Case No. D21/19

Salaries tax – whether services in connection with employment rendered outside Hong Kong – sections 8(1), 8(1A), 8(1B) and 68(4) of the Inland Revenue Ordinance

Panel: Wong Kwai Huen Albert (chairman), Christopher Chain and Sara Tong.

Date of hearing: 7 August 2019.
Date of decision: 16 March 2020.

The Appellant objected to the Salaries Tax Assessment for the year of assessment 2013/14.

The Appellant contends that his entire income for the 2013 Employment with Company B should be exempted from salaries tax as:

- He had rendered all his services in Macau, outside Hong Kong.
- He had visited Hong Kong for less than 60 days.
- There was a Company H contract which superseded the 2013 Employment contract.

Alternatively, the Appellant contends that only the salaries attributable to his actual services rendered in Hong Kong should be chargeable to salaries tax.

The Appellant further contends that if his income attributable to his visits in Hong Kong were taxable, he should be allowed deduction of the relevant outgoing and expenses.

Held:

1. The Appellant did not render all his services to Company B outside Hong Kong. He had worked in Hong Kong on 27 June 2013.
2. The Appellant visited Hong Kong 205 days during the Period.
3. There is no legal basis to exclude any days of annual leave, 'non-working days', Macau public holidays, sick leave and rest days.
4. The 2013 Employment contract was entered into between Company B and the Appellant.

5. Only the income attributable to the Appellant's services rendered in Macau could be excluded from Section 8(1A)(C).

6. There was no basis for the Appellant to deduct all outgoings and expenses for visits to Hong Kong.

Appeal dismissed and costs order in the amount of $20,000 imposed.

Cases referred to:

D40/07, (2007-08) IRBRD, vol 22, 983
Commissioner of Inland Revenue v So Chak Kwong Jack, 2 HKTC 174
D39/04, IRBRD, vol 19, 319
D37/01, IRBRD, vol 16, 326
Commissioner of Inland Revenue v George Andrew Geopfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D53/12, (2013-14) IRBRD, vol 28, 91
D17/04, IRBRD, vol 19, 145
Varnam v Deeble [1985] STC 308
Commissioner of Inland Revenue v Humphrey 1 HKTC 451
Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74
D30/11, (2011-12) IRBRD, vol 26, 524
Chok Kin Ming v Equal Opportunities Commission HCLA 42/2015
CIR v TSAI Ge-wah 1/2007
Wong Tai Wai David v Commissioner of Inland Revenue
D29/89, IRBRD, vol 4, 340
D12/94, IRBRD, vol 9, 131
D11/97, IRBRD, vol 12, 147
D27/03, IRBRD, vol 18, 448

The Appellant in person.
Cheung Ka Yung, Lau Wai Sum and Cheng Po Fung, for the Commissioner of Inland Revenue.

Decision:

1. Background

(1) Mr A ('the Appellant') has objected to the Salaries Tax Assessment for the year of assessment 2013/14 raised on him. The Appellant claimed that his income were derived from services rendered outside Hong Kong and should not be chargeable to tax.

(2) (a) By a contract dated 18 July 2012, Company B employed the Appellant as Position C in the sites of Station D Residential Development for the period from 1 August 2012 to 31 July 2014 at a monthly salary of $50,000 ('the 2012 Employment'). At all material times, Company B was a company incorporated and carried on business in Hong Kong.

(b) By a letter dated 10 April 2013, Company B informed the Appellant that the 2012 Employment would be early terminated with effect from 11 April 2013 and one month's payment in lieu of notice would be paid in accordance with the contract.

(3) By an employment contract dated 21 May 2013, Company B offered to employ the Appellant as Position E for Project F in Macau ('the 2013 Employment') on the following terms and conditions:

(a) The monthly basic salary and allowance would be $87,500 and $20,000 respectively, totalling $107,500.

(b) The employment period would be from 27 May 2013 to 26 May 2015, which might be extended if mutually agreed by both parties.

(c) The employment might be terminated by either party by giving seven days' notice during the three months' probation period or thereafter one month's notice.

(d) Annual leave of 12 working days would be granted upon completion of 12 months' service.

(e) Normal working hours would be from 9:00 am to 6:30 pm Monday to Saturday with alternate Saturday off. Lunch break was from 1:00 pm to 2:00 pm. Sunday work would be required on roster basis with day off compensation.

(f) Official holidays for the site should be in accordance with the public holidays in Macau.

