

**Case No. D9/21**

**Salaries tax** – source of income – whether income was from an office of profit within section 8(1)(a) of the Inland Revenue Ordinance (‘the Ordinance’) – whether the source of income was Hong Kong – whether income chargeable to salaries tax

Panel: William M F Wong SC (chairman), Lo Hoi Ki Adrian and Ken To.

Date of hearing: 9 September 2020.

Date of decision: 6 September 2021.

The Appellant appealed against the Determination by the Deputy Commissioner, which confirmed that the remuneration received by the Appellant from a Hong Kong incorporated company (‘the Company’) in the 2010/11 and 2011/12 years of assessment was subject to salaries tax. He argued that the remuneration should be exempt from salaries tax.

The Appellant was appointed to Position A of the Company. The Company’s registered office was in Hong Kong, and applied for business registration. The Company engaged in the business of providing management services, and received income through its bank accounts in Hong Kong. Its only employee was in Hong Kong. In the employer’s returns filed by the Company for the 2010/11 and 2011/12 years of assessment, the Company reported that the Appellant received the remuneration as the fee for Position A. The Appellant argued that he was also appointed to Position D of the Company during the same period. The remuneration was in fact paid for his role as Position D to operate the Company’s business, and he provided such work outside Hong Kong. As the Company was a family business, there was no formal employment contract entered between him and the Company. He only stayed in Hong Kong for 41 days and 9 days respectively for the 2 years of assessment. He only attended in Hong Kong the meetings for Position A. The other persons appointed to Position A of the company did not receive any remuneration. Upon further enquiries by the assessor, the Company confirmed that the remuneration was paid to the Appellant for discharging his duties as a Hong Kong office holder. It did not hire him as an employee, and there was no employment contract entered with him.

**Held:**

1. Since the evidence did not show that the Appellant was employed other than as Position A of the Company, the remuneration received by him was income from an office of profit within the meaning of section 8(1)(a) of the Ordinance (Fuchs v CIR [2011] 2 HKC 422; Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701; D1/18, (2019-20) IRBRD, vol 34, 186; D1/81, IRBRD, vol 1, 388 considered).

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2. Most of the Company's corporate activities were conducted in Hong Kong. The office of Position A held by the Appellant was a Hong Kong office (McMillan v Guest [1942] AC 561; CIR v George Andrew Goepfert [1987] 5 HKLR 888; D123/02, IRBRD, vol 18, 150; De Beers Consolidated Mines Ltd v Howe [1906] AC 455; Swedish Central Railways Co Ltd v Thompson (1925) 9 TC 342; Wood & another v Holden [2006] STC 443; Egyptian Delta Land & Investment Co Ltd v Todd [1929] AC 1; Charter View Holdings (BVI) Ltd v Corona Investments Ltd & Another [1998] 1 HKLRD 469; Hui Yin Sang v Tsoi Ping Kwan [2012] 2 HKLRD 1085; D123/02, IRBRD, vol 18, 150; D21/13, (2013-14) IRBRD, vol 28, 581 considered). As such, the remuneration had a Hong Kong source, and was thus chargeable to salaries tax.

**Appeal dismissed.**

Cases referred to:

McMillan v Guest [1942] AC 561  
Fuchs v CIR [2011] 2 HKC 422  
Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701  
D1/18, (2019-20) IRBRD, vol 34, 186  
CIR v George Andrew Goepfert [1987] 5 HKLR 888  
D123/02, IRBRD, vol 18, 150  
Goodwin v Brewster (1951) 32 TC 80  
De Beers Consolidated Mines Ltd v Howe [1906] AC 455  
Swedish Central Railway Co Ltd v Thompson (1925) 9 TC 342  
Koitaki Para Rubber Estates Ltd v FCT (1904) 64 CLR 15  
Wood & another v Holden [2006] STC 443  
Egyptian Delta Land & Investment Co Ltd v Todd [1929] AC 1  
Shilton Wilmshurst [1991] 1 AC 684  
D1/81, IRBRD, vol 1, 388  
Charter View Holdings (BVI) Ltd v Corona Investments Ltd & Another  
[1998] 1 HKLRD 469  
Hui Yin Sang v Tsoi Ping Kwan [2012] 2 HKLRD 1085  
D21/13, (2013-14) IRBRD, vol 28, 581

Stefano Mariani, Counsel of Messrs Deacons, for the Appellant.

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

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**Decision:**

1. The Appellant has appealed against the Salaries Tax Assessments for the years of assessment 2010/11 and 2011/12 raised on him. He claims that his remuneration should be exempted from Salaries Tax.

