Case No. D1/17

Salaries Tax – whether income source in Hong Kong - sections 8(1), 8(1A), 8(1B) and 68(4) of the Inland Revenue Ordinance ('IRO')

Panel: Cissy K S Lam (chairman), Marshall H Byres and Law Chung Ming Lewis.

Date of hearing: 24 November 2016.
Date of decision: 12 April 2017.

The Appellant contends that he is not an employee with Company C and his earnings of HK$495,000 (the 'Sum') from work undertaken in [Country A] between 10/8/06 and 30/11/06 is not income arising in or derived from Hong Kong.

Held:

1. All the facts and evidence considered, the Appellant was under an employment with Company C and the Sum was 'income from employment' under section 8 of the IRO.

2. Although incorporated in Country D, Company C was essentially a Hong Kong company.

3. The source of the income was Hong Kong. The whole of the Appellant's income is assessable to salaries tax under section 8(1) of the IRO.

4. Section 8(1A) and (1B) of the IRO are not engaged.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Geopfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
Market Investigations v Minister of Social Security [1969] 2 QB 173

Appellant in person, accompanied by his wife.
Wong Suet Mei, Ong Wai Man Michelle and Lee Shun Shan, for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to his Salaries Tax Assessments for the years of assessment 2005/06 and 2006/07 ('2005/06 Assessment' and '2006/07 Assessment' respectively).

2. By Determination dated 20 January 2016 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Commissioner') confirmed the Assessor's revised assessments for the two tax years.

3. In his letter to the Board of Review dated 10 February 2016 and subsequently his Grounds of Appeal dated 19 February 2016, the Appellant stated that the Commissioner was mistaken because he had formally withdrawn his objections to the 2005/06 Assessment way back in 2009.

4. At the hearing before this Board, the Appellant confirmed that he had no objection to the 2005/06 Assessment. Further, in regard to the 2006/07 Assessment, he confirmed that he disputed only one of the items, which concerned a project he did in Country A (referred to as 'Project B' in the Determination) in the sum of HK$495,000. We shall set out the facts and the issues in more detail below.

The Evidence

5. The Appellant gave evidence at the hearing before this Board. We find him an honest witness, but as he himself emphasised at various points, he was asked about matters that happened about 10 years ago, his memory could be impaired. Thus insofar as any of his evidence contradicted the contemporaneous documents, we prefer the documents.

The Facts

6. At the hearing we asked the Appellant to go through paragraphs (2) to (14) of the Determination to see if he agreed to, or disputed, any of the matters stated therein. After careful perusal, the Appellant confirmed to us that he agreed to those paragraphs. On the basis of those paragraphs and the evidence before us, including the documents and the Appellant's evidence, we find the facts stated in paragraphs 7 to 44 below as true and correct.

7. Company C1 (later known as Company C2) (English abbreviation: Company C) was incorporated in Country D and registered as an overseas company establishing a place of business in Hong Kong under Part XI of the then Companies Ordinance (Cap.32).

8. Company E1 (later known as Company E2) (English abbreviation: Company E) was a company registered in Country A.

9. The Appellant is a F professional. He has been a member of Institution G for about 50 years. He was qualified in Country D, but he has worked in many different countries in the world including Region H, Region J and Country A. He became a Country A's citizen in about 1990 and a Hong Kong permanent resident in August 2005. Records from the Immigration Department show that he had been working continuously in Hong Kong under various employments starting from 1998. The Appellant is now semi-retired and is living in Country A.

10. At the relevant time in 2005 and 2006, the Appellant owned properties in Country A and in Hong Kong, but his home was in Hong Kong. He and his wife lived in Hong Kong although his children were in Country D. He held an account in Hong Kong with the Bank K No.XXX-XXXXXX-XXX ('HK Account').

Agreements and Income

11. In total, the Appellant had 4 agreements with Company C and Company E, namely one 'Employment Agreement' and three 'Consultancy Agreements', viz the '2005 Agreement', '2006 Agreement' and '2007 Agreement', particulars of which are set out in Appendix A appended at the end hereof.

12. There is some dispute of facts as to where and when the 2006 Agreement was negotiated. We do not find this dispute significant. We are prepared to accept that the 2006 Agreement was negotiated outside Hong Kong.

13. The 2006 Agreement, which was, on the face of it, entered into between the Appellant and Company E on 1 February 2006, contained the following terms:

(1) 'The Consultant shall undertake such duties and exercise such powers in relation to the Services that the [Position L] of [Group M] or his nominee shall from time to time assign to or vest in the Consultant …'

(2) 'The Consultant shall conform to such hours of work as may from time to time reasonably be required to perform the Services. The Consultant acknowledges that it is not entitled to receive any benefits or payment for work performed outside normal hours;'

(3) 'The Consultant shall operate from home or any of [Group M's] office(s) in order to properly discharge its obligations.'

