Case No. D17/19

Salaries tax – whether income arising in or derived from Hong Kong – factors to be taken into account to identify the locality of the source of income – whether exempted from charge to salaries tax as a crew of an aircraft – section 8 of the Inland Revenue Ordinance ('the Ordinance')

Panel: Elaine Liu Yuk Ling (chairman), Clark Douglas Stephen and Claire Wilson.

Date of hearing: 28 June 2019.
Date of decision: 3 December 2019.

The Taxpayer was hired by a Hong Kong company ('Company C'), which was held by a Hong Kong holding company ('Company D'), as a pilot in 2004. In 2008, the Taxpayer resigned from Company C, and was hired by an overseas branch of Company D as a pilot. His duties remained the same. The Assessor raised a first additional assessment for salaries tax on income reported by Company D to have been earned by the Taxpayer in the 2008/09 year of assessment. Such salaries tax was paid by the Taxpayer without objection.

Later, Company D reported further income earned by the Taxpayer in the same year of assessment. Part of such income was reported to be subject to income tax in the overseas country that the Taxpayer was based in. The remaining income was not subject to salaries tax in any other country. Since the commencement of his employment with Company D, the Taxpayer spent 56 out of 243 days overseas, and the rest in Hong Kong. Evidence showed that he signed the employment contract with Company D in Hong Kong, although the employment contract was stated to be governed by the law of the overseas country the Taxpayer was stationed at. The Taxpayer did not have any work visa to work in Hong Kong during the time when he was employed by Company D.

The Assessor raised a second additional assessment for salaries tax on the further income reported by Company D. The assessment excluded the part of the income corresponding to the time the Taxpayer spent overseas, which already had income tax withheld according to the laws of that overseas country. The Deputy Commissioner confirmed the assessment on objection. The personal representative of the Taxpayer appealed against the Determination.

The Board decided to proceed with the appeal in the absence of the Appellant, as she confirmed that the she did not wish to return to Hong Kong to attend the hearing in person, and there would be no authorized representative to attend on her behalf. She would also not call any witness.

Held:

1. In determining whether an income is chargeable to salaries tax, the question to ask is whether the income which is sought to be charged is income from a Hong Kong source; and the place where the services are rendered is irrelevant. The locality of the source of income earned from an employment is the place where the contract for payment is deemed to have a locality (Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888; Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80 followed).

2. The income earned by the Taxpayer with Company D was located in Hong Kong. Company D was incorporated and based in Hong Kong. Its major business and investment were in Hong Kong. There is no evidence that Company D had its central management and control outside Hong Kong. The fact that the income was paid to the Taxpayer outside Hong Kong is a factor, but it is not conclusive (Bennett v Marshall [1938] 1 KB 591, as applied in Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80, considered).

3. The Taxpayer is not entitled to the exemption under section 8(2)(j) of the Ordinance, as he was present for more than 120 days in Hong Kong in the 2008/09 year of assessment. The income derived from the services the Taxpayer rendered in the overseas country, and taxed by that country, was also excluded. Therefore, the remaining income was not exempted from charge of salaries tax under section 8(1A)(c) of the Ordinance.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
Bennett v Marshall [1938] 1 KB 591

Appellant in absentia.
Chiu Ming Wai and Fung Ka Leung, for the Commissioner of Inland Revenue.

Decision:

A. The Appeal

1. The Appellant is the surviving spouse and personal representative of the late Mr A ('Taxpayer'), who passed away on 7 April 2011. The subject matter of the present appeal is on the assessment of the Second Additional Salaries Tax for the year of assessment 2008/2009 in respect of the Taxpayer that a sum of $75,662 additional tax shall be payable ('Assessment'). By a Determination of Deputy Commissioner of Inland Revenue ('Deputy Commissioner') dated 29 October 2018 ('Determination'), the Deputy Commissioner rejected the objection to the Assessment. The Appellant lodged this appeal.

B. Application for the appeal to be heard in the absence of the Appellant

2. By an email dated 7 December 2018, the Appellant applied for the appeal to be heard in her absence under section 68(2D) of the Inland Revenue Ordinance ('Ordinance') on the grounds that she resided overseas and did not wish to return to Hong Kong to attend the hearing in person. The Appellant also confirmed that there would be no authorized representative to attend on her behalf at the hearing, and the Appellant would not call any witness.

3. Under section 68(2D) of the Ordinance, if, upon the written application of the appellant made at least 7 days prior to the date fixed for the hearing of the appeal, the Board is satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter, the Board may proceed to hear the appeal in the absence of the appellant or his authorized representative. If the Board decides to hear the appeal in the absence of the appellant, the Board may consider the written submission from the appellant pursuant to the section 68(2E) of the Ordinance.