**Facts not in dispute**

2. The following facts were not in dispute, and we so find:
- (a) The Company was incorporated as a private company in Hong Kong in 2010.
  - (b) The Company applied for business registration in Hong Kong in 2010, which was renewed annually. The Company declared dormant after 31 March 2012.
  - (c) At the material times, the Company's registered office was in Hong Kong.
  - (d) The Company filed Profits Tax Return and audited financial statements for the year of assessment 2011/2012 and employer's returns of remuneration and pensions (the 'Employer's Returns') for the years of assessment 2010/11 and 2011/12 to the Inland Revenue Department ('IRD').
  - (e) The Company filed Employer's Returns for the years ended 31 March 2011 and 2012 in respect of the Appellant reporting, among other things, the following particulars:

<u>Year of Assessment</u>	<u>2010/11</u>	<u>2011/12</u>	(Revised) <u>2011/12</u>
Capacity	Position A	Position A	Position A
Period of employment	01-09-2010 to 31-03-2011	01-04-2011 to 31-03-2012	01-04-2011 to 31-03-2012
Income	HK\$	HK\$	HK\$
Salary/Wages	931,200	1,860,000	1,707,200
Bonus	<u>Nil</u>	<u>1,550,000</u>	<u>Nil</u>
Total	<u>931,200</u>	<u>3,410,000</u>	<u>1,707,200</u>
Place of residence	No	Yes	Yes

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<u>Year of Assessment</u>	<u>2010/11</u>	<u>2011/12</u>	(Revised) <u>2011/12</u>
Address	—	Country B	Country B
Period provided	—	01-04-2011 to 31-03-2012	01-04-2011 to 31-03-2012

- (f) The Appellant furnished Tax Returns – Individuals dated 25 February 2013 for the years of assessment 2010/2011 and 2011/2012. He filed a nil return for the year of assessment 2010/2011 and declared income of HK\$1,773,178 for the year of assessment 2011/2012. The Appellant also supplied a computation of income for the year of assessment 2011/2012 showing that he received Position A’s fee of US\$20,000 from the Company per month from 1 April 2011 to 31 March 2012, which was equivalent to HK\$1,773,178 (based on an average of exchange rates).
- (g) The Appellant claimed that his income for the years of assessment 2010/2011 and 2011/2012 should be fully exempt from Salaries Tax. The assessor of the IRD (the ‘Assessor’) considered that the Appellant held an office of Position A of the Company and hence exemption from Salaries Tax under sections 8(1A)(b)(ii) and 8(1B) of the Inland Revenue Ordinance (the ‘Ordinance’) did not apply.
- (h) The Appellant objected to the Assessor’s Salaries Tax Assessments on the ground that they were excessive. In amplifying the ground of objection, he put forth contentions including the following:
- (i) The Appellant was appointed as Position A and Position D of the Company during the years of assessment 2010/11 and 2011/12. The remuneration was not paid to the Appellant as Position A’s fee, but for the services he provided as an employed Position D of the Company. His role as a Position D was to research, evaluate and propose solutions for the implementation of natural resources and infrastructure projects and the day-to-day running of the Company’s business.
- (ii) The Appellant did not have any employment contract entered with the Company because the Company was part of his family business and formal documentations was considered not necessary.
- (iii) The Appellant was not a resident in Hong Kong. He performed services in Country E, Country F and the Mainland. The Appellant was present in Hong Kong for 41 days and 9 days during the years of assessment 2010/11 and 2011/12 respectively. During his stay in Hong Kong, the Appellant did not render any

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substantive services. He only attended Position As' meetings in Hong Kong.

- (iv) The Appellant's base salary was US\$20,000 per month plus a performance-related bonus determined by the Board of the Company on an ad hoc basis. He claimed that a bonus of HK\$1,702,800 was received from the Company on 15 June 2011. All of the above income was not subject to tax in other territories.
  - (v) The other two Position As of the Company did not receive any Position A's fee from the Company, indicating that the remuneration received by the Appellant could not be Position A's fee.
- (i) In response to the Assessor's enquiries dated 14 May 2018, Company H on behalf of the Company replied on 11 July 2019 as follows:
- (i) The Appellant was appointed as Position A to comply with the statutory requirement of the Companies Ordinance. The remuneration reported in the Employer's Returns represented Position A's fee paid to him.
  - (ii) The Appellant had never been employed by the Company or any of its group companies and hence there was no employment contract entered with the Appellant.
  - (iii) As the Appellant was not hired as an employee, he did not enroll in any provident fund scheme and was not entitled to any medical benefits and insurance.
  - (iv) The Company paid the Appellant a monthly Position A's fee of US\$20,000 (equivalent to HK\$155,200) during the period from October 2010 to February 2012. No bonus or consulting income was paid to the Appellant. The breakdown of the remuneration reported in the Employer's Returns was as follows:

<u>Year of assessment</u>	2010/11 (HK\$)	2011/12 (HK\$)
01-10-2010 – 31-03-2011 (HK\$155,200 x 6 months)	<u>931,200</u>	
01-04-2011 – 31-12-2011 (HK\$155,200 x 11 months)		<u>1,707,200</u>

- (v) The Position A's fee was reported in Hong Kong because it was paid to the Appellant to discharge his duties as a Hong Kong office holder.

