner of Inland Revenue ('CIR') dated 7 July 2020 (the 'Determination').
2. In the Determination, the Deputy Commissioner of Inland Revenue ('Commissioner') dismissed A's objection to the following:
 - a. Additional Salaries Tax Assessment for the year of assessment 2012/13 of \$292,162;
 - b. Additional Salaries Tax Assessment for the year of assessment 2013/14 of \$478,757 from \$414,345;
 - c. Additional Salaries Tax Assessment for the year of assessment 2014/15 of \$456,809;

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- d. Additional Salaries Tax Assessment for the year of assessment 2015/16 of \$449,690;
- e. Salaries Tax Assessment for the year of assessment 2016/17 of \$911,335; and
- f. Salaries Tax Assessment for the year of assessment 2017/18 of \$686,281.

3. The Commissioner was of the view that both Mr A's employment contracts (i.e. with Company M and Company J) constituted one single employment based on income sourced in Hong Kong ('HK') and, therefore, the entire income was chargeable to Salaries Tax under section 8(1)(a) of the Inland Revenue Ordinance ('IRO').

4. The Appellant has all along accepted that the employment with Company M was entirely sourced in HK and the tax consequence associated with it, but contends that the other employment, i.e. the one with Company J, is a separate and distinct employment and sourced outside of HK.

Background Facts

5. Company J was a Country C holding company established in 2009 and at all material times, represented by its director, Mr B.

6. In March 2009, Company J set up its Asia operations by establishing Company M in HK, whose focus was to manufacture and distribute watches and jewellery ('Asia Operation'). The Asia Operation was previously managed by one Position D.

7. At all material times, Company J, through other subsidiaries, mainly distributed watches to retailers in Region R and Country S ('Non-Asia Operation').

8. Mr A is a Country E national and has established himself rather successfully in the fashion industry. From 2009 to 2012, Mr A was an executive level Position F at a highly reputable and upscale fashion group earning an annual salary of roughly HK\$2 million plus bonus. He, along with his family, had been an ordinary resident in Hong Kong since 2009.

9. On 28 December 2011, Mr A and Mr B (representing Company J) signed an employment contract in City G, Country H. The material terms were as follows:

- a. Mr A was appointed as Position K of the Non-Asia Operation from 1 July 2012 to 31 December 2015;
- b. Mr A is to report to Mr B;
- c. Annual fixed salary of HK\$1,752,000, payable monthly with discretionary bonus on the group level (including the Asia Operation);

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d. 21 paid working days vacation; and

e. Country C governing laws

(‘Contract J’).

10. On the same date, Mr A and Mr B also signed one incentive agreement, the significance of which, if any, is to reflect the bonus scheme described above.

11. The intention was to have Mr A become Position L of Company J.

12. Then, on 24 May 2012, upon Mr B’s offer, Mr A signed in HK an employment contract with Mr B on behalf of Company M with the following material features:

a. Appointment of Mr A as Position K for the Asia Operation from 1 July 2012;

b. Annual fixed salary in HKD of HK\$3,000,000;

c. Fringe benefits include annual leave of 21 working days, pension, and medical and housing allowances;

d. The contract was addressed to Mr A’s HK address; and

e. Company M sponsored Mr A’s HK working visa.

(‘Contract M’).

13. It is indisputable, at least from this point onwards, that

a. Mr A would work out of HK with frequent travel trips to Mainland to oversee the manufacturing operations;

b. Mr A would report to Mr B under both Contracts; and

c. Mr A would require a HK working visa for his role under Contract M by 1 July 2012.

14. On 30 June 2012, Mr A ceased employment with the fashion group in HK.

15. On 1 July 2012 and based in HK, Mr A began employment with both Companies J and M. At all material times, Mr A maintained two distinct email addresses respectively for Companies J and M for communication.

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16. Until 31 December 2017 where Company M ceased its operations, there have been reorganization activities of Company J which necessitated further contracts between Mr A and Mr B, but these are merely cosmetic and have no material consideration to this Appeal.

Legal Principles

17. There is no dispute by both parties as to the applicable legal principles. The Board will summarize them as follows.

18. In the context of salaries tax, the starting point is sections 8(1)(a)&(b) of the IRO, which confers jurisdiction to the Inland Revenue Department to charge a person with tax on his salary that is sourced in Hong Kong:

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

(a) any office or employment of profit; and

(b) any pension.’

