

**Case No. D10/20**

**Salaries tax** – power to summons witnesses – ‘60 days’ rule – exemption under section 8 of the Inland Revenue Ordinance (the ‘IRO’) – hopeless appeal – costs of the Board – sections 8, 8(1), 8(1A), 8(1A)(b)(ii), 8(1A)(c), 8(1B), 8(1C), 66, 68, 68(4), 68(9) of the IRO

Panel: Chui Pak Ming Norman (chairman), Renu Bhatia and Leung Wai Lim.

Date of hearing: 17 August 2020.

Date of decision: 27 October 2020.

The Appellant was employed by Bank A Hong Kong office. The employment was located in Hong Kong, and commenced on 21 January 2013. As part of his job, he might be required to work in any other location. The source of his income was derived from his employment with Bank A in Hong Kong. The Appellant’s income earned in the Assessment Year was therefore subject to section 8 of the IRO. If he provided the services outside Hong Kong or if he rendered some services in Hong Kong during visits not exceeding a total of 60 days in the basis period for year of assessment, the Appellant was entitled to an exemption under section 8(1A)(b)(ii) of the IRO.

The Appellant objected to the Salaries Tax Assessment for the year of assessment 2014/15 (the ‘Assessment Year’) raised on him. The Appellant claimed that the assessment was excessive. By the determination (the ‘Determination’) dated 28 November 2019, the Deputy Commissioner of Inland Revenue rejected the Appellant’s objection and confirmed the Additional Salaries Assessment for the Assessment Year. The Appellant lodged this appeal against the Determination to the Board of Review on 27 December 2019. According to his tax representative (the ‘Tax Representative’), the Appellant’s grounds of appeal could be summarized as follows:

- (a) He rendered no services in Hong Kong in the Assessment Year; and
- (b) His visit did not exceed a total of 60 days in the Assessment Year.

Seven days prior to the hearing, the Tax Representative requested to summon at the hearing staff of Bank A as witnesses. The Board directed that the Appellant’s application should be made at the hearing. The main reasons for calling the proposed witnesses were that they had never met with the Appellant and could not directly attest to the statements made by them to the Respondent. The Appellant was absent on the day of hearing but was represented by his Tax Representative. The Appellant also filed a witness statement (the ‘Witness Statement’).

**Held:**

1. The Board rejected the Appellant's application for issuance of the witness summonses as sought. The evidence of the staff of Bank A, if given by them personally at the hearing, would not add or diminish the evidential value of the correspondence themselves. It should be a matter of weight for the Board to attach on those correspondence.
2. From the movement record kept by the Immigration Department in respect of the Appellant for the Assessment Year, he visited Hong Kong every month from April to November 2014. There was 37 paid working days (the '37 Paid Working Days') while the Appellant was in Hong Kong. He did not attempt to explain why he should receive pay from Bank A for no services performed by him in those 37 Paid Working Days. Neither did he explain in the Witness Statement his travel pattern from April to November 2014. The denial of rendering services and the account given by the Appellant in the Witness Statement would not discharge burden to prove his case. Having considered all the evidence of the case, the Board found that the Appellant did render services to Bank A while he visited Hong King in the Assessment Year.
3. In order to be qualified for the exemption under section 8(1B) of the IRO, a taxpayer, even though he had rendered services in Hong Kong, must not do so during visits which exceeded a total of 60 days in the relevant financial year. The words 'not exceeding a total of 60 days' qualified the word 'visits' and not the words 'services rendered' under section 8(1B). The Board agreed with the Respondent that there was no ambiguity or absurdity in section 8(1B) which necessitated the Board to look at Hansard in determining the purpose of that legislation, The Board found that in the Assessment Year the number of days of the Appellant to Hong Kong was 62 (Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174 followed, and Pepper v Hart [1993] AC 593 distinguished).
4. The Appellant failed to discharge the burden of proof under section 68(4) of the IRO to show that the assessment was incorrect and excess. The appeal should be dismissed and the Determination should be confirmed. This appeal was a hopeless one and the Board exercised its power under section 68(9) of the IRO to order the Appellant to pay the sum of HK\$12,500 as costs of the Board.

**Appeal dismissed and costs order in the amount of \$12,500 imposed.**

Cases referred to:

D2/06, (2006-07) IRBRD, vol 21, 111  
Commissioner of Inland Revenue v So Chak-kwong (1986) 2 HKTC 174  
D37/01, IRBRD, vol 16, 326

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D76/04, IRBRD, vol 19, 590  
Pepper v Hart [1993] AC 593  
Hong Kong Legislative Counsel (6th January 1972) (Hansard), 321  
R v Justice of West Riding of Yorkshire 4 B & AD 685  
D112/00, IRBRD, vol 15, 943  
D56/05, (2005-06) IRBRD, vol 20, 768  
D21/10, (2010-11) IRBRD, vol 25, 410  
Commissioner of Inland Revenue v George Andrew Geopfert 2 HKTC 210  
D20/00, IRBRD, vol 15, 297  
D2/04, IRBRD, vol 19, 76  
D40/07, (2007-08) IRBRD, vol 22, 983  
D19/16, (2017-18) IRBRD, vol 32, 183

Edward Lean of Lean Solutions Limited, for the Appellant.  
Leung Hoi Sze and Lo Hok Leung Dickson, for the Commissioner of Inland Revenue.