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- (j) Company H also provided, among other things, copies of the following documents:
- (i) Resolution in writing dated 15 September 2010 resolving to appoint the Appellant as Position A of the Company.
  - (ii) A minutes of meeting of the board held on 15 September 2010 at a hotel in Hong Kong resolving to appoint the Appellant as Position J of the Company to open and manage certain bank accounts in Hong Kong.
  - (iii) The Company’s audited financial statements dated 10 August 2012 for the period from 3 September 2010 to 31 December 2011 showing, among other things, that Position A’s emoluments of HK\$2,328,000 (i.e., HK\$155,200 x 15 months, from October 2010 to 31 December 2011) was paid.
- (k) The Assessor ascertained that the Articles of Association of the Company included, among other things the following terms:

‘[POSITION A]’S REMUNERATION

90(a)The [Position As] shall be paid out of the funds of the Company remuneration for their services such sums (if any) as the Company may be ordinary resolution from time to time determine.’

**The Determination**

3. On 28 November 2019, the Deputy Commissioner of Inland Revenue (‘the Commissioner’) determined the Salaries Tax Assessment for the year of assessment 2010/11 under Charge No. X-XXXXXXXX-XX-X dated 3 January 2017 showing Net Chargeable Income of HK\$823,200 with Tax Payable thereon of HK\$121,944, and for the year of assessment 2011/12 under Charge No. X-XXXXXXXX-XX-X dated 27 December 2013 after adjustment showing Assessable Income of HK\$1,877,920 with Tax Payable thereon of HK\$269,688, breakdown as follows:

	2010/11 (HK\$)	2011/12 (HK\$)
Income	931,200	1,707,200
<u>Add:</u> Value of residence	-	<u>170,720</u>
Assessable income	931,200	<u>1,877,920</u>
<u>Less:</u> Basic allowance	108,000	
Net Chargeable Income	<u>823,200</u>	
Tax payable thereon (at progressive rate)	<u>121,944</u>	
Tax payable thereon (at standard rate)		<u>269,688</u>

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4. In coming to this conclusion, the following were considered:
- (a) The Company confirmed that the Appellant was appointed as its Position A to comply with the statutory requirement of the Companies Ordinance and in no other capacity. The Company also confirmed that the remuneration received by the Appellant was in the nature of Position A's fee.
  - (b) The Appellant did not enter into any employment contract showing the terms of his appointment as an employed Position D with the Company. The emails and notes of presentations showed that the Appellant performed managerial and strategic functions of the Company. However, the documents could not indicate whether the Appellant performed such functions as an employed Position D or as Position A of the Company.
  - (c) The Appellant tried to demonstrate that he was remunerated by a bonus in order to support his claim that he was an employed Position D remunerated according to his performance. It is noted that the amount of the Appellant's share of management fee stated in the Memorandum did not match with the amount of the alleged bonus. There was no evidence showing that the management fee was bonus received by the Appellant in the capacity of any employed Position D.
  - (d) Although the other two Position As did not receive any Position A's fee from the Company, it does not necessarily follow that the Appellant did not receive any Position A's fee. Under the Articles of Association of the Company, Position A was entitled to receive remuneration as determined by the Board. The audited financial statements disclosed that the Company did pay emoluments to its Position As.
  - (e) The total amount of remuneration accrued to the Appellant showed in the breakdown provided by the Company corresponded with the revised Employer's Return for the year of assessment 2011/12 and the audited financial statements for the period ended 31 December 2011.
  - (f) In relation to the location of the Appellant's office with the Company, it was held that fees paid to persons who hold the office of Position A of a corporation whose central management and control are exercised in Hong Kong, are income arising in or derived from Hong Kong and chargeable to Salaries Tax under section 8(1)(a) of the Ordinance irrespective of where the person resides. This is because the office of Position A of a corporation is located in a place where the central management and control of the corporation is exercised (McMillan). If an office is located in Hong Kong, any fees derived from the office can be said to arise in Hong Kong. The exemption under sections

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8(1A)(b)(ii) and section 8(1B) of the Ordinance has no application to Position A's fees.