(4) '[Group M] will arrange Workers' Compensation Insurance & Travel Insurance for the Consultant.'

(5) 'The Consultant will be required to join the Mandatory Provident Fund Scheme of the Company in compliance with the Mandatory Provident Fund Schemes Ordinance or an MPF scheme of your choice if the service period is more than 60 days.'

(6) '[Group M] shall reimburse the Consultant for reasonable business expenses incurred in carrying out any services previously approved by [Group M].'

(7) 'The Consultant shall submit to [Group M] an invoice for fees on or before the 20th day of each month for the Services provided in that month. Summary of the Services rendered shall be attached to the invoice and the travel and business expenses shall be included in the invoice, with supporting documents such as receipts and/or invoices acceptable to [Group M].'

(8) 'In circumstance where the Consultant is required to travel outside [Country A], [Group M] shall provide hotel accommodation for the duration of each assignment.'

(9) 'INDEMNITIES The Consultant shall indemnify [Group M] and its related companies against any action, suit, claim or demand, cost or expense arising out of or referable to any damage, injury or loss caused by or resulting from any wilful or negligent act or omission of the Consultant. Such damage, injury or loss occurring at any time during or after the period of this Agreement shall be the responsibility of the Consultant.'

14. We would accept that, in the context of the 2006 Agreement, the words 'Group M' referred to therein meant Company E.

15. The terms of the 3 Consultancy Agreements were essentially the same and the above terms could also be found in the 2005 and 2007 Agreements, except that:

(1) The 2005 and 2007 Agreements did not contain the 'Indemnities' clause.

(2) The 2006 Agreement was stipulated to be governed by the law in force in State N in Country A whereas the 2005 and 2007 Agreements were governed by the law in force in Hong Kong.

(3) References to 'Group M' in the 2005 and 2007 Agreements were specifically defined to mean Company C. There was no such specific definition in the 2006 Agreement. But as aforesaid, we would accept that in the 2006 Agreement references to 'Group M' should mean Company E.

(4) The definitions of 'the Services' were not exactly the same, but the difference is immaterial to the present purpose.

16. The agreed fees under the 2005 Agreement and 2007 Agreement were

respectively HK$6,000 and HK$10,000 per day gross. The agreed fee under the 2006 Agreement was A$875 per half day gross.

17. The Appellant's total earnings for the two tax years under the 4 agreements with Company C and Company E are summarised in Appendix B appended herewith.

18. Eventually no work was done under the 2007 Agreement. All the Appellant's earnings for the year 2006/07 were paid under the 2006 Agreement.

The Invoices and the Projects

19. Only invoices for the months of February to November 2006 are available (Appendix B(11)-(20)).

20. During those months, the Appellant had worked on 4 different projects. Project P and Project Q were both Hong Kong based projects. Project R was a project based in City S, Country T, and Project B was based in City V, Country A.

21. Although the agreement applicable was the 2006 Agreement purportedly made between the Appellant (using his address in Country A) and Company E, the Appellant issued all his invoices to Company C, not Company E. The Appellant used his home address in Hong Kong in all the invoices. All his remunerations and the reimbursement of his expenses were paid in Hong Kong dollar and were paid into his HK Account.

22. Despite that the 2006 Agreement stipulated for a pay in Australian dollar at A$875 per half day, the Appellant was paid in Hong Kong dollar at the rate of HK$5,000 for each half day and HK$10,000 for each full day. This was said to be at an exchange rate of HK$5.714 to A$1 with payments rounded up to the nearest whole dollar.

23. With each invoice, he submitted a timesheet showing the number of full days and half days he had worked in the previous month with a description of the projects involved, and a list of expenses he incurred in connection therewith.

24. For February 2006 and March/April 2006 (Appendix B(11)-(13)), the Appellant worked partly on the Project R and partly on the Project P and Project Q. He invoiced for expenses related to Project R, which included his airfare to and from City S, hotel in City S and airport parking in Hong Kong. The expenses incurred in City S were converted to Hong Kong currency and paid in Hong Kong currency. For the Hong Kong based project, there was only one item described as 'Out of Pocket Expenses MTRC/KCRC/ETC' in the sum of HK$250.

25. For August to October 2006 (Appendix B(17)-(19)), he was largely involved in Project B. He invoiced for related expenses, which included his airfare to and from City V, hotel in City V, taxi fare in City V, parking in City V, petrol in City V, airport parking in Hong Kong and taxi fare to the airport in Hong Kong. The expenses

incurred in City V were converted to Hong Kong currency using an exchange rate of HK$6.0 to A$1 and paid in Hong Kong currency. The Appellant did not explain why a different rate of exchange was adopted. He was also involved in Project P (a Hong Kong based project) in August, but he made no claim for reimbursement in relation to that project.