### **Decision:**

#### **Introduction**

1. The Appellant objected to the Additional Salaries Tax Assessment for the year of assessment 2014/15 ('Assessment Year') raised on him. The Appellant claimed that the assessment was excessive.

2. By the determination dated 28 November 2019 ('Determination'), the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') rejected the Appellant's objection and confirmed the Additional Salaries Tax Assessment for the Assessment Year under Charge Number X-XXXXXXXX-XX-X dated 9 December 2016, showing Additional Net Chargeable Income of HK\$3,987,873.00 with Additional Tax Payable thereon of HK\$635,180.00.

3. The Appellant was not satisfied with the Determination and lodged this appeal against the Determination to the Board of Review ('Board') pursuant to the provisions of section 66 of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance') on 27 December 2019.

#### **Grounds of Appeal**

4. The grounds of the appeal raised by the Appellant in the letter of his tax representative, Lean Solutions Limited which was sent by hand-delivery to the Board on 27 December can be summarized as follows:

- (a) The Appellant rendered no services in Hong Kong in the Assessment Year; and

- (b) The Appellant's visits did not exceed a total of 60 days in the Assessment Year.

Under the aforesaid grounds, the tax representative made further elaborations to support the grounds.

### **The hearing**

5. The Appellant was absent on the day of hearing but he was represented by Mr Edward LEAN ('Tax Representative'), Principal of Lean Solutions Limited, Appellant's tax representative.

### **Preliminary Issue**

6. On 10 August 2020, seven days prior to the hearing, the Tax Representative wrote to the Board requesting the Board to use its power to summon to attend at the hearing a number of witnesses, being the staff of Bank A to give evidence respecting the appeal and examine them on oath or otherwise.

7. The witnesses requested to be summoned by the Appellant are:

- (a) Ms B, Human Resources Division of Bank A – to confirm that she has never met or spoken to the Appellant and cannot directly attest to any of the statements made by her in Bank A correspondence; and, as such, to explain where and how the information in those statements was obtained by her.
- (b) Mr C, Human Resources Division Bank A – to confirm that he has never met or spoken to the Appellant and cannot directly attest to any of the statements made by him in Bank A correspondence; and, as such, to explain where and how the information in those statements was obtained; and
- (c) The 'manager' who confirmed the Appellant's presence in the Hong Kong office of Bank A to Mr C as stated in the letter from Bank A to the Revenue dated 18 August 2017 – to confirm under oath that the Appellant provided services of his employment in the Hong Kong offices of Bank A during the Assessment Year.

8. Section 68(6) of the Ordinance provides *inter alia*:

*'The Board shall have power to summon to attend at the hearing any person whom it may consider able to give evidence respecting the appeal and may examine him as a witness either on oath or otherwise.....'*

9. According to the Tax Representative, the late application was due to the fact that he had not had sight of the correspondence exchanged between the Respondent and the

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aforesaid persons of Bank A until he was served with the Respondent's Bundle R1 on 6 August 2020, amongst which the said correspondence was found. Further there were a number of discrepancies between Bank A replies to the Respondent and the contents of the Form IR56B submitted by Bank A to the Respondent on 15 May 2015.

10. Given the proximity of the hearing date and the date of application, the Board directed that the application of the Appellant for an order to summon the witnesses should be made at the hearing so that the parties could make submissions on the application.

11. The Appellant made the application at the beginning of the appeal. The main reasons for calling the proposed witnesses were that they had never met with the Appellant and could not directly attest to the statements made by them to the Respondent. They should therefore be called to explain where and how the information in those statements was obtained to make the statements and/or to confirm that the Appellant actually provided services of his employment in Hong Kong.

12. It is the Respondent's submission that the replies made by Bank A in response to the Assessor's enquiries were summarized and set out in paragraph 1(9) of the Determination which was served on the Appellant around the end of November 2019. If the makers of Bank A's replies were so essential to the Appellant's case, the Appellant should arrange for calling them soon after the Determination was sent to him. The Appellant's late application should therefore be rejected on the ground of late application, which if granted, would affect the progress of the hearing. The Application should also be rejected on the ground that the Appellant gave no cogent or good reasons as to why the Board should issue the summonses.

13. After hearing the submissions made by both parties, the Board dismissed the Appellant's application and said it would render its reasons in this Decision, which the Board hereby does.