- (g) The Company was incorporated in Hong Kong. It maintained a principal place of business in Hong Kong and applied for a business registration in Hong Kong. It held board meetings and opened bank accounts in Hong Kong. The Company also filed its Profits Tax Return, audited financial statements and Employer's Returns to the IRD. The central management and control of the Company was exercised in Hong Kong. In such circumstances, the Appellant's office of Position A with the Company was located in Hong Kong.

### **Oral evidence of the Appellant**

5. During the hearing, the Appellant and Mr K, the sole employee of the Company who was based in Hong Kong at the material times gave oral evidence by video conferencing and was cross-examined thereon. Some of that evidence related to the agreed facts and we will not necessarily repeat them here. The following salient points emerged:

- (a) The audited report of the Company dated 10 August 2012 was signed by the chairman of the Company, i.e., the Appellant's father. It stated 'Position A's emoluments' of HK\$2,328,000 and 'salaries and allowance' of HK\$675,152. The Appellant argued that the report was by nature imperfect.
- (b) Notwithstanding the Appellant's letter dated 26 February 2013 stating that he received 'Position A fee', the Appellant alleged that at the material times, it did not come across his mind that he should have been employed as the 'Position L' (income from employment would be exempt from Salaries Tax by virtue of the 60-days rule) or employed as an independent Position D. There was no formal agreement but there was a verbal agreement with the other two Position As of the Company (including the Appellant's father) that the Appellant was the 'Position L', however, they did not give any evidence.
- (c) Similarly, it was stated in the Company's letter dated 16 December 2013 signed by the Appellant's father similarly stating 'Position A's fee' and 'Position A's emoluments'. The letter was drafted by the Appellant, and the correct use of the wording did not come across his mind.
- (d) The Appellant admitted that there was no term of employment, such as there was no specific period of annual/sick leave, he did not participate in any MPF/pension scheme, nor was there any medical benefit nor insurances, which he alleged that he did not need it because he had insurance.

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- (e) The Appellant alleged that the Company H's letter dated 11 July 2019 to the IRD was unreliable, and the person who prepared the letter did not know what happened between 2010 to 2012. The letter stated that the Appellant 'did not have business namecard', but that was factually incorrect. It also stated that 'Please note that the current contact person of the company does not have any details available regarding the type of services rendered by [Mr G] and [Mr M].'
- (f) The Appellant admitted that the Company was incorporated in Hong Kong to enjoy the Hong Kong regime and it was audited in Hong Kong. It had and maintained bank accounts in Hong Kong. Its sole employee was based in Hong Kong. Its administration, secretarial and back office was based in Hong Kong. However, the Appellant denied that the Company's central management and control was in Hong Kong.
- (g) In one of the Company's marketing presentation, the Appellant's profile was shown among the profiles of other Position Ds of the Company, and they were paid as Position Ds. However, the Company's consulting fees and expenses of the Company included Person N, Person Q, Person R, Person S, Person T, but did not include the Appellant.

**The Appellant's contentions**

6. The Appellant's representative, Mr Stefano Mariani of Deacons, raised the following issues to be determined by the Board:

- (a) Whether the fees received were income from an office of profit within the meaning of section 8(1)(a) of the Ordinance (the 'First Issue'); and
- (b) If the First Issue is answered in the affirmative, whether the office of Position A of the Company held by the Appellant was a Hong Kong office, such that the fees were Hong Kong source and so chargeable to Salaries Tax (the 'Second Issue').

7. Mr Mariani does not dispute that a Position A of a company constitutes an 'office of profit' within the meaning of section 8(1) of the Ordinance. However, he argues that it is not sufficient that the income be paid whilst the Appellant was Position A of the Company, the income must be an income from that office, which imports a direct and casual relationship. The office must therefore be the source of the income. The relevant test in ascertaining whether a sum is from an office is not therefore a 'but for' test (i.e., but for the individual holding an office, would he have received the sum), but a 'causal' test (i.e., did the individual receive the sum by virtue of past, present or future services as an officer, or otherwise for acting as an officer), Fuchs.

8. Mr Mariani argued that there is a fundamental distinction between, on the one hand, payment made by an employer to an employee that are a reward for past, present,

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or future services as employee, which are chargeable under section 8(1) of the Ordinance, and, on the other hand, payments made by an employer to an employee that are made for any other reason, which are not so taxable, Fuchs at [22]. In his closing submission, he further argued that it is sufficient for the Appellant to show that he was employed by the Company in any capacity, however called (i.e., in any capacity other than being Position A) and that he received the income in consideration for him acting in that capacity.