4. Having considered the Appellant's application, we ordered that the appeal be heard in the absence of the Appellant, with directions given to the parties on the filing of written submissions. The Appellant was also given the opportunity to reply to the written submission lodged by the Respondent.

C. Whether the Notice of Appeal was lodged in time

5. The Determination was made on 29 October 2018. According to the postal record from the Hongkong Post, the Determination was delivered to the Appellant's address on 20 November 2018.

6. The Notice of Appeal that was lodged on 22 November 2018 and the required documents received by the Board on 2 and 6 December 2018 were therefore within the one month period pursuant to section 66(1) of the Ordinance. This appeal is lodged within the required time limit.

D. Background Facts

7. The Taxpayer was from Country B. By a letter dated 25 October 2004 issued by Company C, the Taxpayer was offered an employment as a first officer operating the freighter B747-200/300F with effect from the same date of the letter. The employment contract with Company C was governed by the laws of Hong Kong and was subject to the Company C Conditions of Service (1999).

8. Company C is a company incorporated in Hong Kong, carried on a business of providing aircrew services. The holding company of Company C is Company D, a Hong Kong company engaged in the operation of scheduled airline and related services, with its headquarters located in Hong Kong.

9. On 14 October 1993, Company D established a branch in Country E ('Company D-Country E Branch').

10. On 8 May 2008, the Taxpayer tendered his resignation from Company C. By a letter from Company D-Country E Branch issued on the same date, Company D-Country E Branch offered to employ the Taxpayer with effect from 1 July 2008 ('Employment Contract'). The Employment Contract was governed by the laws of Country E and was subject to the Company D Country E Conditions of Service 1999. The Taxpayer accepted the offer and signed on the Employment Contract on 15 May 2008.

11. Company C had filed notification in respect of the Taxpayer for the period from 1 April 2008 to 30 June 2008. The notification submitted by Company C on 28 May 2008 reported that the Taxpayer's income during the period from 1 April 2008 to 30 June 2008 was $293,833.

12. Company D-Country E Branch filed an employer's return of remuneration and pensions ('IR56B') in respect of the Taxpayer for the year ended 31 March 2009 showing that for the period from 1 July 2008 to 31 March 2009, the income of the Taxpayer in his capacity as Senior First Officer employed by Company D-Country E Branch was $201,768.

13. The Assessor raised on the Taxpayer the following Salaries Tax Assessment and First Additional Salaries Tax Assessment for the year of assessment 2008/2009:

	Assessment ($)	First Additional Assessment ($)
Income	293,833	495,601 ($293,833 + 201,768)
Less:		
Basic allowance	108,000	108,000
Single parent allowance	108,000	108,000
Child allowance	50,000	50,000

	Assessment ($)	First Additional Assessment ($)
Net Chargeable income	27,833	229,601
Less: Net Chargeable Income already assessed		27,833
Additional Net Chargeable Income		201,768
Tax Payable thereon		19,032

14. The Taxpayer did not object to the above assessment, which have become final and conclusive in terms of section 70 of the Ordinance.

15. Subsequently, Company D-Country E Branch filed a revised Form IR56B ('Revised IR56B') in respect of the Taxpayer showing that for the period from 1 July 2008 to 31 March 2009, the income of the Taxpayer while under its employment as the Senior First Officer was:

Salary / Wages	$706,327
Other Rewards, Allowance or Perquisites	$102,180
	$808,507

16. In response to the Assessor's enquiries, Company D provided the following information and documents:

(a) A breakdown of the Taxpayer's income reported in the Revised IR56B as follows:

Period	Salary	Other allowances	Total
01-07-2008 – 28-02-2009 ('Period A')	£46,147.13	£6,658.71	£52,805.84
01-03-2009 – 31-03-2009 ('Period B')	€8,470.60	€1,246.05	€9,716.65
Grand total in HK$	$706,327	$102,180	$808,507

(b) The Taxpayer was treated as a non-resident in Country E during Period A and Company D-Country E Branch had reported the Taxpayer's income of £52,805.84 to the Country E Tax Authority. Company D had agreed with Country E Tax Authority that only 5% of the Taxpayer's income was withheld as Income Tax. As such, £2,640.35 of the Taxpayer's income was withheld.