14. Mr C was the Position D, Division E of Bank A when he made his reply to the Respondent on 9 November 2016 and Position F of Human Resources Division of Bank A when he made his reply to the Respondent on 18 August 2017 while Ms B was position G of HR Service Division of Bank A when she made her reply to the Respondent on 4 March 2016.

15. They were from the Human Resources Division of Bank A which was different from the department in which the Appellant provided the services to Bank A. Ms B and/or Mr C were not the senior or junior of the Appellant and should not have any direct dealing with the Appellant in normal course of event. It would not add any value to confirm the obvious fact by them in person that they had not met with the Appellant.

16. As to where and how the information stated in the correspondence to the Respondent, it is a logical and reasonable deduction that the information was based on the record kept by the relevant departments of Bank A if one accepts that both Mr C and Ms B had no direct dealing with the Appellant. It follows that the above answers, if given at the hearing by Mr C and Ms B in person, would not add more probative value as to whether the

Appellant had provided services or not when he visited Hong Kong than the value of the contents of such correspondence.

17. Regarding the Appellant's manager who confirmed with Mr C for the Appellant's presence in the office, his evidence would not help the Appellant much on whether the Appellant had provided services of employment in Hong Kong or not because the letter said the Bank do not require to keep copy of the record of staff returning office. Even if the 'manager' was called to give evidence, he could not confirm whether on each day of the Appellant's visit to Hong Kong, he had returned to office; and if he returned to office, whether he had provided any services to Bank A.

18. Although there were some discrepancies between the correspondence and the contents of the Form IR56B referred to by the Tax Representative as pointed out by the Tax Representative, such discrepancies, such as the title of the Appellant and the description of his duties or his address in Hong Kong or in City H, would not alter the fact that the Appellant was an employee of Bank A and was bound by the Contract. The discrepancies could not lead to the conclusion one way or the other whether the Appellant had rendered services to Bank A in Hong Kong during the Assessment Year and whether the Appellant's visits in Hong Kong in the Assessment Year exceed 60 days. Even if the discrepancies had any remote connection to the issues, the issues could be resolved by the evidence submitted by the parties.

19. By reasons of the aforesaid, the Board does not think that the evidence of Ms B, Mr C and the 'manager' of Bank A, if given by them personally at the hearing, would add or diminish the evidential value of the correspondence themselves. It should be a matter of weight for the Board to attach on those correspondence, which should also be tested against all evidence available to the Board. Accordingly, the Board rejected the Appellant's application for issuance of the witness summonses as sought.

### **The Evidence**

20. Due to his absence at the hearing, the Appellant did not testify at the hearing. Neither did he call any witness to testify on his behalf. However, amongst others, he filed his witness statement dated 26 July 2020 ('Witness Statement') and a record of attendance with his Mr J, to whom he reported during the period from 1 April 2014 to 31 December 2014 to support his case which form part of the bundle of documents submitted by the Appellant ('A1 Bundle'). There was also a bundle of documents submitted by the Respondent ('R1 Bundle'). The documents in the A1 Bundle, R1 Bundle and the Board's bundle of documents ('B1 Bundle') form the evidence of the case.

### **The Agreed Facts of the Appeal**

21. The Respondent prepared a draft statement of agreed facts for the Appellant's consideration and agreement. At the hearing, the Tax Representative confirmed his agreement to accept the said draft statement of agreed facts. Accordingly, the draft statement of acts becomes the agreed facts of this appeal. In order to avoid repetitiveness, the Board does not propose to set out the agreed facts in full in this Decision but only renders some

background information below so as to facilitate the discussion:

By a contract of employment dated 14 November 2012 (the ‘Contract’) together with an employment letter addendum, Bank A employed the Appellant commencing on 21 January 2013. The Contract set out, among other things, the following terms:

***Clause 3 – Appointment***

The Appellant initially worked in Division K, reporting to Position L, Division K or such other person as Bank A might determine from time to time.

***Clause 5 – Place of work***

The Appellant’s current place of work would be at Bank A’s HKSAR offices. Bank A reserved the right to change his place of work to any other location either temporarily or permanently as the business might require. Bank A might require the Taxpayer to work at any other offices at any location overseas as Bank A might from time to time determine.

***Clause 15 – Working hours***

The Appellant’s normal hours of work were 40 hours over 5 days week but specific hours were subject to departmental approval and would be in line with business and customer needs.

***Clause 16 – Annual leave***

In addition to the usual public holidays, the Appellant was entitled to 24 days’ paid annual leave during each year.