9. In respect of the First Issue, Mr Mariani argued that the Appellant received the fees because he rendered consulting services to the Company. It was argued that the consulting function was distinct from the office of Position A of the Company. No other Position A of the Company received any remuneration suggesting that no remuneration was attached to the bare role of Position A. It may consequently be inferred that the Company paid the Appellant as Position D.

10. Mr Mariani cited Southern Foundries and D1/18 in support of the proposition that a Position A may render other services to a company and receive fees in reward, and it is sufficient only for the Appellant to show that they were paid to him otherwise than as a reward for past, present or future services as Position A of the Company, or otherwise for acting as Position A, Fuchs.

11. Mr Mariani argued that the Appellant was in fact only paid by the Company for being Position D, and he described it as the irresistible inference to be drawn because no other Position A received any remuneration. He concluded that the fees were not from his officer of Position A of the Company in the sense that they were not paid for past, present, or future services rendered by the Appellant as Position A.

12. In respect of the Second Issue, Mr Mariani argued that even if the fees were from the Appellant's office as Position A of the Company, it is not chargeable because the Company is not centrally managed and controlled in Hong Kong. In the Second Issue, the Appellant relies on the following propositions:

- (a) The paramount statutory question in section 8(1)(a) of the Ordinance is whether an office is a Hong Kong office, if it is not, any emoluments payable in consideration for that office are not Hong Kong source and consequently not taxable.
- (b) The locality of an office should be determined by reference to the 'totality of facts' approach with a view to identifying the true locus of the office, Goepfert and D123/02.
- (c) The office of Position A is located in the place where the central management and control of the company is located, as it is the Position As who are statutorily charged with the management of the company's business, McMillan and Goodwin. It would follow that the place where the Position As customarily discharge their statutory duties should be the locality of the office itself.

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- (d) The management and control of a company is located where it really keeps house and carries on its business, De Beers. If a company carries on its business and keeps house in more than one place it can be said to have multiple residences, Swedish Central Railways. That may require the application of a tie-breaker, which should favour the place where the superior or directing authority of the company was to be found, Koitaki Para Rubber Estates.
- (e) The exercise should look to substance over form, Wood. The question is where the actual control and management of the company's substantive business are situated, as distinct from functions that are merely administrative, Egyptian Delta Land.

13. Mr Mariani argued that the Company was not centrally managed and controlled in Hong Kong based on the following reasons:

- (a) The Company was incorporated in Hong Kong and was required to and in fact it did comply with the statutory requirements, however, it is not sufficient for it to be found to be managed and controlled in Hong Kong.
- (b) The Company had only one employee in Hong Kong, who did not play any material decision-making role in the Company's business.
- (c) It was Dr C, and to a lesser extent, Mr P (the Appellant's father), who were the principal decision-makers of the Company. As there were no board meetings, they made their decisions ad hoc and from wherever they happened to be from time to time.
- (d) The Appellant played an important role in informing those decisions, but he was hierarchically subordinate to Dr C. On balance, the central management and control of the Company there resided with Dr C and Mr P, or in the alternative, with the Company's board as a whole.
- (e) None of the Appellant, Dr C or Mr P were ordinarily resident in Hong Kong, and most of their face-to-face meetings took place in Country F and the Mainland. Dr C imparted directions and orders remotely from City U, and the Appellant furnished Mr P with periodic reports, which the latter shared with Dr C.
- (f) The three Position As did on occasion meet in Hong Kong may suggest that there was some incidental management and control of the Company from Hong Kong, but that fact cannot displace the conclusion that most of the Company's decision-making was in fact made elsewhere. The superior directing authority, or central management and control of the Company resided outside of Hong Kong.

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- (g) The Appellant did most of his work for the Company while in Country B, which is the place in which he was ordinarily resident.
- (h) The investments identified by the Company and recommended to its parent company for investment were all in Country E.
- (i) Apart from operating a Hong Kong bank account and employing one employee in an administrative role, the Company's presence in Hong Kong was limited to the bare minimum required by the Companies Ordinance and the Ordinance.

### The Commissioner's contentions

14. Mr Ryan Law represented the Commissioner.

15. In relation to the First Issue, Mr Law does not dispute Fuchs and Shilton, however, note that they are cases concerning the meaning of 'income from employment' and in the context of a compensation paid under a termination agreement, Fuchs.

16. In the context of 'income from an office' in section 8 of the Ordinance, Mr Law submitted that the emphasis should be that whether the income was paid to the Appellant as a Position A, instead of whether it was a reward for the Appellant's past services rendered.