26. The invoice for the month of February 2006 showed that it was approved by Mr W, Position X of Company C. It is not apparent from the other invoices who approved them.

27. The income paid by Company C to the Appellant was accounted as follows:

Period	Sum	Ref	Account
Apr-Aug 2005	534,000	Appendix B(1)-(3)	484,200 was charged to 'Salaries & Wages' and borne by Company C, 49,800 was recharged to Company E and borne by Company E
Sep 2005 to Jan 2006	835,707	Appendix B(4)-(10)	835,707 was charged to 'Salaries & Wages' and borne by Company C
Feb 2006	135,000	Appendix B(11)	135,000 was split up evenly and charged to 'Salaries & Wages' and 'Costs to Sales' respectively and borne by Company C
Mar 2006 to Feb 2007	1,726,027	Appendix B(12)-(22)	631,700 and 599,327 were charged to 'Salaries & Wages' and 'Costs to Sales' respectively and borne by Company C, 495,000 was recharged to Company E and borne by Company E

28. The sum of HK$495,000 under the period Apr 2006 - Mar 2007 was the remuneration for Project B. We have no evidence what the sum of HK$49,800 under the period Apr-Aug 2005 related to.

Project B

29. The work was undertaken in City V between 10 August 2006 and 28 October 2006, for a total of 49.5 working days:

(1) 9 days in August 2006

(2) 20.5 days in September 2006

(3) 20 days in October 2006

30. The remuneration for this project was HK$10,000 x 49.5 days =

HK$495,000 ('the Sum').

31. In his evidence at the hearing, the Appellant said that he had worked for 50 days on the project and his remuneration was at A$1750 per day. Using the exchange rate of 5.69, it came to roughly HK$10,000 per day, giving him a total of HK$10,000 x 50 days = HK$500,000. When Company C was subsequently reimbursed by Company E, because of the difference in exchange rate, the reimbursement was HK$495,000 instead of HK$500,000. This evidence is clearly inaccurate in the light of the invoices. His timesheet for September 2006 showed that half a day was attributed to the Project P, so that only 20.5 days were attributed to the Project B, making a total of 49.5 days.

32. The Appellant did not pay any income or profit tax, or national health insurance programme, in respect of the Sum in Country A.

33. The Appellant did not hold any business registration certificate whether in Hong Kong or Country A.

Mandatory Provident Fund ('MPF')

34. The Appellant and Company C maintained that despite Clause 2(c) of the 2005 and 2006 Agreements, the Appellant did not join Company C's MPF scheme. Nonetheless relevant statements show that the Appellant maintained an MPF account with Bank K and Company C contributed to the Appellant's MPF as his 'employer'. Company C and the Appellant each contributed $1,000 per month making a total of:

	Employer mandatory contribution	Member mandatory contribution
	$	$
01-09-2005 – 31-03-2006	7,000	4,000
01-04-2006 – 28-02-2007	10,000	10,000

Employment Visa issued to the Appellant

35. According to information given by the Director of Immigration:

(1) On 25 May 1998, the Appellant was issued an entry employment 12 months' visa for employment with Company Y.

(2) On 10 May 1999, he was granted an extension of stay until 2 June 2001 for the same employment.

(3) On 23 March 2000, the Appellant applied for a change of employment to take up employment as Position AC with Company C. His application was approved on 12 April 2000.

(4) On 10 May 2001, he was granted an extension of stay until 2 June 2003 for the same employment.

(5) On 31 March 2003, he was granted an extension of stay until 2 June 2005 and allowed to take up employment as Position AC with Company Z.

(6) On 26 April 2005, he was granted an extension of stay until 31 December 2005 and allowed to take up employment as a consultant with Company C.

(7) On 29 August 2005, he was granted permanent residence in Hong Kong.

36. In an application made to the Immigration Department dated 13 April 2005 and signed by the Appellant and Company C, the Appellant applied for a 2 years' stay for the purpose of 'Employment' with Company C as his 'Future Employee' and Company C was the Appellant's Sponsor for the application. The 2005 Agreement was submitted in support.

Returns and Notifications filed by Company C

37. Company C filed the following Returns and Notifications:

Year of assessment	2005/06 IR56B	2005/06 IR56P	2005/06 IR56M	2006/07 IR56M
(a) Period of employment	01-04-2005 – 31-08-2005	01-09-2005 – 31-01-2006	01-02-2006 – 31-03-2006	01-04-2006 – 31-03-2007
(b) Capacity in which employed	Consultant	Position AA	Consultant	Consultant
Year of assessment	2005/06	2005/06	2005/06	2006/07
(c) Income	$	$	$	$
Salary	534,000	685,000	-	-
Leave Pay	-	51,092	-	-
Others	-	34,615	-	-
Consultancy fees	-	-	135,000	1,226,027
Consultancy services carried out in Country A for Company E	-	-	-	500,000
Total	534,000 Appendix B(1)-(3)	770,707 Appendix B(4)-(8) + (10)	135,000 Appendix B(11)	1,726,027 Appendix B(12)-(21)
(d) Place or residence	-	Yes	-	-
Rent refunded to employee	-	$65,000	-	-
(e) Whether the Taxpayer was wholly or partly paid by an overseas company either in Hong Kong or overseas	No	No	-	-