22. In the course of discussion, the Board will refer to such part of the agreed facts as may be necessary.

**Relevant Hong Kong statutory provisions**

23. Section 8(1) of the Ordinance provides:

*‘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 of employment of profit; and*

*(b) Any pension.’*

24. Section 8(1A) of the Ordinance provides:

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

*...*

*(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 Commission is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.’*

25. Section 8(1B) of the Ordinance provides:

*‘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.’*

#### **Authorities relied on by the parties**

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

(a) Inland Revenue Ordinance (Chapter 112): Sections 8, 64 and 68

(b) D2/06, (2006-07) IRBRD, vol 21, 111

(c) CIR v So Chak-kwong (1986) 2 HKTC 174

(d) D37/01, IRBRD, vol 16, 326

(e) D76/04, IRBRD, vol 19, 590

(f) Pepper v Hart [1993] AC 593



- (g) Hong Kong Legislative Counsel (6<sup>th</sup> January 1972) (Hansard), 321
  - (h) Interpretation and General Clauses Ordinance (Chapter 1): Section 19
  - (i) R v Justice of West Riding of Yorkshire 4 B & AD 685
  - (j) D112/00, IRBRD, vol 15, 943
  - (k) D56/05, (2005-06) IRBRD, vol 20, 768
  - (l) D21/10, (2010-11) IRBRD, vol 25, 410
27. The Respondent submitted and relied on the following authorities
- (a) Inland Revenue Ordinance (Chapter 112): Section 8, 68 and Schedule 5, Part 1
  - (b) CIR v George Andrew Geopfert 2 HKTC 210
  - (c) CIR v So Chak Kwong, Jack 2 HKTC 174
  - (d) D20/00, IRBRD, vol 15, 297
  - (e) D2/04, IRBRD, vol 19, 76
  - (f) D40/07, (2007-08) IRBRD, vol 22, 983
  - (g) D19/16, (2017-18) IRBRD, vol 32, 183

**Discussion, Analysis of Evidence and Finding of Facts (other than the Agreed Facts)**

28. It is common ground that the Appellant was employed by Bank A Hong Kong office and his employment was located in Hong Kong. According to the Contract, the Appellant's place of work would be at Bank A's HKSAR office. As part of his job, he might be required to work in any other location either temporarily or permanently as the business of Bank A might require. He received his salaries in Hong Kong and paid in Hong Kong dollar. It follows that the source of his income was derived from his employment with Bank A in Hong Kong. The income of the Appellant earned in the Assessment Year is therefore subject to the charging provision of section 8 of the Ordinance. However, if he provided the services outside Hong Kong or if he rendered some services in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment, the Appellant was entitled to an exemption under section 8(1A)(b)(ii) of the Ordinance.

29. The issues before the Board are therefore (1) whether the Appellant rendered no service in Hong Kong in the Assessment Year; and (2) if the Appellant did render services in Hong Kong, whether the Appellant's visits in the Assessment Year exceeded sixty days.

***Whether the Appellant rendered no service in Hong Kong in the Assessment Year?***

30. It is the Appellant's contention that the Appellant did not render any services in connection with his employment while visiting Hong Kong during the Assessment Year and none of his trips to Hong Kong during that period were related to the duties of his employment. In this connection, the Tax Representative referred the Board to the Witness Statement. Amongst others, the Appellant said in the Witness Statement:

- (a) Between 1 April 2014 and 31 December 2014, he worked exclusively with customers based outside of Hong Kong and executed a single transaction for the bank with a Country M customer, based in City N, Country M, financing equipment in Country P. From 1 January 2015, he was seconded to City Q, Country R and worked exclusively with European clients in Europe (paragraph 6).
- (b) During the Assessment Year, he spent the majority of his time outside of Hong Kong being present in Hong Kong on only 62 days in that year. The purpose for these visits was to meet with his girlfriend at the time, whose employment as a flight attendant also meant she travelled in and out of Hong Kong regularly. A number of other visits were seeking or attending interviews for new employment (in light of his likely redundancy) and meeting colleagues and business contacts to explore new business opportunities unrelated to Bank A... (paragraph 7).
- (c) None of his trips were employment related during the Assessment Year and he booked his own hotel accommodation through his personal travel agent, staying in cheaper, non-Bank A approval list hotels for all his stays in Hong Kong, which would not be the case if they were visits required by his employers. If these trips were for work purposes he would have been entitled to reimbursement of his expenses and would likely have stayed in one of Bank A's approval hotels rather than the cheaper accommodation (paragraph 12).
- (d) There was in fact only one face-to-face interaction in Hong Kong, ...and it was with Mr S (Position T of Division K at the bank, based in Country U). To the best his recollection, this occurred during the trip to Hong Kong between 13 May 2014 and 15 May 2014, though it was not a formal scheduled meeting between the two of us... (paragraph 14).
- (e) As Mr S was visiting Bank AHK, he took a temporary room to work from for his visit (which he understood was for the main purpose of discussing ship leasing with another executive in an unrelated business area at the bank – Mr V)(paragraph 15).
- (f) On passing the temporary room where Mr S was located, he entered to greet Mr S and has an informal chat... (paragraph 17).

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- (g) There was no discussion regarding his work (other than in the context of rumoured redundancies) and furthermore, Mr S was not directly involved in his work as he did not report directly to him)... (paragraph 20).

31. In support of his claim that he provided no service to Bank A while he visited Hong Kong, he produced the 'Record of Dialogue' and extracts of e-mails exchanged between him and other staff of Bank A.