17. Even if the Appellant acted both as Position A and in another capacity (which the Commissioner denied), he has to prove that the sum were paid to him in other capacity without apportionment in respect of his Position A's fees, D1/81 paragraph 8.

18. In relation to the Second Issue, Mr Law cited the following comments in Charter View Holdings applied in Hui Yin Sang v Tsoi Ping Kwan:

*'In Insurance Co. of the State of Pennsylvania v. Grand Union Insurance Co. Ltd. [1988] 2 HKLR 541, the Court of Appeal held that, for the purpose of Ord. 23 r. 1(1)(a), the ordinary residence of a limited company is to be decided by reference to where its central management and control is. However, the application of that test is not straightforward. It was considered in Re Little Olympian Each Ways Ltd. [1995] 1 WLR 560. Three propositions can be derived from the judgment of Lindsay J.:*

- (i) *The mere assertion of where the company's central management and control is unsatisfactory. What is needed are the primary facts on which that assertion is based.*
- (ii) *All the circumstances in which the company carries on its business should be taken into account, though the weight to be applied to each factor will obviously differ from case to case. Those factors include the provisions of the company's objects clause, the place of incorporation,*

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*the place where the company's real trade and business is carried on, the place where the company's books are kept, the place where the company's administration is carried out, the place where the [Position As] with power to disapprove of local steps or to require different ones to be taken themselves meet or are resident, the place where its chief office is or where the company secretary is to be found, and the place where its most significant assets are.*

(iii) *In applying the test to a non-trading company, it may be more important than would otherwise be the case to have regard to the nature of the company's corporate activities.'*

19. Mr Law accepted that the central management and control of a company may be divided and it may be in more than one place, D123/02 and Swedish Central Railway. However, where the central power and authority abides does not demand that the court should look, and look only, to the place where the final and supreme authority is found, D21/13.

### **Analysis**

20. In respect of the First Issue, the fact is clear that the Appellant was never employed as 'Position V', 'Position L', 'Position D' or otherwise. The Appellant admitted that it never crossed his mind at the material times that he should be stated as a Position L or Position D, and we find that he was not so employed. His various positions are afterthoughts unsupported by the evidence.

21. The contemporaneous documents including the Appellant's Tax Return dated 26 February 2013 and letters dated 4 April 2013 and 22 January 2014 submitted by the Appellant, the Employer's Returns, and Company H's letter dated 11 July 2019 for the Company are clear that the Appellant was paid US\$20,000 on a monthly basis as Position A's fee. The Company did make payments to its Position Ds, however, it did not include the Appellant.

22. The Board also accepts and adopts Mr Law's analyses as stated in paragraphs 22 and 23 of his Skeleton Submissions, and paragraphs 17 to 19 of his Closing Submissions. They are extracted below:

#### ***Paragraphs 22 and 23 of the Respondent's Skeleton Submissions***

'22. The Company's Statement was unequivocal in refuting A's assertion of being an employed or independent [Position D]. Further, A's case is inconsistent with most of the **contemporaneous documents** submitted to R:

- (1) In all the tax returns submitted by A and the [Company, A] was stated as a [Position A] of the Company instead of a [Position D] or any other capacity.

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- (2) A did not enter into any employment contract showing the terms of his appointment as an employed [Position D] with the Company.
  - (3) Under the Articles of Association of the Company, a [Position A] was entitled to receive remuneration as determined by the Board. In fact, page 16 of the Audited Financial Statements disclosed that the Company did pay emoluments in the sum of HK\$2,328,000 to its [Position A].
  - (4) This is consistent with the sum of the Company paid to A as a [Position A] showed in the breakdown provided by the Company and corresponded with the revised Employer's Return for the year of assessment 2011/12.
  - (5) Instead, the Company denied ever hiring or employing A or paying A any consulting income. From the Profit and Loss statements of the Company and breakdown of the consulting fees paid by the Company during the relevant period, the Company only engaged [Company W] and their [Position Ds] to provide services for the Company. There was an agreement for consulting services with [Company W].
  - (6) None of A's payment was recorded in the Profit and Loss statements or the breakdown of consulting fees and there was no agreement for services between the Company and A.
23. Even on A's evidence in this appeal, a case of employed or independent [Position D] is not made out:
- (1) The slides for presentations on 24 January and 25 January 2012 (PT-2) represent matters on two particular days and their evidential value to prove any relationship spanning a period of one and a half year is low.
  - (2) But even leaving that aside, the presentations seem to be an internal meeting of the Company with the attendance of the other [Position As] and staff. They were consistent with A's strategic functions as a [Position A] of the Company. In any event, they are not indicative of A being an employed [Position D].
  - (3) As to the representative report PT-4, again, its evidential value is low. A even explicitly held himself out as an "[Position L]" in the report instead of a [Position D] of the Company. In any event, they are not indicative of A being an employed [Position D].