IR56B = Employer's Return of Remuneration and Pensions

IR56P = Notification by an Employer of an Employee who is about to cease to be employed

IR56M = Notification of Remuneration paid to Persons Other Than Employees

Tax Returns and Assessments

38. In his tax return for the years of assessment 2005/06 ('2005/06 Return'), the Appellant declared the following income under Part 4: Salaries Tax:

Employer	Capacity Employed	Period	Amount (HK$)	
Company C	Consultant	05-04-2005 – 31-08-2005	534,000	Appendix B(1)-(3)
	Position AA	01-09-2005 – 03-01-2006	750,000	Appendix B(4)-(9)
	Consultant	01-02-2006 – 31-03-2006	135,000	Appendix B(11)
Company AB	Consultant	24-06-2005 – 02-07-2005	100,000	Not in issue
		Total:	1,519,000	

39. The sum of $85,707, viz Appendix B(10), was declared separately as a lump sum receipt and 'value of residence' provided was declared at $76,477..

40. In his tax return for the years of assessment 2006/07 ('2006/07 Return'), the Appellant declared the following income under Part 4: Salaries Tax:

Employer	Capacity Employed	Period	Amount (HK$)	
Company Z	Position AC	14-08-2006 – 31-03-2007	405,000	Not in issue
Company C	Consultant	01-04-2006 – 08-08-2006	935,000	Appendix B(12)-(19) minus a sum of 500,000 which the Appellant thought was not subject to HK tax because it arose from Project B (see paragraphs 29-31 above and para 42 below of this decision)
	Consultant	01-11-2006 – 15-02-2007	291,027	Appendix B(20)-(22)
		Total:	1,631,027	

41. Although the sum $170,000, viz Appendix B(12) was already included in

the said sum of $935,000, he also declared it separately as a lump sum receipt.

42. In a letter filed with the 2006/07 Return the Appellant stated: 'For the avoidance of any doubt in this regard, I would confirm that I have not included in part 4 of the return my overseas earnings from work undertaken in [Country A]. These were derived from a consultancy agreement with [Company E1] of [Country A] for services carried out in [Country A] between 10/8/06 and 30/11/06. I understand from the "Guide to Tax Return" that it is only income arising in or derived from Hong Kong which needs to be reported'.

43. He was there referring to the Sum and he used the figure HK$500,000. The Assessor considered that the Appellant's income should be assessed in full and adopted as his total income $1,631,027 + $500,000 = HK$2,131,027.

44. Based on the Appellant's declarations in the two Returns, the Assessor made the 2005/06 and 2006/07 Assessments as follows:

Year of assessment	2005/06	2006/07
	$	$
Income	1,519,000	2,131,027
Add: Value of residence provided	76,477	-
	1,595,477	2,131,027
Less: MPF contributions	5,000	9,000
Outgoings/other deductions	933	1,070
Net Income	1,589,544	2,120,957
Tax Payable thereon (standard rate)	254,327	324,353

45. These assessments were subsequently revised by the Assessor because the housing allowance was already included in the sum of $1,519,000 and he considered that the sum of $170,000, viz Appendix B(12), should be included in the 2005/06 year of assessment ($2,131,027 - $170,000 = $1,961,027):

Year of assessment	2005/06	2006/07
Income from	$	$
- Company C	1,674,707	1,556,027
- Company AB	100,000	
- Company Z		405,000
	1,774,707	1,961,027
Less: MPF contributions	5,000	10,000
Outgoings/other deductions	933	1,070
Net Income	1,768,774	1,949,957
Tax Payable thereon (standard rate)	283,003	296,993

46. The above revised assessments ('Revised 2005/06 Assessment' and 'Revised 2006/07 Assessment' respectively) were confirmed by the Commissioner in the

Determination.

Relevant Statutory Provisions

47. Section 8(1)(a) of the Inland Revenue Ordinance ('IRO') stipulates that '*Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from … any office or employment of profit*' .

48. Section 8(1A) of the IRO stipulates:

> '*(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment-*
>
> *(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*
>
> *(b) excludes income derived from services rendered by a person who-*
>
> *(i) is not employed by the Government or as master or member of the crew of a ship or as commander or member of the crew of an aircraft; and*
>
> *(ii) renders outside Hong Kong all the services in connection with his employment; and*
>
> *(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where-*
>
> *(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and*
>
> *(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.*'

49. Section 8(1B) of the IRO stipulates that '*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.*'

Relevant Authorities

50. We refer to the following authorities on the determination of the source of income:

(1) CIR v George Andrew Geopfert [1987] HKLR 888,

(2) Lee Hung Kwong v CIR [2005] 4 HKLRD 80.