32. In reply to the Respondent's enquiries in respect of the employment of the Appellant, Mr C and Ms B of Bank A respectively gave the following replies to the Respondent (collectively 'Bank A Replies'):

- (a) There was a total of 12 employees including the Appellant under the Division K Hong Kong team, reporting to Mr W, Position X1 and Position X2 of Greater China, North Asia & ASEAN, who was based in Hong Kong. All 12 employees were employed by Bank A and had a regular office in Hong Kong located at Address Y Hong Kong.
- (b) The Appellant was responsible to originate structured lending opportunities with European clients into Bank A's footprint. This was a broad financing mandate and not capital equipment finance. The Appellant had to work with individual regional teams in the footprint to help originate business from European multinational companies. That role had no team or people responsibility but the Appellant had to travel to several offices across Hong Kong, City H, City Z and City Q in Europe to scope the opportunity.
- (c) The Appellant took annual leave and sick leave for a total number of 7 days during the period from 1 April 2014 to 31 March 2015.
- (d) The Appellant rendered services to Bank A in Hong Kong during the period from 1 April 2014 to 31 March 2015.
- (e) The Appellant was required to report his work progress or take instructions from his senior in Hong Kong. It was confirmed by the Appellant's manager that he was present in the office while he was in Hong Kong.

33. The Appellant asked the Board to place no weight on Bank A Replies because the makers were not called to give evidence. In the meantime, the Respondent asked the Board to place no weight on the Witness Statement because it is a self-serving statement and unsupported by evidence.

34. It is noted from the movement record kept by the Immigration Department in respect of the Appellant ('Record of Movement') for the Assessment Year, the Appellant

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visited Hong Kong every month from April 2014 to November 2014. There was a regular pattern that there were a few days in each visit:

Period	Date of Week	Number of Days
23 to 25 April	Wednesday to Friday	3
30 April to 1 May	Wednesday to Monday	6
13 to 15 May	Tuesday to Thursday	3
28 to 30 May	Wednesday to Friday	3
3 to 5 June	Tuesday to Thursday	3
17 to 20 June	Tuesday to Friday	4
8 to 11 July	Tuesday to Friday	4
13 to 16 August	Wednesday to Saturday	4
4 to 6 September	Thursday to Saturday	3
14 to 16 September	Sunday to Wednesday	4
27 September to 2 October	Saturday to Thursday	6
28 to 29 October	Tuesday to Wednesday	2
4 to 7 November	Tuesday to Friday	4
10 to 12 November	Monday to Wednesday	3
18 to 21 November	Tuesday to Friday	4

35. Most, if not all, the above visiting days were working days. It is not disputed that the Appellant was paid on those days.

36. The Respondent prepared a table to analyze the Appellant's visits in Hong Kong during the Assessment Year ('Travel Schedule') which is helpful in our discussion.

37. Setting aside the issue of whether the number of days of visits made by the Appellant in the Assessment Year was 62 days or 60 days as contended by the Appellant for a moment, it is noted from the Travel Schedule that amongst those visiting days, there were 27 full days and 11 partial days in Hong Kong during office hours. According to Bank A, the Appellant took leave and sick leave for a total of 7 days in the Assessment Year. After deducting 7 days of annual leave and sick leave from those 27 working days, there remained 20 working days and 11 partial days in Hong Kong during office hour (collectively '37 Paid Working Days').

38. It is noted from the Witness Statement that the Appellant had not attempted to tell what he did in those 37 Paid Working Days while he was in Hong Kong and why he should receive pay from Bank A for no services performed by him in those 37 Paid Working Days. Neither did the Appellant see fit to explain in the Witness Statement his travel pattern for the period from April to November 2014 and why he stayed in Hong Kong for several days in each visit without providing services to the bank. There are a lot of doubts in this regard which require the Appellant to explain.

39. Under Section 68 (4) of the Ordinance the Appellant bears the onus to prove that he did not render any services while he visited Hong Kong. The mere claim in the Witness Statement that the Appellant did not render services of employment while he visited

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Hong Kong but for personal matters or meeting his girlfriend is not sufficient to lead one to believe this allegation in the light of other evidence of the appeal, such as the Record of Movement, the Record of Dialogue and the Bank A Replies. Neither does the claim remove the doubts aforesaid.

40. The Record of Movement shows that the Appellant landed in Hong Kong at 16:32 on 27 September 2014 and left Hong Kong through airport immigration control at 07:24 on 2 October 2014. The Appellant claimed he rendered no service to his employer on 2 October 2014.

41. Common sense tells us that one needs at least 10 minutes to walk from the airport immigration control point to the gate for the flight (even if it was the nearest gate next to the airport immigration control point). As a matter of practice, the gate would be closed 20 minutes prior to the scheduled departure time. It follows that if one could catch up a flight leaving Hong Kong after he passed the airport immigration control point at 07:24, the scheduled departure time for that flight should at least be 07:54 or later (after adding 30 minutes to the time of passing the airport immigration control point).