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- (4) As to the email and bi-weekly reports PT-5, it is not known who actually prepared them as some of the emails were being forwarded messages. It is also not known to which company or entity these matters relate. For instance, A was a [Position A] for multiple entities within [Company X] and some of the matters in the email relate to other entities within the group (e.g. [Company Y] etc.).
- (5) The emails appeared to be communication between A and his father in relation to matters of [Company X] in general. In any event, they are consistent with A being a [Position A] of the Company but not indicative of A being an employed [Position D].
- (6) In fact, A on one hand claims himself an employed [Position D] but on the other hand an independent [Position D] is inconsistent in itself. The nature of an employment and an independent contractor is so starkly different that they could not possibly be reconciled see **Poon Chau Nam v Yim Siu Cheung** (2007 10 HKCFAR 156 (R's authority)). The fact that such an alternative case is raised by A is most telling about the consistency and genuineness of A's position.'

*Paragraphs 17 to 19 of the Respondent's Closing Submissions*

'17. At the hearing the following evidence was adduced:

- (1) A agreed that he was experienced in the business sector, especially the investment management and consulting services and were well familiar with the job nature and duties of a [Position D], even before the incorporation of the Company in 2010.
- (2) However, there was not a single document submitted by A or the Company that suggested or recorded A as an employed or independent [Position D] of the Company.
- (3) In all the tax returns submitted by A and the Company, A's capacity was stated as [Position A] but a [Position D].
- (4) When being cross-examined, A even explained that the only mistake was that he should put down [Position L]. It has not come to him that he should put down [Position D].
- (5) He put down "[Position A]" because [Mr Z] (A's 2<sup>nd</sup> witness) told him that he could get his tax exempted because he stayed in Hong Kong for less than 60 days.

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- (6) This, however, was contradictory to the evidence of [Mr Z] who said that he did not draft the tax return for A or tell him to put down “[Position A]”.
  - (7) Although legal representative of A tried hard to link the tax return with [Company AA], the Company’s accountant, [Mr Z] was not sure whether A was advised or who advised A.
  - (8) In any event, the emphasis is that it was never A’s intention to put in “[Position D]” in the tax return, and whether A intended to put in “[Position L]” is irrelevant to this appeal.
  - (9) This is consistent with the various statements submitted by A personally to R on 26 Feb 13, 4 Apr 13 and 22 Jan 14 in which A repeatedly and unequivocally regarded the sums he received from the Company “[Position As] Fee” and merely acted as a [Position A] for the Company.
  - (10) It was only after A engaged legal representatives that his case of being an employed [Position D] emerged for the first time (see further the table in S20 of R’s Written Submissions).
  - (11) A did not enter into any employment contract or independent [Position D] agreement with the Company. This is to be contrasted with another [Position D] of the Company, [Company W], which had an agreement for services with the Company. Although the copy provided by the Company was unsigned, all subsequent invoices were well-documented.
  - (12) A confirmed that he had no specific period of annual leave or sick leave. He did not participate in any provident fund scheme, such as MPF, pension scheme with the Company. He did not have any medical benefits or insurance with the Company.
  - (13) In fact, during cross-examination and when being asked by the penal to clarify, A admitted that ultimately he did not become a [Position D] of the Company.
  - (14) A further agreed that [Mr Z] was the only employee of the Company. It is unequivocal that A himself was not an employee of the Company at the relevant period.
18. The statement of the Company and contemporaneous financial documents are even more telling in refuting A’s assertion as a [Position D] of the Company:

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- (1) In the Company's letter dated 11 Jul 19, [Company H] upon the instructions of the Company replied R that:
- i. Appointing A as a [Position A] (office holder) is merely a business decision to comply with statutory requirement of the Companies Ordinance (see answer to Q4).
  - ii. A has never been employed by the company or any of its group companies and there were no employment contract/ precise job duties for A (see answer to Q4).
  - iii. The filing of the employer's returns is simply for reporting of the [Position A]'s fee paid to A due to his statutory [Position A] status (see answer to Q4).
  - iv. Beginning October 2010, A received a monthly [Position A]'s fee of US\$20,000 from the company. Apart from the [Position A]'s fee, he did not receive any bonus/ consulting income chargeable to Hong Kong salaries tax (see answer to Q5).
  - v. The total [Position A]'s fee paid to A for the captioned period is HK\$2,328,000 which is consistent with the [Position A]'s Emoluments as stated on page 16 of the auditor's report (Appendix VIII) (see answer to Q5).
  - vi. On the basis that A was appointed as the statutory [Position A] instead of hiring as an employee of the company during the years of assessment 2010/11 and 2011/12, there was no MPF/ other provident scheme enrolled and he was not entitled for any medical benefits and insurance. A is not required to render services in Hong Kong (see answer to Q6-8).
  - vii. As the [Position A]'s fee paid to A is to discharge his duties as a Hong Kong [Position A]/office holder, the [Position A]'s fee is reportable in Hong Kong. Based on the available information, the [Position A]'s fee was not reported in other locations (see answer to Q10).
- (2) A during cross-examination tried to say that [Company H] got it all wrong. This is untenable for three reasons:
- i. First, even A's father in a letter submitted to R on 16 December 2013 confirmed that the amount of [Position A]'s fee paid to A for the captioned year was USD240,000 and it is reflected on the yearly return as [Position A]'s

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emoluments. A's father who had at all material times a major management role at the Company could not have mistaken A's capacity.

- ii. Second, A's own letters to R stated above on 26 Feb 13, 4 Apr 13 and 22 Jan 14 were all consistent with [Company H]'s reply.
- iii. Third, the contemporaneous [Position A]'s report and financial statements which was approved by A himself as a [Position A] confirmed A's payment as Position A's emoluments.

19. On the other hand, the evidence adduced by A does not assist A at all:

- (1) For the presentation notes PT-2, there is no indication of A's capacity as an employed or independent [Position D]. In any event, they represent matters on two particular days and their evidential value is low.
- (2) For the project overview notes PT-4, there is no indication of A's capacity as an employed or independent [Position D]. A was regarded as an "[Position L]" which was consistent with him receiving [Position A]'s fees. In any event, their evidential value is low.
- (3) For the emails PT-5, A admitted that they related to matters of [Company X] instead of the Company specifically (see in particular [Company X] structure and the entities mentioned in and. In any event, these emails were consistent with A's role as a [Position A] instead of a [Position D].
- (4) For the bi-weekly memos PT-5, it is the Company's position that it did not carry out any business after 31 March 2012. The panel should be slow to accept the bi-weekly memos which purportedly related to matters in January and **April 2012** as evidence. In any event, these memos were consistent with A's role as a [Position A] instead of a [Position D].
- (5) For the memorandum of the bonus A received PT-6, a sum of USD2.3 million was paid to A's father who personally was not a [Position D] of the Company. The sum paid to A was specifically recorded as "[Company X] Management". These payments had nothing to do with A's alleged capacity of a [Position D] but was consistent with A's role as a [Position A].'

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23. The Board finds that the fees received were income from an office of profit within the meaning of section 8(1)(a) of the Ordinance.
24. In respect of the Second Issue, the following salient facts are relevant:
- (a) It was admitted that the Company was incorporated in Hong Kong to take advantage of the Hong Kong's legal and fiscal regime. It had its registered office in Hong Kong. The Company held a business registration in Hong Kong since its incorporation. Its only employee was based in Hong Kong. It is not disputed that the Company is a resident in Hong Kong.
  - (b) The Company engaged in the business of providing management services. The sole source of its income came from its parent company, and the money was received through its bank accounts in Hong Kong. A very substantial portion of its income between April and June 2011 (HK\$22,892,000) was expensed as management fee (HK\$18,430,000), or HK\$13,386,000 of management income and HK\$7,030,242 as shown in the Company's audited report as at 31 December 2011. There were also other Position Ds engaged by the Company. Hence, the management services provided by the Company was mainly outsourced through the Hong Kong office. This reflected that a central management and control of the Company should not be the only consideration and be given the weight as Mr Mariani submitted.
  - (c) All the operational assets of the Company were located in Hong Kong. Most of the Company's corporate activities were conducted in Hong Kong including contract with outsourced Position Ds, receiving payment for the management service income and paying its Position Ds through bank accounts in Hong Kong. The Company was audited in Hong Kong, filed Profit Tax Return, financial statements and Employer's Returns to the IRD. The board held meetings in Hong Kong.

## **Conclusion**

25. We find that:
- (a) the fees received by the Appellant were income from an office of profit within the meaning of section 8(1)(a) of the Ordinance; and
  - (b) The office of Position A of the Company held by the Appellant was a Hong Kong office, such that the fees were Hong Kong source and so chargeable to Salaries Tax.
26. The Board thanks both Mr Mariani and Mr Law for their very helpful and comprehensive arguments and submissions before us.