(c) The Appellant confirmed that the Taxpayer's income for Period A and Period B was not subject to tax in other countries. In other words, the

income earned by the Taxpayer during Period B was not taxed in Country E or other overseas countries.

(d) A copy of the Taxpayer's duty roster for the period from 1 January 2008 to 31 March 2009 ('Duty Roster').

17. During the year of assessment 2008/2009, the number of days that the Taxpayer was in Hong Kong was 141 days.

18. The Assessor considered that the Taxpayer's income earned from Company D-Country E Branch shall be assessable to salaries tax, and those part of the income which had been subject to tax in Country E could be excluded under section 8(1A)(c) of the Ordinance. The Assessor, with reference to the Duty Roster, raised the Second Additional Salaries Tax Assessment for the year of assessment 2008/2009 on the basis that the Taxpayer stayed in Country E for a total of 51.5 days during Period A, and excluded the portion of such income attributable to the 51.5 days.

19. The Appellant objected to the assessment and contended that the Taxpayer was subject to Country E Income Tax as he was working for a company in Country E during Period A and Period B.

20. In further correspondence with the Assessor, Company D-Country E Branch provided the following information:

(1) Company D-Country E Branch was engaged in airline industry and was one of the overseas branches of Company D. It carried on business in Country E address.

(2) The Taxpayer transferred from Company C to Company D-Country E Branch because he tendered his resignation from Company C on 8 May 2008 and was then offered an employment by Company D-Country E Branch.

(3) The Taxpayer's job duties, years of service, seniority and pay scale were not affected when he transferred from Company C to Company D-Country E Branch on 1 July 2008. He continued to report to the Chief Pilot (Company F).

(4) The Taxpayer was based in Country E when he commenced his employment with Company D-Country E Branch and subsequently based in Country G. The payment of the Taxpayer's salary was in Country E and Country G respectively.

21. The Assessor maintained the view that the Taxpayer's income earned from Company D-Country E Branch was derived from Hong Kong and that only a portion of his employment income could be excluded from the charge of Salaries Tax under section 8(1A)(c) of the Ordinance. The Assessor further considered that the number of days the

Taxpayer was present in Country E during Period A was 56 days (instead of 51.5 days). The Assessor revised the Second Additional Salaries Tax Assessment in respect of the Taxpayer as follows:

	$	$
Income from Company C		293,833
Income from Company D-Country E Branch	808,507	
Less:		
Income to be excluded under section 8(1A)(c) of the Ordinance (£52,805.84 x 13.2847 x 56/243)		
	161,665	646,842
		940,675
Less: Basic allowance		108,000
Single parent allowance		108,000
Child allowance		50,000
Net Chargeable Income		674,675
Less: Net Chargeable Income already assessed		229,601
Additional Net Chargeable Income		445,074
Tax Payable thereon		94,694
Less: Tax already charged		19,032
Additional Tax Payable thereon		75,662

22. The Deputy Commissioner confirmed the Assessment, and the Appellant appealed against the Deputy Commissioner's Determination.

D. Ground of Appeal

23. The Appellant's grounds of the appeal stated in her Notice of Appeal are as follows:

(1) The Taxpayer's change of employer from Company C to Company D-Country E Branch was the requirement of Company D to 'onshore' its employees who were based and living outside Hong Kong as a result of an order by an overseas court in 2008. The change of employer in 2008 was not a voluntary choice of the Taxpayer.

(2) The Employment Contract contained new conditions of service and was governed by the laws of Country E. The Taxpayer's salary was paid in Country E.

(3) The Taxpayer was released by the Inland Revenue Department of Hong Kong and did so in good faith.

(4) The Taxpayer's Hong Kong work visa was not renewed.

(5) Drawing reference to the colleagues of the Taxpayer who were also employed by Company D-Country E Branch and based in Country E, the time they stayed in Hong Kong while under the employment of Company D-Country E Branch was not counted by the Hong Kong Immigration Department as the period of stay required for the right of abode application.

(6) The Taxpayer had paid income tax to Country E Tax Authority in Country E.

E. Relevant Legal Principles

24. Pursuant to section 68(4) of the Ordinance, the Appellant bears the burden of proving that the Assessment is excessive or incorrect.

25. Section 8(1) of the Ordinance is the charging provision for salaries tax which provides that salaries tax shall be charged on income arising in or derived from Hong Kong from any office or employment of profit. Section 8(1A)(a) expressly provided that all income derived from services rendered in Hong Kong including leave pay attributable to such services are included.