42. Depending on the air traffic and weather conditions of the day and the location of the gate, the taxing time for a plane from the boarding gate to the runway would need at least 5 to 10 minutes or even more. Taking into account the taxing time, the plane which the Appellant was on board on 2 October 2014 should still be in the territory of Hong Kong as at 07:59 (if not later). Further it needed time to leave the territory of Hong Kong after it took off. In other words, we have no doubt that the Appellant was at least still in the territory of Hong Kong as at 07:59 on 2 October 2014, though he passed the airport immigration control point at 07:24.

43. The Record of Dialogue, the Appellant's own document, shows that the Appellant was corresponding with Mr J, his superior for the period from 07:45 to 07:56 on 2 October 2014. The contents this dialogue appear to us that the dialogue was referring to a deal, and not for the Appellant's personal business:

‘I see there is a replacement hire made in [Country AA] and in [Country AB]. Even tho (sic) we've not booked our deals yet, we are only replacing. It would seem a bit harsh if GB said “no”.’.

44. It flies in the face of common sense that the Appellant did not render services to his employer from 07:45 to 07:56 on 2 October 2014 while during that period he was in Hong Kong. The Board has no doubt that the Appellant had rendered services of employment in Hong Kong on 2 October 2014.

45. Bank A Replies were made by Ms B and/or Mr C for and on behalf of Bank A to answer the detailed and structured questions or queries about the Appellant's employment raised by the Respondent. The answers provided were detailed and complete. We have no reason to believe that the makers of Bank A Replies would provide the information not based on their own knowledge, or if they had no personal knowledge, on records kept by Bank A or information provided by relevant personnel of Bank A. Neither

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do we have any reason to believe that the makers would concoct or fabricate any information which were meant to be provided to the Respondent by Bank A.

46. One has to bear in mind that the makers have no personal interest in the investigation conducted by the Respondent on the Appellant. It is improbable that they would fabricate or concoct information against the Appellant.

47. By the above reasons, Bank A Replies were most probably made, as we have expressed in the previous paragraphs, on the basis of the records kept by Bank A. We therefore see no reason why the Board should exclude Bank A Replies or place no weight thereon in our deliberation or analysis as suggested by the Appellant. Having considered the background against which Bank A Replies were made by Bank A, their contents and other evidence available, the Board can draw, from the Bank A Replies alone, the inference that the Appellant did render services to Bank A while he visited in Hong Kong during the Assessment Year.

48. The Appellant claimed that during the Assessment Year he had not returned to the office save for some occasions for non-business matters. As a matter of common sense, even if we accepted that he did not return to office during the Assessment Year for providing services while he visited Hong Kong, he could still provide services of employment to Bank A by means of phones or computer or other technology equipment during his visits in Hong Kong. In this regard, the Record of Dialogue showed that the Appellant could render his services by phone. In the circumstances, we do not accept the proposition made by the Appellant that as he did not return to office (save for some occasions for non-business matters), he therefore did not render services to the bank.

49. It is not disputed by the Appellant he was paid for the 37 paid Working Days by Bank A. On this fact, the Appellant should have rendered services to Bank A on paid working days unless the Appellant could give a credible account why he had pay without rendering services under the Contract. However, the Witness Statement was silent in this respect.

50. The denial of rendering service and the account given by the Appellant in the Witness Statement would not help discharge his burden to prove his case. Quite the opposite, such denial would, against other evidence in the appeal, undermine the evidential value of the Witness Statement. Having considered all the factors and evidence of this appeal, the Board would not place much weight on the Witness Statement.

51. In support of his claim that the visits to Hong Kong were not for business purposes, the Appellant submitted that he received no reimbursement of costs of hotel in Hong Kong from Bank A. The Tax Representative argued that if the Appellant visited Hong Kong for business purposes, Bank A would have paid his costs of hotel in Hong Kong, but all the hotel costs in the Assessment Year were paid by the Appellant personally. The Board finds this argument not attractive at all. According to the Contract and the Addendum, the Appellant was entitled to a housing allowance for 3 years from January 2013 upon his move to Hong Kong. Since the Appellant was entitled to a housing for his employment in Hong Kong, the Board sees no reason why the Appellant should be paid again the costs of hotel

whether or not he performed services in Hong Kong during his visits.

52. Based on the above analysis and having carefully considered all the evidence of the case, the Board finds it a fact that the Appellant did render services to Bank A while he visited Hong Kong in the Assessment Year.

**Whether the Appellant's visits to Hong Kong during the Assessment Year exceeded 60 days in total**

53. Since we find that the Appellant did render services in Hong Kong during the Assessment Year, it necessitates us to consider the issue whether he was entitled to exemption under section 8(1B) of the Ordinance that his visits in Hong Kong during the Assessment Year was not more than 60 days.