The Appellant signed to accept the 2013 Employment on 24 May 2013. At the hearing, the Appellant put forward a contention that despite the 21 May 2013 letter, Company B could not have offered to employ him as it was not registered in Macau. This contention will be dealt with in detail below.

(4) For the year of assessment 2013/14, Company B filed separate Employer's Returns of Remuneration and Pensions ('the Employer's Return') in respect of the Appellant for the 2012 Employment and

2013 Employment respectively. Particulars of the Employer's Returns filed by Company B are extracted below:

		The 2012 Employment	The 2013 Employment
Capacity in which Mr A was employed	:	Position C	Position E
Period of employment	:	01-04-2013 – 10-04-2013	27-05-2013 – 31-03-2014
Particulars of income	:	$	$
- Salary / wages		16,666	1,092,338
- Leave pay		15,000	
- Back pay, payment in lieu of notice, terminal awards or gratuities		112,500	
Total		144,166	
Whether the employee was wholly or partly paid by an overseas company	:	No	No

(5) In his Tax Return – Individuals filed for the year of assessment 2013/14, the Appellant declared that employment income of HK$144,166 and MOP1,125,108 (equivalent to HK$1,092,338) ('the Sum') had been derived from Company B for the periods from 1 to 10 April 2013 and from 27 May 2013 to 31 March 2014 ('the Period') respectively. The Appellant stated that the Sum was an overseas earning.

(6) Based on the Employer's Returns filed by Company B, the Respondent raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2013/14:

	$
Assessable Income ($144,166 + $1,092,338)	1,236,504
Less: Married person's allowance	240,000
Dependent parent allowance	38,000
Net Chargeable Income	958,504
Tax Payable thereon (after tax reduction)	140,945

(7) The Appellant objected to the assessment in sub-paragraph (6) above on the grounds that he had been stationed in Macau and was not required to work in Hong Kong during the year of assessment 2013/14.

(8) In response to the Respondent's enquiries, the Appellant could only provide copies of his pay slips for April to September 2014 and

November 2014 to March 2015 (for the year of assessment 2014/15) to support his claim. The pay slips showed that part of his income was withheld for the payment of professional tax in Macau.

(9) In response to the Respondent's enquiries, Company B replied as follows:

(a) The Appellant, as Position C during the period from 1 to 10 April 2013, carried out his duties in Hong Kong. As for Position E during the Period, he carried out his duties in Macau.

(b) The Appellant had attended a meeting in Hong Kong on 27 June 2013. The meeting was an internal meeting amongst the team members for the purposes of project review and site progress review.

(c) The Appellant had paid tax in Macau when he was working there during the year of assessment 2013/14.

(d) The Appellant had taken 3 days annual leave and 40 days sick leave during the Period. A summary of the Appellant's leave records had been prepared by the Respondent and included in its trial bundles.

(10) According to the arrival/departure records of the Appellant provided by the Immigration Department, the Appellant had stayed outside Hong Kong for a total of 179.5 days during the Period. He had not travelled outside Hong Kong on 27 June 2013. A travel schedule of the Appellant for the year of assessment 2013/14 had also been prepared by the Respondent.

(11) To support his objection, the Appellant put forth the following arguments:

(a) He worked in Hong Kong for one day only during the year of assessment 2013/14. He should be exempt from salaries tax as he worked (emphasis added) less than 60 days in Hong Kong. At the hearing, the Appellant for the first time contended that he had in fact only worked half a day during the year of assessment. The Respondent did not dispute this fact but would make submissions on the legal effect of 'fraction-equal-whole' approach in the counting of the number of days. This point will be discussed further below.

(b) He had no obligation to understand the case law in Hong Kong. It was the duty of the government to amend the law.

(c) He noted that someone, who stayed nearly full time in Hong Kong, received US$50 million from Country G, was exempt from tax. It would be unjust and unfair if the Appellant's income was chargeable to tax.

(d) His outgoings and expenses for travelling between Hong Kong and Macau had not been allowed.

(e) Macau was not part of the territory in Hong Kong. The Inland Revenue Ordinance ('IRO') had no jurisdiction over Macau.