51. The followings are clear from these authorities:

(1) Section 8(1) imposes a basic charge to salaries tax.

(2) Section 8(1A)(a) creates a liability to tax additional to that basic charge. It brings into the charge income from a source outside Hong Kong if the services were rendered in Hong Kong [Geopfert, 901D, Lee Hung Kwong, 89F].

(3) In the enquiry under section 8(1) as to whether his income arose in or was derived from Hong Kong, the place where the employee renders his services is not relevant. It should be completely ignored [Geopfert, 901E, Lee Hung Kwong, 89J].

(4) It is necessary to look for the place where the income really comes to the employee, that is to say, where the source of income, the employment, is located. Regards must first be had to the contract of employment. This must include consideration as to the place where the employee is to be paid, where the contract of employment was negotiated and entered into and whether the employer is resident in the jurisdiction. But none of these factors are determinative [Geopfert, 901J, Lee Hung Kwong, 91B].

(5) This does not mean that the Commissioner may not look behind the appearances to discover the reality. The Commissioner is not bound to accept as conclusive, any claim made by an employee in this connexion. He is entitled to scrutinise all evidence, documentary or otherwise, that is relevant to this matter. The so called 'totality of facts' test is descriptive of the process adopted to ascertain the true answer to this question [Geopfert, 901-902].

(6) Once it is decided that the source of income is Hong Kong so that it is caught by section 8(1), then there is no provision for apportionment. His entire salary is subject to salaries tax wherever his services may have been rendered, unless (i) he can claim relief by way of exemption under section 8(1A)(b) as read with section 8(1B) [Geopfert, 902I], i.e. he performed all of his services overseas

(section 8(1A)(b)), and in determining whether he performed all of his services overseas, period of less than 60 days in Hong Kong are to be disregarded (section 8(1B)); or (ii) he satisfies section 8(1A)(c) and pays tax in another country.

(7) It is only where the source of income is outside Hong Kong that one applies section 8(1A)(a) and apportions his income in and out of Hong Kong on a 'time in time out' basis, subject again to the so-called 60 days rule under section 8(1B) [Geopfert, 903A].

The Grounds of Appeal

52. In his Grounds of Appeal dated 19 February 2016, the Appellant started by stating the Determination was incorrect in respect of the 2005/06 tax year since his objection to that assessment was formally withdrawn by letter dated 18 February 2009 and he attached the letter and a Reply Slip as proof. It was thus only his notice of objection dated 14 August 2008 in respect of the 2006/07 Assessment that needs to be considered.

53. Miss Wong for the Commissioner referred to the correspondence between the Appellant and the Assessor and submitted that various proposals and counter-proposals were made between 2007 and 2009 and the Reply Slip related to a 2007 computation which was no longer valid by the time the Appellant signed it in 2009. Hence there was never any effective withdrawal of his objections to the 2005/06 Assessment.

54. We do not have to decide if Miss Wong is correct in her reading of the correspondence because at the hearing before this Board, the Appellant confirmed to us in no uncertain terms that he only wished to dispute the Sum relating to Project B. He accepted his liability to salaries tax regarding all the other projects. The Sum is the only matter in issue.

55. Regarding the Sum, the Appellant stated his grounds of appeal as follows:

(1) The Appellant was not an employee of Company C but a freelance consultant. This was made clear by Company C and its subsequent owner Company C2 in writing.

(2) The Appellant had to bear financial risks because Clause 6 of the 2006 Agreement required him to provide indemnities to Company E (paragraph 13(9) above). Given that the nature of his work under the agreement was to set up the necessary infrastructure, sub contract agreements and staffing for a multi million A$ contract which Company E had been awarded to build a heavy haul railway in the remote Region AD of north western Country A, these risks were indeed financial in nature and very real.

(3) The 2006 Agreement was negotiated and agreed with Mr AE, Position AF of Company E on 14th December 2005 in State AG.

(4) The 2006 Agreement was signed by Mr AE.

(5) The 2006 Agreement was governed by the laws in force in State N of Country A.

(6) Under the 2006 Agreement the Appellant was required to report to Mr AH, Position AI of Company E, who was based in Country A.

(7) The income arising under the 2006 Agreement from his overseas services in Country A did not arise nor was it derived from Hong Kong nor did it have any connection with Hong Kong or Company C. The locus of control for all engagements under this agreement was Country A and he was required to obtain approval for all of his invoices in respect of the services rendered from Mr AH.

(8) Payments made in respect of his overseas engagement in Country A were at the request of Company E paid to the Appellant by Company C, but Company C was subsequently reimbursed by Company E.