19. Sections 8(1A)(a) and (b)(ii) of the IRO further provide that all incomes derived from services rendered in Hong Kong are chargeable unless all services are rendered outside HK:

‘For the purposes of this Part, income arising in or derived from Hong Kong from any employment—

(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;

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

...; and

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

20. Section 8(1B) of the IRO further states that in determining whether or not all services are rendered outside Hong Kong, no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.

21. The leading case dealing with the statutory interpretation of section 8, and cited by both parties, is CIR v George Andrew Goepfert [1987] HKLR 888.

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22. It is said that if a person derives income from a HK employment, then income will be fully chargeable to Salaries Tax under section 8(1)(a) of the IRO no matter the place of services being rendered (at 902I).

23. On the other hand, if a person having an employment located outside Hong Kong renders services in Hong Kong, his income derived from such services will be chargeable under section 8(1A)(a) of the IRO, and in general the income will be apportioned and assessed on a time-in time-out basis (at 903A-B).

24. The test of ‘totality of factors’ (901J to 902E), in gist, requires the Board to look for the place where the income really came to the employee, i.e. where the source of income, the employment, was located. In this investigation CIR may look beyond the appearances to discover the reality and was entitled to scrutinize all evidence documentary or otherwise relevant to this matter.

25. The Board is mindful that the onus of proof is on Mr A by virtue of section 68(4) of the IRO, which says:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant’.

Analysis

Requirement of a HK Working Visa

26. Prior to joining Company M, Mr A was working in Hong Kong from 2009 on a working visa while his family members were his dependents under the working visa.

27. Mr A’s live evidence confirmed that, during the material times, Mr A and his family had always intended to stay in HK, no matter whom Mr A worked for. In other words, Mr A and Mr A’s family knew that the working visa would have to be obtained, one way or the other, at the time when Mr A signed Contract J on 28 December 2012. The question is who the sponsoring entity would be.

28. The Board has serious reservation as to Mr A’s explanation given under cross-examination. Mr A explained that absent a working visa from Company M, his wife would be then willing and able to secure an employment in HK and, accordingly, a working visa while Mr A would travel abroad for the Non-Asia Operation. Nowhere could this explanation be found in his witness statement nor is it supported by any contemporaneous evidence.

29. The requirement of a HK working visa to Mr A’s family takes on a particular importance against the following backdrop:

- a. By affirmation and live evidence, Mr A and Mr B began negotiation in at least mid-2011 and came to conclude Contract J in December 2011.

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- b. Mr A requested remuneration under Contract J to be paid in HKD.
 - c. During the negotiation, both Mr A and Mr B knew about the express intention / wish of Mr A and his family to remain in HK for the foreseeable future, despite Mr B had specifically asked Mr A to relocate to Region R.
 - d. Mr A and his family's wish to remain in HK was due partly to the fact that their daughter was in the process of completing the IB curriculum.
 - e. The working and dependent visas were due to expire in August 2012.
 - f. On 24 May 2012, Company M sponsored Mr A's application for a HK working visa.
 - g. From a letter dated 29 November 2019 to CIR, Mr A's then legal representative described Contract M as one for 'immigration purposes'.
30. Mr A sought to contend that the actual requirement of a working visa only crystalized upon entering into Contract M (since there was no visa issue with respect to Contract J), but this is in direct contradiction against Mr A's case.

31. Rather, it seems, from the evidence, that Mr A had clearly contemplated HK as a permanent base (for him and/or his family) in his mind at the time when planning for this significant career shift. It is inconceivable / incredible, at the time of accepting Contract J after months of career planning, that Mr A paid no attention to or did not plan for the visa arrangement to enable his family (and/or him) to continue their lives in HK.

Remuneration and Job Duties

32. Under Contract J, Mr A was being remunerated at a fixed annual rate of HK\$1,752,000 and HK\$3,000,000 under Contract M, plus bonuses. It is natural to expect that these business decisions involving hefty sums must accord with commercial sense. However, when asked, Mr A and Mr B were unable to tell the Board the exact basis upon which these figures were arrived at (either/both in December 2011 of Contract J and in May 2012 of Contract M) except to point to (i) the remuneration package of previous employment at around HK\$3 million (inclusive of bonus) and other fringe benefits and (ii) that he was a senior professional.

33. This unsatisfactory explanation, of course, leaves a big question mark as to the authenticity of Contract J being a standalone arrangement between the two.