(12) According to the Respondent, as the Appellant had stayed (emphasis added) in Hong Kong for more than 60 days and had rendered service in Hong Kong during the Period, the Respondent was of the view that the Appellant could not be entitled to full exemption under Section 8(1A)(b)(ii) read together with Section 8(1B) of the IRO. However, in view of the reply from Company B as mentioned in subparagraph (9)(c) above and the pay slips provided by the Appellant, the Respondent accepted that exemption under Section 8(1A)(c) was applicable to the Appellant for the year 2013/14. On the basis that income was accrued to the Appellant day to day, the Respondent computed the amount of income derived by the Appellant from services rendered outside Hong Kong as follows:

Month		Income for the month	No. of days outside Hong Kong	No. of days during the Period	Income exempt under section 8(1A)(c)
		$			$
2013	May	17,338	5.0	5	17,338
	Jun	107,500	17.0	30	60,917
	Jul	107,500	22.0	31	76,290
	Aug	107,500	15.5	31	53,750
	Sept	107,500	7.0	30	25,083
	Oct	107,500	12.5	31	43,347
	Nov	107,500	20.5	30	73,458
	Dec	107,500	18.5	31	64,153
2014	Jan	107,500	20.5	31	71,089
	Feb	107,500	19.0	28	72,947
	Mar	107,500	22.0	31	76,290
		1,092,338	179.5	309	634,662

(13) The Respondent then considered that the Appellant's Salaries Tax Assessment should be revised as follows:

	$
Assessable Income	1,236,504
Less: Income excluded under Section 8(1A)(c)	(634,662)
	601,842
Less: Married person's allowance	240,000

	$
Dependent parent allowance	38,000
Net Chargeable Income	323,842
Tax Payable thereon (after tax reduction)	33,053

(14) The Appellant objected to the above assessment. A Determination was made by the Respondent on 21 December 2018 ('the Determination'). The Appellant's objection was rejected. The Appellant appealed to this Board.

(15) As already mentioned, at the hearing the Appellant put forward a new ground of appeal regarding a contract allegedly entered into between the Appellant and an entity known as Company H, and possibly a third party whose identity had not been made clearly to the Board. The Appellant's case was that in view of this Company H contract which was said to have superseded the 2013 Employment contract, all the facts stated in the preceding paragraphs were therefore denied. The effects of this Company H contract will be fully canvassed below.

2. Preliminary Issues

(1) Appeal was lodged out of time

(i) Since the date of the Determination was 21 December 2018, the Appellant should have filed a notice of appeal within one month thereof. However, the notice was not given until 28 January 2019.

(ii) The Appellant contended that he was told by the Respondent that the deadline should be 31 January 2019.

(iii) The Respondent confirmed that it would not take issue on this point. The Board therefore took it that the notice was given within the time limit.

(2) Submissions of both parties

(i) At the conclusion of the hearing, the Respondent handed in a written Submission ('the Draft Submission'). Since the Appellant had raised a new ground of appeal relating to the Company H contract and the half-day issue which had not been dealt with in the Respondent's Submission, the Board therefore directed that the Respondent should amend its Submission to include the new grounds. A revised Submission should be re-submitted to the Board and copied to the Appellant within 14 days.

(ii) The Board also directed the Appellant that he would have to prepare his Submission, the purpose of which was explained to him in detail. The Appellant would have 21 days to file his own Submission upon receipt of the Respondent's revised Submission.

(iii) For the benefit of the Appellant, he was given the Respondent's Draft Submission pending the receipt of the revised Submission within 14 days which should include the Company H contract and half-day issues. The Appellant would then have plenty of time to prepare his own Submission.

(iv) At the hearing, the Appellant objected to those directions of the Board. He averred that the Respondent should 'have made an application following his appeal'. The Appellant was adamant that the Respondent should have filed a defence statement within 14 days when he 'appealed to the court', instead of filing a submission within 14 days after the hearing. It had taken quite some time for members of the Board and the Respondent to figure out the basis of the Appellant's objection which was apparently due to his misreading of the IRO relating to the appeal procedures to court. Those procedures did not apply to the case of an appeal to the Board. The Appellant seemed to understand the position at the hearing.

(v) The Respondent filed its revised Submission on 21 August 2019 and the Appellant filed his Submission on 10 September 2019.

(vi) The Board was at loss when the Appellant asserted in his Submission that he refused to accept the Respondent's revised Submission on the ground that it should have been filed before the hearing. He argued that the Respondent's revised Submission contained 'new items' which were never mentioned in the Determination and the Respondent 'submitted further evidence' at a very late stage. The Appellant maintained that the Respondent's Submission 'should be disposed', which the Board takes it to mean 'should be rejected'.