54. According to the Record of Movement, in the Assessment Year the number of days of the Appellant's visits to Hong Kong was 62. The Board accepts the Appellant's explanation that out of those visits, two of them were for transit purpose. Although the Tax Representative had no quarrel on 62 days, it is his contention that different interpretations of the meaning of 'visits' and 'days' might lead to different results of 'visits not exceeding a total of 60 days' referred to in section 8(1B) of the Ordinance.

55. In order to be qualified for the exemption under section 8(1B) of the Ordinance, a taxpayer, even though he has rendered services in Hong Kong, must not do so during visits which exceed a total of 60 days in the relevant financial year.

56. It is common ground that the words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered' under section 8(1B) of the Ordinance, a decision made by Mortimer J in CIR v So Chak Kwong, Jack<sup>1</sup>.

57. Despite the fact that the Tax Representative accepted the decision of Mortimer J, he contended that there are some doubts as to the correctness of decision of CIR v So Chak Kwong, Jack. The Tax Representative queried whether it would be upheld if a case were taken to the High Court again, as it can result in absurdities such as the additional assessment raised on the Appellant. In this regard, the Tax Representative referred the Board to the decisions made by other boards of review in D2/06<sup>2</sup>, D37/01 and D76/04. The Tax Representative specifically referred the Board to the relevant paragraphs of D2/06 which are reproduced below:

*'Nonetheless, like the Board in Case No. D37/01 this Board must voice its serious doubts as to whether the decision CIR v So is correctly decided. This Board notes that in CIR v So only the Commissioner appeared before Mortimer J. The respondent was absent and was not represented by counsel. The learned Judge therefore did not have the benefit of submissions from the other perspective. In contrast, the Board from which the Commissioner*

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<sup>1</sup> 2 HKTC 174

<sup>2</sup> (2006-07) IRBRD, vol 21

*appealed by way of case stated had the benefit of argument from experienced counsel (Mr. Anthony F Neoh, as he then was) and arrived at the opposite conclusion which appears to this Board to be more logical and certainly more fair and reasonable. The Board strongly believes that it would be appropriate for the issue to be re-considered by the Court or the legislature.'*

58. Relying on the decision in Pepper v Hart<sup>3</sup>, the Tax Representative argued that where legislation is ambiguous as to its meaning and purpose, reference may be made to extraneous materials in interpreting it and specifically to debates in the legislature (Hansard). In this regard, the Tax Representative referred the Board to the speech of the Financial Secretary to explain the purpose of section 8(1A) and 8(1B) of the Ordinance made to the legislature before the enactment:

*'Liability to tax may arise from two separate factors from a Hong Kong contract of employment wherever services are performed (the so-called situs of employment); or from performance of services in Hong Kong. I said, when I introduced the Bill, that we intended to maintain the first of these as the main general criterion but to give general exception in the case of both (a) and (b) where a person otherwise chargeable renders services in Hong Kong for not more than sixty days in a year of assessment. This applies whether or not there is a Hong Kong contract of employment.'*

59. The Tax Representative argued that Mortimer J did not consider in his decision, let alone rule on, the meanings of 'visits' or 'days' and how to count them for the purposes of section 8(1B) of the Ordinance. As such, he submitted that it is still open to the Board to properly interpret these words and their meanings while continuing to respect the precedent of the High Court.

60. The Respondent submitted that it was not necessary for the Board to look to Hansard in determining the purpose of section 8(1B) because the decision of Mortimer J was clear and unambiguous.

61. CIR v So Chak Kwong, Jack was an appeal case taken by the Commissioner to the High Court by way of case stated on points of law from the board of review. The first question posted by the board of review was:

*'was the board of review correct in holding that the words 'visits not exceeding a total of 60 days' in Section 8(1B) of the Inland Revenue Ordinance, Cap.112 refer only to days spent rendering services in Hong Kong?'*

62. In the judgment, Mortimer J expressed the opinion that the question of law posed in the case stated is to be answered in the negative. In other words, Mortimer J said that it was wrong to refer 'visiting not exceeding a total of 60 days' in section 8(1B) of the Ordinance to 'days spent rendering services in Hong Kong'.

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<sup>3</sup> [1993] AC 593



63. Mortimer J said in the judgement that section 8(1A) is clear and unambiguous. The words ‘not exceeding a total of 60 days’ qualify the word ‘visits’ and not the words ‘services rendered’. To put it in any other way, Mortimer J just said the total number of days of visits under section 8(1B) of the Ordinance matters and we are not concerned about the number of days in which the taxpayer renders service during his visits in Hong Kong in the relevant period. Were it otherwise, his Lordship took the view that the section would be expressed differently. In order to take the benefit of the section, Mortimer J held that a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.

64. The Board accepts the Respondent’s submission that there is no ambiguity or absurdity in section 8(1B) which necessitates the Board to look to Hansard in determining the purpose of that legislation.