34. Mr A contends that there are separate duties concerning the two employments, hence, forming two separate employments. And since Contract J was wholly outside of HK, there should be no tax chargeable in HK.

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35. In short, under Contract J, Mr A managed and supervised the Region R' and Country S' operations. This involved Mr A physically meeting with the sales and management team of Company J and also negotiating with external distribution contacts at retail stores.

36. Under Contract M, Mr A was tasked to manage the manufacturing business operation, export and supply chain activities. This involved making frequent trips to Mainland to oversee the manufacturing process. Mr A was also involved in managing the distribution channels and networks of Company M.

37. At this point, it is, perhaps, pertinent to point out that having distinct job responsibilities / duties under two purported employments cannot be determinative in deciding the question whether there is one or two separate employments. This is because it is possible for one employment (i.e. a Position K) to include a diverse range of job responsibilities (i.e. from HR to PR to accounting and so on), as is often the case with smaller sized company. While the Board accepts it is more likely than not that Company J and Company M did have distinct business operations and the Position Ks in charge would perform different tasks, this distinction alone does not assist Mr A's contention that such distinction is indicative of two employments agreed upon separately on two different occasions and at two different times. By the same token, the fact that Company J and Company M were established long before the involvement of Mr A could have no relevance to the precise issue that the Board needs to decide.

38. From the travel record obtained by the Immigration Department, one can see the number of days Mr A spent in and out of Hong Kong:

Year of Assessment	Number of days in HK	Number of days in the period
2012/13*	144	274
2013/14	198	365
2014/15	185	365
2015/16	162	366
2016/17	217	365
2017/18	177	275

*01-07-2012 to 31-03-2013

39. Mr A first produced a work calendar to the CIR purporting to show the number of days Mr A allegedly worked for Company J and Company M during the material times:

Year of assessment	Company J					Company M				
	Region R	Mainland	Others	Total	Proportion	Region R	HK and Mainland	Others	Total	Proportion
2012/13*	30	6	-	36	22%	20	92	16	128	78%
2013/14	13	-	2	15	7%	63	131	15	209	93%
2014/15	44	-	5	49	22%	33	121	22	176	78%
2015/16	25	-	-	25	12%	54	106	22	182	88%

*01-07-2012 to 31-03-2013

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40. Upon the request of the Board, Counsel for Mr A supplemented the information with the following table:

Period	Number of working days during the Period	Number of days working outside Hong Kong	Number of days working outside Hong Kong for Company J	Number of days working outside Hong Kong for Company M
01-07-2012 – 31-03-2013	164	82	36	46
01-04-2013 – 31-03-2014	225	108	15	93
01-04-2014 – 31-03-2015	225	108	49	59
01-04-2015 – 31-03-2016	207	104	25	79

41. There are two important observations regarding the work calendar. First, the work calendar and its content are not independently verified. Second, and more important, as admitted by Mr A in live evidence, there is no objective criteria to determine how to allocate a particular work day to Company J or Company M. Needless to say, Mr A was unable to recall the specific tasks undertaken on each particular day due to the long lapse of time.

42. Despite the foregoing, Mr A was adamant, when questioned, that he would not undertake any work non-related to the company once a day was assigned/allocated to be that company's work day. This might include not taking up the call from the other company's staff unless emergency and in any event, these phone calls were few and far in between due to the time zone difference. In our view, CIR is right to cast doubt on the viability of such mode of operation since there is no evidence (of any formal system in place) to show the delineation of work undertaken by Mr A on a particular day. As a passing remark, it also seems unrealistic to confine one to minding solely a single company's work once a day is so arbitrarily assigned. This is so especially when Mr A only reported to Mr B under both Contracts.

43. Be that as it may, even on Mr A's own case, Mr A seemed to have spent very little time on its Non-Asia Operation duties. In particular, he spent only 7% of his total working time, i.e. 15 days, in 2013/2014 and 12%, i.e. 25 days, in 2015/16 to perform all the duties outlined above.

44. Now compare this with the position adopted by both Mr A and Mr B. By way of letter to the CIR dated 19-07-2019, Mr A's then legal representative stated that the remuneration package to Mr A was 'based on time-spent between the two business units' (i.e. 1/3 of the time to Company J for its Non-Asia Operation and 2/3 of time to Company M for Asia Operation). Similarly, Mr B in his letter to CIR on even date said that Mr A would be expected to 'go to [Region R] and [Country S] every month approximately for 10 days a month' to manage the Non-Asia Operation and 'monthly meetings were organized in [Country N], [Country H] or [Country P] with the local teams'.