(vii) The Board finds that the Respondent's revised Submission contained no 'new items' whatsoever other than the new grounds of appeal raised by the Appellant at the hearing. The Board allowed the Appellant to introduce these new grounds on the basis that the appeal hearing was de novo and the new grounds should not cause any serious prejudice to the Respondent's case. The Board has not found any trace of new evidence or any additional arguments being propounded by the

Respondent in its revised Submission; other than those which had already been alluded to at the hearing.

(viii) Quite ironically, in his Submission the Appellant purported to introduce a completely new argument; the so-called 'control test' or 'multifactor test'. The Appellant referred to a host of authorities which were never produced at the hearing, together with new evidence going towards those tests in the form of fresh assertions in the Appellant's Submissions. Since these arguments had not been sufficiently ventilated, if at all, at the hearing, the Board will deal with them to a limited extent only as set out below.

(ix) It is quite astonishing that the Appellant would accuse the Respondent of adducing new evidence and raising new arguments but in the same breath he advanced completely new contentions of his own.

(x) Further, the Appellant purported to submit another item of new evidence relating to the alleged Company H contract which he claimed to have obtained from a former colleague of his (but which was not actually enclosed or submitted). The Board would certainly not accept any new evidence at this late stage. In any event, as the alleged Company H contract was admittedly signed by the Appellant's colleague, it would be of very little relevance to this Appeal. More importantly, the only two documents actually enclosed in the Appellant's Submission appeared to be two letters sent to the Appellant by Company B dated 18 July 2012 and 10 April 2013 – the latter had already been submitted previously, whereas the former appears to be irrelevant to the Appellant's case.

(3) Calling Witnesses

(i) In the Appellant's Submission, he raised an issue that the Board had the power to summon anyone to give evidence at its hearing under Section 68(6) of the IRO. Despite an oral request made by him on the telephone to the staff of the Board, the Appellant queried why the Board had refused to summon or subpoena a witness.

(ii) It should be noted that under Section 68(6), the Board is indeed empowered to summon anyone to attend a hearing to give evidence. However, such a power is only exercised at the discretion of the Board upon its finding that the witness is able to give evidence to assist the Board in an appeal. Such a power should not be exercised lightly. Least of all, it should not be a

power to be used as a fishing exercise to cause inconvenience or embarrassment to any person who would not likely in any way advance an appellant's case.

(iii) In this appeal, other than a telephone call made by the Appellant, he did not provide any detailed information regarding the witness nor did he advance any argument to the Board that calling that witness was essential to his appeal. As it turned out, during the hearing it transpired that the would-be witness was the senior director of Company B, one Mr J. According to the Appellant, Mr J was not willing to attend the hearing to give evidence. This is not surprising as there is an on-going Labour Tribunal case between the Appellant and Mr J representing Company B. In fact, the case clearly demonstrated that Mr J's evidence would be totally unfavourable to the Appellant's case. More discussion on this point will follow later in this finding.

3. The Issues

The issues for the Board to decide are:

(i) whether the Appellant had rendered all services in connection with the 2013 Employment outside Hong Kong during the year of assessment 2013/14;

(ii) whether the number of days in which the Appellant had visited Hong Kong exceeded 60 days during the year of assessment 2013/14;

(iii) whether the 2013 Employment was sourced outside Hong Kong on the ground that there was a Company H contract which superseded the 2013 Employment contract; and

(iv) what the correct amount of the Appellant's chargeable income for the year of assessment 2013/14 was.

4. Statutory Provisions

4.1 The Respondent referred the Board to the following statutory provisions in the IRO:

(i) Section 8(1)(a)

'*Salaries tax shall, subject to the provisions of [the IRO], 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 …'

(ii) Section 8(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 service rendered by a person who–

(i) …

(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 [the IRO]; 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.'

(iii) Section 8(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.*'

(iv) Section 9(1)(a)

'*Income from any office or employment includes–*

(1) any wages, salary, leave pay, fee, commission, bonus,

gratuity, perquisite, or allowance, whether derived from the employer or others …'

(v) Section 11B

'*The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.*'

(vi) Section 11D(b)

'*For the purpose of Section 11B–*

(b) income accrues to a person when he becomes entitled to claim payment thereof:

Provided that—

(a) any lump sum payment received on or after 1 April 1966, being a lump sum payment or gratuity paid or granted upon … termination of any office or employment or any contract of employment of an employee …, shall upon the application in writing of the person entitled to claim payment thereof within 2 years after the end of the year of assessment in which the payment is made be related back and shall then be deemed to be income which has accrued during the periods in which the services or employment, in respect of which the payment was made, were performed or exercised, … notwithstanding Section 70, an application made by any person under this proviso for the adjustment of an assessment shall, to that extent, be regarded as a valid objection to the assessment under Section 64;'

(vii) Section 12(1)(a)

'*In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person–*

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income;'

(viii) Section 68(4)

'*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.*'

4.2 Regarding the apportionment basis of rents and other periodical payments, including salaries, the Respondent referred the Board to the following provisions in the Apportionment Ordinance (Chapter 18):

Section 2

'*annuities (年金) includes salaries and pensions;*'

Section 3

'*All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.*'

5. Relevant Cases

The Respondent referred the Board to the following authorities:

Exemption under Section 8(1A)(b) as read with Section 8(1B)

5.1 In D40/07, (2007-08) IRBRD, vol 22, 983, the Board has analyzed thoroughly on the issues of Sections 8(1A)(b)(ii) and 8(1B) of the IRO. To consider whether the exemption under Section 8(1A)(b)(ii) applies, the Board stated the following:

'*45. … Exemption under Section 8(1A)(b)(ii) therefore requires proof that a taxpayer did render all services outside Hong Kong and in this connection, each and every of his visit or stay in Hong Kong must therefore be shown to be wholly unconnected with his employment or work. By showing that a taxpayer had no responsibilities or not required to perform services in Hong Kong is not enough; it must be shown that his visit or stay in Hong Kong was in fact unconnected with his employment or work.*'

5.2 In CIR v So Chak Kwong Jack, 2 HKTC 174 ('Jack So'), the interpretation of Section 8(1B) was considered by the then High Court at page 188 as follows:

'*... this Section is clear and unambiguous. The words "not exceeding a total of 60 days" qualify the word "visits" and not the words "services rendered". Were it otherwise the Section would be expressed differently. In order to take the benefit of the Section therefore a Taxpayer must not render services during visits which exceed a total of 60 days in the relevant period.*'

5.3 (a) In D39/04, IRBRD, vol 19, 319, the taxpayer stayed in Hong Kong for over 200 days during each of the relevant year of assessment. He claimed that he did not render services in Hong Kong. In the decision, the Board confirmed that the law was as follows:

(i) The words 'not exceeding 60 days' in Section 8(1B) of the IRO qualify the word 'visits' and not the words 'services rendered'.

(ii) For the purpose of calculating the 60 days in Section 8(1B) of the IRO, any part of a day is regarded as one day.

(b) The Board in this decision had considered D37/01, IRBRD, vol 16, 326 but declined to follow its decision on the ground that it was against all the other authorities. By applying the authority of Jack So, the Board dismissed the taxpayer's appeal. The Board stated the following:

'*32. ... Unless he can satisfy us that he did not render a single jot of service for the benefit of his employer within the territory of Hong Kong during such time, he is not entitled to claim exemption from salaries tax under Section 8(1A)(b) of the IRO.*'

'*34. ... ignorance of the law does not assist the Taxpayer.*'

5.4 The issue of whether the fraction-equals-whole approach in counting the number of days of visits for the purpose of Section 8(1B) has been discussed in D40/07, (2007-08) IRBRD vol 22, 983. The Board said that:

'*83. The language in Section 8(1B) plainly states "visits not exceeding a total of 60 days". There is no qualification or limitation to the word "days". We cannot say a person is not visiting Hong Kong on a day because he enters Hong Kong close to the end of that day. Likewise, we could not say a person is not in Hong Kong as a visitor on a day because he departs at a very early hour of that day. There is no reason why we should not count a day as a day of visit just because a person has*

chosen to visit at a very late hour of that day or he has chosen to depart at a very early hour of that day. … This Board should not interfere to count a day not as a day of visit just because a taxpayer has not maximized his physical presence in Hong Kong as a result of his late-hour arrival or his early-hour departure. We fail to see any room for passing value judgment against the fraction-equals-whole approach. We disagree that there is injustice or unfairness in the fraction-equals-whole approach. Whether late-hour or early-hour, the day he arrives Hong Kong should be counted as a day of his visit, likewise, the day he departs Hong Kong should also be counted as another day.'