26. The Ordinance expressly excludes from the charge to salaries tax the following income:

(1) income derived by a person from services rendered by him in any territory outside Hong Kong where 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 the Ordinance; and 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; or (Section 8(1A)(c))

(2) income derived from services rendered as a member of a crew of an aircraft by a person who was present in Hong Kong on not more than a total of 60 days in the basis period for that year of assessment, and a total of 120 days falling partly with each of the basis periods for 2 consecutive years of assessment (section 8(2)).

27. In determining whether an income is chargeable to salaries tax, the question to ask is whether the income which is sought to be charged is income from a Hong Kong source and the place where the services are rendered is irrelevant. The locality of the source of income earned from an employment is the place where the contract for payment is deemed to have a locality (Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888; Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80)

F. The Decision

28. It is not in dispute that the Taxpayer's employment with Company C since 25 October 2004 was located in Hong Kong and the income he earned while under the employment of Company C was chargeable to salaries tax. The question in this appeal is whether the income earned by the Taxpayer under the Employment Contract is chargeable to salaries tax.

29. The Employment Contract was signed by Company D, pursuant to which the Taxpayer was offered employment with Company D-Country E Branch. Company D-Country E Branch was an overseas branch of Company D and it is not a legal entity separate from Company D. Company D is a company incorporated and based in Hong Kong. Its major business and investment were in Hong Kong. There is no evidence that the central management and control of Company D is outside Hong Kong. There is however evidence showing that the board meeting of Company D during 2008 were all held in Hong Kong.

30. There is no evidence on the place where the Employment Contract was negotiated nor the place where the Employment Contract was signed by Company D. However, the Employment Contract was accepted and signed by the Taxpayer on 15 May 2008. According to the report provided by Company D, the Taxpayer was in Hong Kong on 15 May 2008, the date when the Employment Contract was signed and concluded by him.

31. The Employment Contract was governed by the laws of Country E, and it was subject to the Company D Country E Conditions of Service 1999 which were applied to aircrew officers employed by Company D who were based in Country E. The aircrew officers would serve Company D by operating any aircraft as defined by Company D's Air Operator's Certificate in any part of the world and on any of the routes served by Company D.

32. We note that the income was paid to the Taxpayer in Country E or in Country G. The place of payment is a factor, but not a conclusive factor. The Board has to look for the place '*where the income really comes to the employee*' (Bennett v Marshall [1938] 1 KB 591, applied in Lee Hung Kwong, *supra*).

33. The Appellant contended that the Taxpayer was forced to change his employer from Company C to Company D-Country E Branch in 2008. The reason for the change of employment of the Taxpayer, in the present case, would not change the source of income which was otherwise shown to be in Hong Kong. In any event, the Appellant's contention was different from the information provided by Company D, which confirmed that the Taxpayer was transferred from Company C to Company D-Country E Branch because the Taxpayer tendered his resignation to Company C.

34. The Taxpayer's loss of employment visa and the non-recognition of the time working for Company D-Country E Branch by the Immigration Department of Hong Kong in his right of abode application are not factors determining the locality of the source of the employment income. Company D had been confirmed by the Immigration Department of

Hong Kong that overseas based aircrews were not required to hold a Hong Kong employment visa. The Taxpayer could work as a pilot when flying to and from Hong Kong without a Hong Kong employment visa.

35. The Appellant relied on the Letter of Release issued by the Inland Revenue Department in support of her appeal. The Letter of Release was issued on 24 June 2008 to allow Company C to make the payment to the Taxpayer which had previously been retained under section 52(7) of the Ordinance when an employee is about to leave Hong Kong for any period exceeding 1 month. The Letter of Release shall not bear any relevance in the determination of the locality of the income earned by the Taxpayer after the termination of employment with Company C.

36. We have carefully considered all the relevant factors and the grounds of appeal contended by the Appellant, we considered that the income of the Taxpayer earned in the employment with Company D was located in Hong Kong.

37. The Inland Revenue Department had excluded the relief that the Taxpayer was entitled to under section 8(1A)(c) of the Ordinance. The income earned by the Taxpayer during Period B was not taxed in Country E or other overseas countries. There shall be no exemption in regard to this part of the income under section 8(1A)(c). As to the income earned during Period A, such part of the income derived by the Taxpayer from services rendered by him in Country E and taxed in Country E with reference to the number of days when the Taxpayer was in Country E was excluded.

38. The Taxpayer was present in Hong Kong for more than 120 days in the year of assessment 2008/2009 and therefore, he was not entitled to the exemption under section 8(2)(j) of the Ordinance.

39. By reason of the above, we dismissed the appeal and confirmed the Assessment.