Case No. D19/16

Salaries tax – whether all the services in connection with employment rendered outside Hong Kong – '60 days' rule – section 8 of the Inland Revenue Ordinance ('IRO')

Panel: Elaine Liu Yuk Ling (chairman), Cheung Ming Chee and Liu Pak Yin.

Date of hearing: 12 May 2016.
Date of decision: 29 July 2016.

The Appellant was employed by a company in Hong Kong and assigned to work in Country C. He applied for full exemption of his income on the grounds that he stationed or travelled outside Hong Kong, and his stay in Hong Kong during the year of assessment 2012/13 did not exceed a total of 60 days.

Held:

1. The Board found the source of the taxpayer's income was derived from his employment with the Company in Hong Kong, and his entire income was chargeable to salaries tax under section 8(1)(a) of the Ordinance irrespective of the places where he rendered services during the year of assessment unless exemption applied (CIR v George Andrew Goepfert 2 HKTC 210 considered).

2. The taxpayer had visited Hong Kong 61 days during the relevant year of assessment. The Board concluded he was not entitled to any exemption under section 8(1B) of the Ordinance (CIR v So Chak Kwong, Jack 2 HKTC 174 followed).

3. The taxpayer had failed to prove that he did not have any business activity with the Company during those 61 days in Hong Kong. The Board decided he was not entitled to any exemption under section 8(1A)(b)(ii).

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert 2 HKTC 210
Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174
D40/07, (2007-08) IRBRD, vol 22, 983

D45/09, (2010-11) IRBRD, vol 25, 1

Appellant in person.
Yu Wai Lim, To Yee Man and Chan Lok Ning Loraine, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. The Appellant appeals against the Determination of the Deputy Commissioner of Inland Revenue in respect of his Salaries Tax Assessment for the year of assessment 2012/13 ('Determination'), in which the Deputy Commissioner confirmed that the Appellant's income for the year of assessment 2012/13 is chargeable to salaries tax with no exemption and the tax payable is $83,995.

The Facts

2. By an employment contract dated 13 May 2011 ('Employment Contract'), the Appellant was employed by Company A ('the Company') as Position B with effect from 1 June 2011.

3. The Company is a private company incorporated in Hong Kong and at all material times, carries on business in Hong Kong.

4. The Employment Contract provided, among other things, the following terms:

(a) The normal working hours were 9:00 a.m. to 5:30 p.m. (including a one-hour lunch break) from Mondays to Fridays.

(b) The Appellant was entitled to paid leave of 15 working days per annum and all general holidays specified under the General Holidays Ordinance.

(c) Clause 5 of the condition of employment annexed to the Employment Contract and acknowledged by the Appellant provided that the Company reserved the right to transfer the Appellant from one division/company to another division/company within the group on the same job responsibilities at any time at the discretion of the management of the Company.

5. For the year of assessment 2012/13, the Company furnished an employer's return in respect of the Appellant which showed, among other things, the following particulars:

(a) The Appellant's total income for the period from 1 April 2012 to 31 March 2013 was $758,000.

(b) The Appellant was not wholly or partly paid by an overseas company either in Hong Kong or overseas.

6. The Appellant failed to furnish his tax return for the year of assessment of 2012/13. In the absence of a tax return, the Assessor raised on the Appellant the following estimated Salaries Tax Assessment for the year of assessment 2012/13:

	$
Income	758,000
Less: Basic allowance	120,000
Net chargeable income	638,000
Tax payable (after tax reduction)	86,460

7. Having received the assessment, the Appellant raised his objection on the grounds that they are excessive. He then furnished his tax return for the year of assessment 2012/13, in which he declared that he had a total income of $758,000 from the Company. He also applied for full exemption of his income on the grounds that he stationed or travelled outside Hong Kong, and his stay in Hong Kong during the year of assessment 2012/13 did not exceed a total of 60 days.

8. According to the information provided by the Immigration Department, the Revenue calculated that the Appellant was present in Hong Kong for a total of 61 days in the relevant year of assessment. In calculating the number of days in Hong Kong, part of a day spent in Hong Kong was counted as one day in Hong Kong.

9. The Revenue also noted that the Appellant was present in Hong Kong on 40 weekdays which were not public holidays. These include dates in May, July to December 2012 and February 2013. Two of these days were taken as the annual leave of the Appellant.

10. The Appellant had contended that although he was employed by a Hong Kong company, he was assigned to work in Country C and he spent most of his time in Country C. He did not perform any duties when he came back to the Company.

11. In respect of the weekdays when the Appellant was present in Hong Kong, the Appellant said to the Revenue that he did not have any activities in the Company during those days. He said that during the period of 6 September 2012 and 19 February 2013, his entries in Hong Kong were for transit. He went direct from Hong Kong to Mainland China where he stayed all the time including those weekdays.