Source of employment income

5.5 The issue of whether an employment was sourced in Hong Kong was analysed in the High Court case CIR v George Andrew Geopfert [1987] HKLR 888 ('Geopfert'). Macdougall, J said the following at page 901:

'*…the place where the services are rendered is not relevant to the enquiry under s. 8(1) as to whether income arises in or is derived from Hong Kong from any employment. It should therefore be completely ignored.*'

Macdougall, J continued to state the following principle at the same page :

'*Specifically, 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. As Sir Wilfrid Greene said, regard must first be had to the contract of employment.*'

At page 902, Macdougall, J stated the following principle:

'*If during a year of assessment a person's income falls within the basic charge to salaries tax under s. 8(1), his entire salary is subject to salaries tax wherever his services may have been rendered, subject only to the so called "60 days rule" that operates when the taxpayer can claim relief by way of exemption under s. 8(1A)(b) as read with s. 8(1B). Thus, once income is caught by s. 8(1) there is no provision for apportionment.*'

5.6 The principles in Geopfert were applied in Lee Hung Kwong v CIR, [2005] 4 HKLRD 80 ('Lee Hung Kwong'). The Court stated the following at page 90 E-F and page 103:

'*24. … Thus, where the source of income is from an employment, the locality of the source of income is the place where the contract for payment is deemed to have a locality. By "contract for payment", Lord Normand must mean the contract of employment based on which the employee earned his payment and not necessarily the place where the payments are made.*'

'*62. … Depending on the circumstances of the case, a secondment may be based on a contract of service made between the temporary employer and the employee with the consent of the general employer, or it may simply be a case of the general employer directing the employee to go and do some work for the temporary employer without involving the creation of a contract of service between the temporary employer and the employee. A secondment does not necessarily change the location of employment. It depends on the terms of the secondment and in particular and ultimately where the income comes to the employee, ie the source of the income, etc. In the eventual analysis, it is this question which has to be determined and it has to be determined by looking for the place where the income really comes to the employee.*'

5.7 In D53/12, (2013-14) IRBRD, vol 28, 91, the taxpayer was employed by a company in Hong Kong. In the time of employment, he was assigned to work in another country. An overseas supplemental contract was entered into for that assignment. In determining the source of the taxpayer's employment, the Board, by applying Geopfert and Lee Hung Kwong, held that the taxpayer's employment income was sourced from Hong Kong. During his assignment to work outside Hong Kong, the employment relationship between the taxpayer and the Hong Kong company did not change. He was still paid according to the contract in Hong Kong and was entitled to the benefits provided by the Hong Kong company. The overseas supplemental contract was entered into for the purpose of applying work permit in that country. The source of income from Hong Kong did not change during the assignment.

Exemption allowable under Section 8(1A)(c) of the IRO

5.8 In D17/04, IRBRD, vol 19, 145, the taxpayer was employed by a company in Hong Kong but required to work in the Mainland. He claimed that the amount of income that had been assessed to tax in the Mainland should be exempted under Section 8(1A)(c) of the IRO. In dismissing the taxpayer's appeal, the Board stated that in order to qualify for the exemption, three requirements must be satisfied:

(a) the taxpayer derived income from services rendered outside

Hong Kong;

(b) the income was chargeable to tax of a similar nature to salaries tax; and

(iii) the Commissioner is satisfied that the person has paid tax of that nature in that territory in respect of the income.

5.9 Varnam v Deeble [1985] STC 308 is a Court of Appeal case in the United Kingdom concerning the basis of income apportionment. In that case, the taxpayer worked outside the United Kingdom for 33 and 34 days in the years 1977/78 and 1978/79 respectively. There were no specific payments made for those foreign duties. In claiming exemption of the income attributable to his duties performed outside the United Kingdom, the taxpayer contended that the emoluments attributable to duties performed abroad should have regard to the nature of and time devoted to the duties performed outside and in the United Kingdom respectively. On the other hand, the Crown considered that the taxpayer's remuneration under his contract was accrued day-to-day and his emoluments attributable to duties performed abroad should be calculated by apportioning his total emoluments for the relevant year on a time basis. The court held that the right construction was to attribute the emoluments on a time apportionment basis. At page 312, Browne-Wilkinson LJ stated that:

'*If, as in the present case, there is no express contractual allocation, the contractual right of the employee to remuneration would be the remuneration for the days on which such duties were performed, the total remuneration being apportioned on a time basis under the Apportionment Act 1870.*'

Deduction of outgoings and expenses

5.10 CIR v Humphrey 1 HKTC 451 is a Supreme Court case concerning deduction of travelling expenses from home to office under Section 12(1)(a) of the IRO. It was held that the travelling expenses from home to office were not incurred in the performance of duties of the office or employment and therefore were not deductible.