65. As a matter of principle, the Board is bound by the previous decisions of the High Court unless and until they are overruled by the Court of Appeal or Court of Final Appeal or by the amendment of the legislation. Accordingly, the Board has no doubt as to correctness of the decision of CIR v Jack So and should still be bound by the decision of Mortimer J.

66. It is the Tax Representative’s submission that the term ‘visit’ in section 8(1B) of the Ordinance should not include visits where it is not possible to render services of the employment as they are so short as to do so would not attain the object of the provision according to its true, intent, meaning and spirit (sic). It is his submission that logically section 8(1B) of the Ordinance must only be referring to ‘visits’ in which it was possible for the taxpayer to render services of his employment with the wording, ‘services rendered in Hong Kong during visits’. In this regard, the Tax Representative argued that the two visits for transit purpose should be excluded from the Appellant’s total days visiting Hong Kong. Accordingly, his income should be excluded from the charge to salaries tax for the 2014/15 year of assessment because the number of visits would be reduced to 60 if such two visits were excluded.

67. The Board does not accept the Appellant’s argument that ‘visits’ in section 8(1B) of the Ordinance should not include visits where it is not possible to render services of the employment. The reasons are simple. Nothing in that section excludes visits where it is not possible to render services of the employment. Nothing in that section give ways to interpret the meaning of ‘visit’. There is no authority submitted by the Appellant to substantiate such argument.

68. In our view, ‘visits’ in section 8(1B) simply is ‘visits’, the purpose of which has no concern to us. As said by Mortimer J ‘visits’ in section 8(1B) is qualified by ‘not exceeding a total of 60 days’. It is not qualified by the ‘purpose of visits’. If it is interpreted in the way suggested, then each and every ‘visit’ would be examined to see if it should be excluded for the purposes of ascertaining his entitlement of exemption under section 8(1B) of the Ordinance. This should not be the intention of the legislature when section 8(1B) was enacted.

69. Another aspect of the Appellant's argument is the 'meaning of days'. It is his argument that for the purposes of section 8(1B) of the Ordinance, the way of counting the days visiting Hong Kong, i.e. to count one full day for each day that the person is present in Hong Kong (as decided in a number of boards of review cases) does not accord with the natural meaning of 'day'. The Tax Representative advocated that the approach taken by the Revenue for the exemption under section 8(1A)(c) (i.e. excluding one of either the day of arrival or departure for each visit) should also be adopted for the exemption under section 8(1B).

70. Section 8(1A)(c) of the Ordinance provides exemption on income derived by a person from services rendered by him in any territory outside Hong Kong where tax of substantially the same nature as Salaries Tax has been charged and paid in that territory on the income. The Board agrees with the Respondent's submission that the method adopted in ascertaining the income to be excluded under section 8(1A)(c) is not relevant when we construe section 8(1B).

71. For the reasons aforesaid and having considered the evidence carefully, the Board finds it a fact that for the purpose of section 8(1C), in the Assessment Year the number of days of the Appellant's visits to Hong Kong was 62.

72. Based on the above analysis, the Board does not feel that the Appellant has discharged the onus under section 68(4) of the Ordinance to prove that the assessment being assessed is excessive or incorrect.

73. It is our conclusion that the appeal should be dismissed and the Determination should be confirmed.

### **Costs**

74. Since the Board does not reduce or annul the assessment being appealed and confirms the Determination, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount of \$25,000 (being the amount specified in Part 1 of Schedule 5 of the Ordinance) pursuant to section 68(9) of the Ordinance.

75. As to the issue of 'whether the Appellant rendered services while he visited Hong Kong', the Appellant only advanced a flat denial which was contradicted by his own document, the Record of Dialogue. Further he did not see fit to provide any explanation as to why he needed not render services on some of the working days in which he was paid. As to the issue of 'whether his visits exceeding 60 days', his argument of interpretation is not supported by authorities and contrary to the established legal principles. Each and every point advanced by the Appellant was rejected by the Board. To sum up, this is a hopeless appeal.

76. Substantial amount of public money is incurred in this appeal. The Board sees no reason why the public fund has to pay the costs of the Board in dealing with the Appellant's appeal, which is considered frivolous and vexatious.

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77. Accordingly the Board, pursuant to section 68(9) of the Ordinance, orders that the Appellant is to pay a sum of \$12,500.00 as costs of the Board, and this sum of \$12,500.00 be added to the tax charged and recovered therewith.

**Disposition of the Appeal**

78. For the reasons and conclusion set out above, we dismiss the appeal and confirm the Additional Salaries Tax Assessment for the year of assessment 2014/15 under Charge Number X-XXXXXXX-XX-X, dated 9 December 2016, showing Additional Net Chargeable Income of HK\$3,987,873.00 with Additional Tax Payable thereon of HK\$635,180.00. The Appellant is to pay a sum of HK\$12,500.00 as costs of the Board which is to be added to the tax charged and recovered therewith.