56. At the hearing before this Board, the Appellant repeated these grounds in his submission.

Our Decision

Contract of Service or Contract for Services

57. The Appellant disputed his liabilities to tax in respect of the Sum on two fronts: (1) he was not an employee, but a freelance consultant; and (2) the source of income in respect of the Sum was not in Hong Kong.

58. We find it difficult to comprehend why the Appellant should choose to take the first point. In his 2005/06 and 2006/07 Returns, he declared all his income under Part 4: Salaries Tax. He never declared any profits under Part 5: Profits Tax. He never stated in either Return that he was carrying on a business.

59. In his letter filed with the 2006/07 Return (paragraph 42 above), he indicated that he had not included the Sum 'in part 4 of the return' because he considered that only income arising in or derived from Hong Kong need to be reported and the Sum was overseas earnings from work undertaken in Country A with a Country A's company. So he did not dispute that the Sum was income subject to salaries tax, his objection was directed to the source of the income.

60. This is clear admission by the Appellant that the Sum was income from employment subject to salaries tax under section 8 of the IRO. We find no basis for the Appellant to retract from this admission. This admission clearly accords with the facts:

(1) The Appellant was required to undertake whatever project that was assigned to him. There was no separate agreement for each project.

(2) The Appellant was paid for each day or half day he was required to work, not a contract sum or project based sum.

(3) He could not increase his earnings by undertaking more projects because the projects were assigned to him.

(4) He bore no cost in doing his work. All his expenses were reimbursed, even his taxi fare and airport parking.

(5) He employed no staff himself and incurred no overheads expenses. He had access to the office facilities of Company C and Company E. He might have used his own computer and stationery, but such expenses were no more than what any employee who chooses to work from home would have to bear.

(6) He personally performed the work. He could not hire a substitute.

(7) Company C, and its head office, Company E, had control over what work he had to do, where and when he had to do them.

(8) He had to conform to such hours of work as may from time to time reasonably be required to perform the work. Clause 1(b) of the 2005 and 2006 Agreements made it clear that there was no pay for work performed outside normal working hours. This kind of provision is only necessary in an employment contract.

(9) Other terms in the 2006 Agreement, including the provision of workman compensation and travelling insurance to the Appellant and the obligation to join the MPF Scheme in compliance with the Mandatory Provident Fund Schemes Ordinance ('MPF Ordinance') in Hong Kong, are consistent with an employment contract. It does not matter whether workman compensation was in fact taken out, what is important is that Company C and Company E made it their stipulated duty to do so.

(10) The Sum, like his other income, was declared for MPF purposes and Company C contributed as his employer (see, for example, the Appellant's earning in October 2006, entirely derived from Project B, was HK$200,000 and the same amount was treated as 'relevant income' for MPF purpose over the same month).

(11) The Appellant did not have any business registration whether in Hong Kong or Country A.

61. The Appellant argued that Company E and Company C made it clear that he was an independent contractor and not an employee. It is true that in many of their letters to the Assessor, Company C reiterated that under both the 2005 and 2006 Agreements, the Appellant was a freelance consultant and not an employee, but we think the stance taken by Company C is contradictory:

(1) Despite their claim, Company C charged the majority of the Appellant's pay under the 2005 and 2006 Agreements into its 'Salaries & Wages' accounts. It is not explained what 'Costs of Sales' represented and how some of the pay was charged to this item, but the fact remains that Company C treated the majority of the Appellant's pay as 'Salaries & Wages', not fee to an independent contractor.

(2) Company C filed Employer's Return (IR56B) for the sum of HK$534,000 paid under the 2005 Agreement.

(3) In his application to the Immigration Department dated 13 April 2005, the Appellant and Company C represented to the Immigration Department that he was to take up employment with Company C under the 2005 Agreement.

(4) Having explicitly represented to the Inland Revenue Department and the Immigration Department that the Appellant was their employee under the 2005 Agreement, to now claim the contrary is unacceptable.

(5) And considering that the terms of the 2005 and 2006 Agreements are comparable in all material terms, the Appellant could not be an employee in one and an independent contractor in another.

(6) Furthermore, in August 2007, Company C stated in 2 letters that '[the Appellant] was employed both as a consultant and an employee' and 'we have separated the income arising from [the Appellant's] employment in Hong Kong from that arising from his employment outside of Hong Kong'.

62. Given Company C's self-contradictions, we are not attracted by their bare assertion that the Appellant was not an employee. In any event, in the light of the overwhelming evidence stated above, we do not think the subjective intention of the parties in this case can affect the true nature of the employment.