Chargeability of certain payments received upon termination of employment

5.11 The issue of whether a payment is income from employment was considered in the Court of Final Appeal case Fuchs v CIR, (2011) 14 HKCFAR 74 ('Fuchs'). Mr Justice Ribeiro PJ stated the following:

'*20. ... in many cases, there will be little doubt that a payment is*

> *assessable as "income from employment". This is so where, for instance, the sum is plainly an entitlement under the contract of employment, such as a lump sum stipulated to be payable in the event of early termination as in Williams v Simmonds and Dale v de Soissons or an amount paid pursuant to a clause enabling the employer to terminate by making a payment in lieu of notice as in EMI Group Electronics Ltd v Coldicott (Inspector of Taxes).*'

5.12 On the authority of Fuchs, if a sum is an entitlement under the employment contract, such sum is assessable as income from employment.

5.13 In D30/11, (2011-12) IRBRD, vol 26, 524, the taxpayer argued that, among others, leave pay or payment in lieu of leave paid upon termination of employment should not be taxable. In dismissing the taxpayer's appeal, the Board stated the following:

> '*28. There can be no doubt in our mind that Sum B is clearly "leave pay" or "payment in lieu of leave". We have considered the evidence and looked carefully at the documents. In our view, it is clear that this sum was paid to the Taxpayer with regard to untaken leave. Indeed, the relevant documentation submitted by Company C supports such a contention. One also must have regard to Clause 6.1 of the Employment Contract which provided that upon termination of employment, the Taxpayer should be entitled to be paid for leave that had accrued but was untaken until the date of such termination. Hence, it is clear that this sum was indeed a reward for services and income from employment and taxable.*'

5.14 In addition, the Appellant also referred the Board to the following authorities although many of them were without full citations or copies of the cases nor even discussed at the hearing:

(1) Chok Kin Ming v Equal Opportunities Commission HCLA 42/2015

(2) Disability Discrimination Ordinance (Chapter 487)

(3) CIR v TSAI Ge-wah 1/2007

(4) Wong Tai Wai David v CIR

(5) D29/89, IRBRD, vol 4, 340

(6) D12/94, IRBRD, vol 9, 131

(7) D11/97, IRBRD, vol 12, 147

6. The case of the Appellant

The Appellant's arguments set out in his notice of appeal can be summarized as follows:

In respect of exemption under Section 8(1A)(b) and Section 8(1B)

6.1 The Appellant claimed that he had rendered all services outside Hong Kong in connection with the 2013 Employment on the grounds that:

(a) He was required to be stationed in Macau and resident on site at Project F construction site to supervise site progress and workmanship. His job should be done in Macau within the Project F construction site as a permanent work base. There was nothing else the Appellant could do to perform his duty if he was not on site.

(b) He was not required to work in Hong Kong. No work station or base was provided for him in Hong Kong. He did not need to report to anyone in Hong Kong. He had no subordinate and no responsibility for any project undertaken in Hong Kong. He was not required to visit Company B's Hong Kong office to attend meeting or to report/discuss progress of work or to seek instructions during his stays in Hong Kong.

(c) As confirmed by Company B, he had attended only one short ad hoc meeting on 27 June 2013 during the Period. This was the only occasion he had rendered a half day service in Hong Kong.

(d) The work performed by the Appellant was only a short ad hoc meeting in Hong Kong which was not related to his duty as Position E. He invited the Board to follow the precedent decision D27/03 where the facts were substantially the same.

6.2 Alternatively, the Appellant asserted that he had not visited Hong Kong for more than 60 days during the Period because his annual leave (3 days), sick leave (52 days) and Macau's public holidays (20 days) should be excluded. According to the Appellant's calculation, the number of days he had visited Hong Kong during the Period should be 54.5 days, which was computed as follows:

	No. of days
Total number of the days during the Period	309.0

	No. of days
Less: No. of days the Appellant was in Macau	(179.5)
Balance of the days in the Period	129.5
Less: Annual leave	(3.0)
Sick leave – working days	(40.0)
– non-working days	(12.0)
Macau's public holidays	(20.0)
No. of days of visits in Hong Kong	54.5

6.3 During the hearing, the Appellant further contended that:

(a) he disagreed with the fraction-equals-whole approach in counting the number of days on which he had visited Hong Kong. He relied on D37/01 in which the 'presence during working hours approach – to count only the number of days on which the taxpayer was present in Hong Kong during working hours' was mentioned to support this claim. Further, he submitted that in Jack So case only home leave or causal leave days were counted but not sick leave.