45. Even assuming the Board were prepared to consider Mr A and Mr B's subsequent and oral explanation that this was meant to be a guideline and it is 'the result of

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[Mr A's] work' that counts, the discrepancy i.e. 7% vs 33% is a significant one and cannot be ignored. There is also no reasonable or credible explanation proffered by Mr A and Mr B as to why they first adopted the 1/3 time apportionment in their letters to CIR back in 2019 if the 1/3 time apportionment is, as they now allege, factually incorrect and baseless. In the Board's view, the discrepancy, coupled with the lofty salary figures, form a material consideration of the true commercial reality regarding Mr A's employment under Companies J and M.

46. If one takes a step further and consider that had Contract M not existed and Contract J been a standalone agreement, then Mr A would be in a situation where he only needed to work 15 to 49 working days only in a year (as he did) to fully discharge his duties as a Position K for the Non-Asia Operation. This seems to defy common sense. Of course, Mr A might argue that it was the commercial result (or strong result, as Mr B seemed to have suggested in his evidence) that counts. But results are a direct function of time and efforts put in. And the fact remains that Mr A only worked 15 to 49 working days during the relevant years as shown and these are very few working days within a year, by any standard, especially being a top-level management of the company.

47. The argument put forth by Counsel for Mr A that the content of work calendar is not 100% accurate is wholly irrelevant. This is a piece of evidence produced and, in fact, relied on by Mr A in this Appeal. Mr A bears the burden to prove his case and, by extension, the burden to ensure the content therein is accurately recorded. It is, therefore, not open to Mr A to dispute those parts of the contents that are unfavourable to his case.

Fringe Benefits and those exercised under both Contracts

48. Upon request of the Board, Counsel for Mr A has helpfully produced a summary of the fringe benefits under both employment and those exercised. Upon review and by reason of the documents, including the employment contracts and the relevant tax returns filed by Mr A and Company M, the Board takes the following to be established:

	Company J	Company M	Benefits exercised
Annual Leave	21 working days	21 working days	According to work calendar: (a) From 01-07-2012 – 30-06-2013: 25 working days on leave (b) From 01-07-2013 – 30-06-2014: 32 working days on leave (c) From 01-07-2014 – 30-06-2015: 31 working days on leave; and (d) From 01-07-2015 – 30-03-2016: 25 working days on leave
Medical Allowance	N/A	Yes	Mr A's evidence is that he did not exercise any medical benefits with Company M.

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	Company J	Company M	Benefits exercised
Housing Allowance	N/A	Yes	<p>According to the tax returns filed, Company M provided the following allowance:</p> <ul style="list-style-type: none"> (a) From 01-07-2012 – 31-03-2013: HK\$1,305,000 (b) From 01-04-2013 – 31-03-2014: HK\$1,243,064 (c) From 01-04-2014 – 31-03-2015: HK\$1,140,000; (d) From 01-04-2015 – 31-03-2016: HK\$1,118,000; (e) From 01-04-2016 – 31-03-2017: HK\$1,116,000; and (f) From 01-04-2017 – 31-12-2017: HK\$837,000
Pension Scheme	N/A	Yes	<p>According to Mr A’s tax returns filed</p> <ul style="list-style-type: none"> (a) From 01-07-2012 – 31-03-2013: HK\$10,000; (b) From 01-04-2013 – 31-03-2014: HK\$15,000; (c) From 01-04-2014 – 31-03-2015: HK\$17,500; (d) From 01-04-2015 – 31-03-2016: HK\$18,000; (e) From 01-04-2016 – 31-03-2017: HK\$18,000; and (f) From 01-04-2017 – 31-12-2017: HK\$13,500.
Others	Re-investment option	N/A	No evidence

49. The benefits provided under Contract J are comparatively flimsy. Besides the annual leave entitlements which Mr A did (partially) exercise, there appears to be no evidence that Mr A exercised and enjoyed other forms of fringe benefits under Contract J. Again, one must be reminded about the context where Contract J was always intended by the parties to be the sole governing employment relationship before Contract M came along. This stands in stark contrast to the remuneration package of Mr A’s previous employment which, besides a substantial salary, also included extremely attractive fringe benefits such as, amongst others, medical coverage and taxes allowances.