63. The Appellant argued that the 'Indemnities' clause meant that he bore financial risks under the 2006 Agreement. But the obligation to indemnify for loss and damage arising out of one's own negligence is not the kind of financial risk Cooke J had in mind in propounding the 'Economic Reality Test' in Market Investigations *v* Minister of Social Security [1969] 2 QB 173. This test asks whether a person is carrying on a business on his own account so that instead of a fixed salary, he risks profit or loss depending on how sound or unsound he manages his business and how well or unwell is the business environment. This kind of financial risk is very different from an obligation

to indemnify for loss arising from one's negligence, which is an obligation common to an employment contract and a contract for services.

64. On all the facts and evidence, we find that the 2006 Agreement as well as the 2005 Agreement were contracts of service, the Appellant was under an employment with Company C in carrying out the various projects under these agreements, including Project B, and the Sum was 'income from employment' under section 8 of the IRO.

Source of Income

65. The next question that we have to decide is whether the income arose in or was derived from Hong Kong. The Appellant accepted that his income from the other projects were subject to salaries tax in Hong Kong. Project P, Project R & Project Q as well as Project B were all done under the umbrella of the 2006 Agreement. He declared his income from these other projects in his 2006/07 Return. Yet, the Appellant argued that Project B should be treated differently.

66. The Appellant seems to have the idea that if a project was carried out in Hong Kong, then he was subject to fiscal liability in Hong Kong, whereas if it was carried out out of Hong Kong, then he was not so liable. There are some anomalies in his logics because:

(1) Project R was not a project located in Hong Kong – it was located in Country T, and yet he had no issue in declaring the earnings for this project to salaries tax in Hong Kong. To this the Appellant explained that as he was not a tax lawyer and the sum was not large, he did not want to dispute it.

(2) If his idea is that the fiscal liability is tied in with the location where the work is done, then he should have reported the Sum for Country A's fiscal purposes. Yet he did not. He did not pay any tax or national health insurance programme in respect of the Sum in Country A. To this, the Appellant offered no explanation.

67. In any event, the Appellant's conception of how one's fiscal liability should be assessed is wrong. Geopfert made it clear that the place where the services were rendered is not relevant at all. It is the locus of the employment which one must look at. If the employment is a "Hong Kong employment", then all the earnings arising out of that employment is assessable to salaries tax in Hong Kong irrespective of where the taxpayer did his work. There is no question of apportionment.

68. The Appellant pointed to various facts in his Grounds of Appeal in support of his argument that the locus of the employment was in Country A (see paragraph 55 above). We do not find those facts reflect the true situation.

69. True it was Mr AE who negotiated and signed the 2006 Agreement with the Appellant, but the 2005 Agreement and the Employment Agreement were likewise

negotiated with Mr AE and Mr AH and signed by them, there signing as representatives of Company C (see Appendix A), and these agreement were expressly made with Company C, not Company E.

70. The Appellant said he was required under the 2006 Agreement to report to Mr AH, Position AI of Company E, but again, the same was true for the 2005 Agreement and the Employment Agreement.

71. While these facts tend to show that the core control of Group M was in Company E, they did not necessarily make Company E the Appellant's employer.

72. The only significant difference the 2006 Agreement had with the other agreements was that the 2006 Agreement was stipulated to be governed by the law in force in State N in Country A, not Hong Kong. We think that was because the Appellant was required to undertake a project of considerable size under the 2006 Agreement, the Indemnities clause was inserted and the agreement was specifically made subject to the law in Country A with the view that should legal action be indeed required against the Appellant, it could be taken in Country A. But these stipulations are not as significant when one is considering the source of income for the purposes of section 8(1) the IRO. We think the relevant facts that give a true picture of how the 2006 Agreement operated in reality are the following:

(1) Although the 2006 Agreement was purportedly made between Company E and the Appellant (using an address in Country A), the Appellant sent his invoices to Company C, not Company E, for all his payment and expenses, and he used his Hong Kong address, not Country A's address, in his invoices.

(2) Despite that the 2006 Agreement stipulated for a pay in Country A's dollar, the Appellant was paid in Hong Kong dollar into his HK Account.

(3) His expenses incurred in City S and City V were converted into and paid in Hong Kong currency into his HK Account.

(4) Apart from the one item described as 'Out of Pocket Expenses MTRC/KCRC/ETC', he never claimed any reimbursement in relation to the Hong Kong based projects.

(5) The sending of his invoices to Company C was not a measure of mere convenience. Company C was not merely an intermediary receiving the invoices. Company C actually paid for the invoices. It is true that Company C subsequently recharged the Sum and a small sum of $49,800 to Company E, but such inter-group accounting does not affect the fact that the initial payments were made by Company C.

(6) The invoice for the month of February 2006 was approved by Mr W, Position X of Company C.

(7) Hong Kong was not a mere location of convenience. The Appellant's base was in Hong Kong. He performed most of his work in Hong Kong. Despite Clause 3(d), when the Appellant was in Hong Kong, his accommodation expenses were not reimbursed, whereas his hotel expenses in City S and City V were reimbursed to him.