12. The Revenue has requested the Appellant to provide supporting documents as to whether he had paid tax in Country C in respect of his income derived from the Company. The Appellant was not able to provide such documents.

13. In answer to the Revenue's enquiries, the Company has provided the following information:

(a) The terms and conditions of the employment with the Appellant had not been amended.

(b) The Company employed the Appellant to develop its sourcing business and build up a work team in Country C. The Appellant's duties were, but not limited to, to develop the Company's sourcing base and network, evaluate potential vendor and solve whenever there was quality and production problem, deal with the Company's customers from overseas and build up a local sourcing team to support daily business operations. The Appellant also needed to report his work and meet the Company's customers from overseas in Hong Kong. He sometimes travelled to other production locations for business/vendor development.

(c) The Appellant was assigned to work in Country C and sometimes needed to travel to other countries for business requirements. He was notified that he needed to spend his time in Country C to perform his duties and it was part of his job specification during hiring assessment process.

(d) The dates on which the Appellant had taken annual leave during the relevant year of assessment were identified. The total number of annual leave taken is 16.5 days.

(e) The Company paid the Appellant's income into his bank account in Hong Kong by auto-payment.

(f) The Appellant made a total contribution of $14,500 to Mandatory Provident Fund Scheme during the year of assessment 2012/13.

14. The Appellant agreed that the above information given by the Company is correct.

15. The Revenue took the view that the Appellant's income are subject to salaries tax and could not be exempted. Taken into account the Appellant's contribution to Mandatory Provident Fund Scheme, the Revenue revised the Salaries Tax Assessment as follows:

	$
Income	758,000
Less: Retirement scheme contributions	14,500
Net income	743,500
Less: Basic allowance	120,000
Net chargeable income	623,500
Tax payable (after tax reduction)	83,995

Grounds of appeal

16. The Appellant appealed against the Determination on the following grounds:

(a) The Appellant identified the following 13 days from his immigration records:

Arrival at Hong Kong		Departure from Hong Kong	
Date	Time	Date	Time
14-05-2012	20:59	15-05-2012	00:47
29-06-2012	20:42	29-06-2012	21:51
09-07-2012	06:48	09-07-2012	07:46
02-08-2012	21:09	02-08-2012	21:52
05-08-2012	11:54	05-08-2012	12:38
27-08-2012	20:41	27-08-2012	21:47
06-09-2012	13:22	06-09-2012	16:14
02-10-2012	14:26	02-10-2012	16:22
07-10-2012	15:10	07-10-2012	16:12
30-10-2012	21:00	30-10-2012	22:06 (according to the immigration record, the departure time should be 22:16)
22-12-2012	12:01	22-12-2012	14:27
19-02-2013	15:11	19-02-2013	19:13
31-03-2013	14:24	31-03-2013	17:41

He asked the Board not to count these 13 days of his presence in Hong Kong. His reason was that those were the days that he came back from overseas for transit in Hong Kong to China, some of those days are Saturdays and Sundays. He also said that he has no business activities with the Company during the transit hours.

(b) He was made redundant on 11 October 2013 and he is unemployed. He was forced to retire and had no choice but to move to either China or Country C to make a living.

(c) In light of his current financial status, he has no ability to pay the tax. He recognized that this is not a strong reason to support a request for waiving the tax payment, he still would like the Board to consider the same and help him out.

The Charging Provision

17. Section 8 of the Inland Revenue Ordinance ('the Ordinance') is the charging provision for salaries tax, which provides that:

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

(a) any office or employment of profit …

…

(1A) 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 Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.

> *(1B) 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.*'

18. The Appellant bears the onus of proving that the assessment appealed against is excessive or incorrect (section 68(4) of the Ordinance).

The Issue

19. The issue of this appeal is whether the Appellant has rendered outside Hong Kong all the services in connection with his employment and therefore is entitled to an exemption under section 8(1A)(b)(ii) of the Ordinance. In this respect, section 8(1B) provided that '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.' In other words, if the Appellant has rendered some services in Hong Kong during this period, his income would not be chargeable to salaries tax provided that his visit to Hong Kong at the relevant period did not exceed a total of 60 days.

Decision

20. There is no dispute that the Appellant's employment was located in Hong Kong. He was employed by a company in Hong Kong. He was assigned by the Company to work in Country C which was part of his job specifications. He received his salaries at his bank account in Hong Kong. He was a member of the Company's Mandatory Provident Fund Scheme and paid mandatory contributions under the Hong Kong laws accordingly. The source of his income was derived from his employment with the Company in Hong Kong. Subject to any exemption he may have, his entire income is chargeable to salaries tax under section 8(1)(a) of the Ordinance irrespective of the places where he rendered services during that year (See: CIR v George Andrew Goepfert 2 HKTC 210).

Visited Hong Kong for less than 60 days?