50. Comparing Contract J to Contract M, Contract M is one with substance: it provided annual leave, pension, medical and housing allowances which were, in fact, exercised and enjoyed by Mr A. Without a doubt, the package offered under Contract M seems commercially more realistic for a ‘senior Position K’ such as Mr A, quoting Mr A’s

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own word. Looking at the totality of evidence thus far, it seems, therefore, fair to say that Contract M was the predominant contract in the dealings between Mr A and Mr B¹.

51. Having found that Contract M represents the predominant commercial terms as agreed between the two, it follows that Contract J is unlikely to be capable of being the only commercial agreement between the parties, at the time when Contract J was concluded in December 2011. Therefore, the balance tips towards CIR's case of a single employment.

Mr A for the Asia Operation

52. This is the weightiest part of the analysis because all the discussions so far culminate to this key question: Why was Mr A being tapped for the Asia Operation at all.

53. It was explained by Mr A during the live session that

- a. Before moving to Company J, Mr A was at the rank of Position Q at a highly reputable fashion group;
- b. Mr A was in charge of the whole Profit&Loss, meaning he was responsible for meeting the profit targets set by the company. His main duties included managing top line sales, organizing the companies in the Asia Pacific region, hiring talents, distributing and designing products, and making market investments;
- c. In other words, his specialty is in sales and marketing; and
- d. He did not have direct experience in managing the manufacturing operation.

54. In relation to this, Mr B had this to say:

- a. Before deciding to take Mr A on board Company M, Mr B was looking for 2 Position Ks separately for Companies J and M.
- b. In December 2011, Mr B accepted that Mr A did not have the capacities and abilities of managing the Asia Operation which heavily involved manufacturing. So, Mr B only offered Mr A the role for the Non-Asia Operation which focused on sales and distribution.
- c. The plan with the then Position D of Company M was falling apart and Mr B needed someone senior to take over.
- d. After months of discussion with Mr A about the difficulties regarding Company M, Mr B discovered Mr A's talent of wearing two hats at the same time. Although acknowledging Mr A was not 'a perfect guy for

¹ As opposed to one solely for 'immigration purposes'.

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manufacturing side', Mr B was confident and convinced that Mr A was capable to learn and deliver.

- e. Mr B, therefore, took certain risks and hired Mr A.

55. However, Mr B was unable to explain what exactly led him to the discovery of Mr A's talent in wearing two hats, or more precisely, in manufacturing, so much so that Mr B would offer Mr A to take up the role of Position K at a lofty annual salary of HK\$3 million, on top of the HK\$1.7 million under Contract J. In addition, Mr B was unable to produce any documentary evidence to show or support the negotiation / formulation of the remuneration figures. Likewise, Mr B was unable to recall the amount previously offered to the Position D, whose role, for our purposes, was akin to that of Mr A.

56. It is noteworthy that between signing of Contracts J and M (i.e. some 5 months in between), Mr A had not started working for Mr B yet. There appears to be no objective basis for Mr B to make a complete U-turn and think that Mr A would be commercially capable of managing the entire manufacturing operation. If Mr B did not hire Mr A for the Asia Operation for his past experience and ability in managing manufacturing (because Mr A has none), then it must be due to other commercial consideration that Mr B and Mr A did not disclose to the Board.

57. The onus is on Mr A (and Mr B) to provide a satisfactory explanation. But Mr A and Mr B did not do that. On this basis, Mr B's evidence in this regard is incredible and untruthful, and must, therefore, be rejected.

58. The Board's task here is to ascertain the commercial reality and arrangement between Mr A and Mr B so as to decide whether the Contracts in fact constitute one single employment. If it is, then it will be caught by section 8(1)(a) of the IRO.

59. Taking into account the whole circumstances of the case and absent a commercially sound basis to hire Mr A as the Position K for the Asia Operation, there could only be one clear inference, which is that at the outset both Mr A and Mr B had contemplated and agreed that Mr A would manage the whole of Company J's operations (including both Asia and Non-Asia Operations). When properly analyzed, the formality of signing both Contracts was artificial and devoid of substance and aimed at deflecting a portion of Mr A's potential tax liabilities to the CIR.

60. Therefore, it follows that CIR was right in determining that Mr A's employments with Companies M and J constitute one single employment.

61. The Appeal is accordingly dismissed.