(8) The Appellant was a citizen of both Hong Kong and Country A at the relevant time, but his home was in Hong Kong. He had ordinarily resided in Hong Kong for a continuous period of not less than seven years prior to 2005 when he became a permanent resident in Hong Kong.

(9) Company C contributed to the Appellant's MPF scheme as his employer in compliance with the MPF Ordinance in Hong Kong.

73. Looking at the totality of the facts, as we are required to do by Geopfert and Lee Hung Kwong, we find that the *de facto* employer of the Appellant was Company C, not Company E. Company C, although incorporated in Country D, was essentially a Hong Kong company. The Appellant was at the relevant time living and working in Hong Kong. He was sent to work abroad in City S and Country A, but his base was Hong Kong. The Appellant was paid in Hong Kong by Company C in Hong Kong currency. It was for all intents and purposes an employment between a Hong Kong company and a Hong Kong based employee with income paid in Hong Kong. The source of the income was Hong Kong. The whole of the Appellant's income under the 2006 Agreement as well as the 2005 Agreement is assessable to salaries tax under section 8(1) of the IRO. Section 8(1A) and (1B) of the IRO are not engaged.

Conclusion

74. For reasons set out above, we find that (1) the Appellant was at all material times an employee and not an independent contractor of Company C; and (2) the locus of the employment and the source of his income was Hong Kong. The whole of Appellant's income from his employment under the the 2005 and 2006 Agreements was subject to salaries tax in Hong Kong. There is no apportionment as the Appellant tried to argue.

75. We confirmed the Revised 2005/06 and 2006/07 Assessments and dismiss the appeal.

Costs

76. The Appellant has very helpfully admitted to most of the facts and made a number of concessions whereby the issues were considerably narrowed down. We make

no order of costs against him.

Appendix A

Table A

Abbreviation	Particulars				Pre-Agreement Negotiations		
	Date	Heading	Party	signed by	When	Where	With Whom
'2005 Agreement'	12-04-2005	Consultancy Agreement	Company C	Mr AH, Position AI	01-04-2005 – 12-04-2005	City AN	Mr AE
						City AN & HK	Mr AH
	Appellant was appointed as Consultant to provide tender planning and preparation services for Company C's participation in various forthcoming tenders in Country AJ.						
'Employment Agreement'	01-09-2005	Letter of Offer	Company C	Mr AE, Position AF	31-08-2005 – 01-09-2005 & 06-09-2005 – 08-09-2005	City AN	Mr AE
						City AN & State AG	Mr AH
	Appellant was appointed as Position AA of Company C.						
'Retrenchment Letter'	21-12-2005	Group M Retrenchment	Company C	Mr AE, Position AF			
	Appellant made redundant effective 31.1.2006.						
'2006 Agreement'	01-02-2006	Consultancy Agreement	Company E	Mr AE, Position AF	14-12-2005	State AG	Mr AE
	Appellant was appointed as Consultant to provide tender planning and preparation services for Company E's participation in various forthcoming tenders in Region AK.						
'2007 Agreement'	04-01-2007	Consultancy Agreement	Company C	Mr W, Position X, Hong Kong			
	Appellant was appointed as Consultant to provide tender planning and preparation services for Company C's participation in Tender AL for Company AM.						

Appendix B

Table B						
	Period	Contract	Project	Income (HK$)	Sub-Total (HK$)	Total (HK$)
(1)	05-04-2005 – 25-05-2005	2005 Agreement	Project AO	159,000	534,000	1,674,707 Revised 2005/06 Assessment
(2)	26-05-2006 – 15-06-2005		Project AO	126,000		
(3)	27-06-2005 – 31-08-2005		Project AP	249,000		
(4)	Sep 2005	Employment Agreement	Project AQ, Project P, Project R	137,000	685,000	
(5)	Oct 2005			137,000		
(6)	Nov 2005			137,000		
(7)	Dec 2005			137,000		
(8)	Jan 2006			137,000		
(9)	Sep 2005 – Jan 2006		Housing Allowance	65,000	65,000	
(10)	Sep 2005 – Jan 2006		Lump Sum	85,707	85,707	
(11)	Feb 2006	2006 Agreement	Project P & Project R	135,000	305,000	1,556,027 Revised 2006/07 Assessment
(12)	March 2006			170,000		
(13)	April 2006		Project P Project R & Project Q	185,000	690,000	
(14)	May 2006			230,000		
(15)	June 2006			125,000		
(16)	July 2006		Project P & Project Q	150,000		
(17)	Aug 2006		Project P & Project B	165,000	575,000	
(18)	Sep 2006		Project P & Project B	210,000		
(19)	Oct 2006		Project B	200,000		
(20)	Nov 2006		Project P	75,000	291,027	
(21)	Jan 2007		Tender AL	120,000		
(22)	Feb 2007		Project P	96,027		