21. We shall first consider whether during the relevant period of assessment, the Appellant has visited Hong Kong a period not exceeding a total of 60 days. This is the Appellant's major ground of appeal. If his visit in Hong Kong did not exceed 60 days, his services rendered in Hong Kong would not be taken into account, and his income would not be subject to salaries tax.

22. In Commissioner of Inland Revenue v So Chak Kwong, Jack 2 HKTC 174, the Court has ruled that the words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered'. In order to take the benefit of exemption under section 8(1B) of the Ordinance, a taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.

23. In the calculation of days for the purpose of section 8(1B), the board in D40/07, (2007-08) IRBRD, vol 22, 983, held that part of a day should be counted as a day. The board rejected all the other approaches suggested by the appellant in that case.

> '*99. Ambiguity does not exist if we adopt the fraction-equals-whole approach in interpreting the plain wordings of section 8(1B). Ambiguities exist only if we attempt to complicate the word 'days' with some other qualification or definition. Indeed, there could be no boundary for other method of calculation which a taxpayer may consider more favourable and preferable to him. We therefore decide that for the purpose of calculating the number of 'days of visits' for the purpose of section 8(1B), fractions of a day should be counted as whole days.*'

24. We agree that the proper approach is to count part of a day as a day for the purpose of section 8(1B).

25. Adopting the above approach for calculation, the Appellant's immigration records showed that he had visited Hong Kong 61 days during the relevant year of assessment.

26. The Appellant invited the Board not to count the 13 identified days as he said, those were days of transit. The Appellant did not refer to any authority to support his contention that such days should not be counted for the purpose of section 8(1A)(b)(ii) or section 8(1B).

27. The Revenue has referred the Board to the decision in D45/09, (2010-11) IRBRD, vol 25, 1 in which the board decided that once a taxpayer has landed in Hong Kong, he is present in Hong Kong. That decision was on the meaning of 'presence' in section 8(2)(j) of the Ordinance. We do not consider it has direct relevance to the present case.

28. As to the present case of the Appellant, looking at the time of entries and departures on those 13 days, the Appellant has landed and stayed in Hong Kong for about an hour to four hours respectively. Notwithstanding the period of short stay, it is clear that the Appellant had landed in Hong Kong and stayed here for some time. Taking the plain and ordinary meaning of the Ordinance, there is no reason to regard these days as not being a 'visit' in Hong Kong for the purpose of section 8(1B).

29. We conclude that during the relevant year of assessment, the Appellant's visit in Hong Kong exceeded 60 days and he is not entitled to any exemption under section 8(1B).

Rendered all services outside Hong Kong?

30. We shall then consider whether the Appellant has rendered all his service outside Hong Kong and therefore is entitled to an exemption under section 8(1A)(b)(ii) of the Ordinance.

31. This is a question of fact that the Board has to determine on the basis of the available evidence before the Board.

32. The Appellant decided not to give any evidence at the hearing despite he was invited to do so. The Appellant has nonetheless confirmed at the hearing that all the documents in the bundle are correct.

33. The Appellant claimed in his submission to the Revenue that he did not have any business activity with the Company during the time when he was in Hong Kong. There is no documentary evidence in support. In the absence of evidence from the Appellant at the hearing, there is no direct evidence to support this contention of the Appellant.

34. The Appellant's contention of no business activity in Hong Kong is contrary to the statement made by the Company to the Revenue that the Appellant had rendered services in Hong Kong in terms of reporting his work and meeting the Company's customers from overseas in Hong Kong.

35. Further, out of the 61 days when the Appellant was present in Hong Kong, there were a total of 38 weekdays which were neither public holidays in Hong Kong nor the Appellant's leave days. These 38 weekdays include:

(a) 11 weekdays when the Appellant was present in Hong Kong throughout the entire period from 9:00 a.m. to 5:30 p.m., that is the Company's working hours in Hong Kong; and

(b) 27 weekdays when the Appellant was present in Hong Kong during the working hours of the Hong Kong office.

36. There is no explanation for his reasons of his stay in Hong Kong during these weekdays and non leave days except that the Appellant has once claimed that all entries in Hong Kong during the period from 6 September 2012 and 19 February 2013 were for transits. Again, there is no evidence to support.

37. In the circumstances, we are not satisfied that the Appellant has proved that he did not have *any* business activity with the Company during these 61 days in Hong Kong. Accordingly, he is not entitled to an exemption under section 8(1A)(b)(ii).

Any other grounds?

38. For the sake of completeness, there is no evidence showing that the Appellant had paid any tax outside Hong Kong in respect of the income attributable to his services rendered outside Hong Kong. The Company has confirmed that the Appellant's income was solely reported in Hong Kong. Therefore, the exemption under section 8(1A)(c) of the Ordinance did not apply to the Appellant.

39. As to the other two grounds of appeal submitted by the Appellant, they are more a plea for compassionate treatment. They are not valid grounds of appeal. We have much sympathy for the Appellant's situation, we are however bound to apply the law, and we dismiss the appeal.