(b) the number of days he had visited Hong Kong during the period should be further reduced by exclusion of certain 'non-working days'. However, he did not specify clearly which days during the Period should be considered non-working days and why they should be excluded.

In respect of the source of the 2013 Employment

6.4 The Appellant maintained that the 2013 Employment was sourced outside Hong Kong because:

(a) the word 'Employer' used in the Hong Kong Institute of Architect Building Contract Standard Form of Contract referred to the property owner. As the word 'Employer' was shown in his employment contract with Company B, his true employer should be the property owner, i.e. Company F1 or Company H. Company B was only an agent appointed by Company F1, which was not resident in Hong Kong;

(b) he had to follow working hours imposed by Company F1. He received instructions given by Company F1;

(c) all his remuneration was paid in Macau where his employment was located and had been fully taxed in Macau; and

(d) Company B used the profits derived from the Macau project to pay him salaries.

6.5 In support of his claims, the Appellant submitted to the Board the following copies of documents:

(a) A 'Statement by Defendant/Defendant Company' filed by Company B under the Labour Tribunal Claim No. LBTCXXXX/XXXX together with the attached sheet. According to the document, Company B was appointed Architects of a project in Macau and one of its services was supervision of the site team.

(b) A contract dated 21 December 2018 entered into between the Appellant and Company B by which the latter appointed the Appellant as Position E for Project F, Macau. The employment was for a period of 18 months effective on 28 January 2019.

(c) The Appellant's pay slips for the period between April 2014 and April 2015. In these documents, Company H was shown as '配額僱主' ('Quota Employer') and Company B was shown as '管理僱主' ('Managing Employer').

(d) An email message dated 1 August from Mr J to the Appellant.

(e) The Appellant's '外地僱員支付薪酬單據及出勤紀錄' ('Foreign Employee Compensation Payment and Attendance Record') for February and March 2019 dated 6 March 2019 and 9 April 2019 respectively. In these documents, Company F1 was shown as 聘用實體公司 (employing company) and Company B was shown as 管理實體公司 (managing company).

(f) A contract dated 6 March 2019 ('the 2019 Contract') entered into between the Appellant and Company F1. The 2019 Contract contained, among others, the following terms:

I. The Appellant's salaries were to be paid by Company B.

II. The Appellant agreed that he would be supervised and controlled by the third party designated by Company F1.

(g) A copy of the 'Statement by Claimant' filed by the Appellant in the Labour Tribunal Claim No. LBTCXXXX/XXXX was submitted at the request of the Board during the hearing.

6.6 The Appellant contended that he had entered into an employment contract with Company H sometime in October 2013, which should

have superseded his employment contract with Company B. However, the Appellant could not locate the said contract with Company H. Instead, he invited the Board to accept that there was in existence such a Company H 2013 contract and the terms contained therein were similar to those stated in the 2019 Contract.

The correct amount of the Appellant's chargeable income for the year of assessment 2013/14

6.7 The Appellant claimed that his entire income for the 2013 Employment should be exempted from salaries tax under Section 8(1A)(b)(ii) read together with Section 8(1B) of the IRO on the grounds that he had rendered all his services outside Hong Kong and he had visited Hong Kong for less than 60 days during the Period.

6.8 Alternatively, the Appellant claimed that only the salaries attributable to his actual services rendered in Hong Kong should be chargeable to salaries tax. As such, he considered that the amount of income from the 2013 Employment chargeable to salaries tax should be computed at 0.5 day out of 180 working days or 4 days out of 309 days i.e. the period of leave during which the 0.5 day of work took place. His income attributable to his sick leave, annual leave and rest days taken in Hong Kong should not be taxable as no service was rendered.

6.9 In respect of the 2012 Employment, the Appellant claimed that the leave pay, gratuity and payment in lieu of notice paid by Company B upon termination of this employment should be compensation and not chargeable to salaries tax. During the hearing, the Appellant claimed that if leave pay and gratuity are taxable, only the portion attributable to the period from 1 April to 10 April 2013 should be assessed in the year 2013/14.

Claim for deduction of expenses

6.10 During the hearing, the Appellant maintained that he had made a total of 44 visits to Hong Kong during the Period, out of which he had attended meeting once. If his income attributable to his visits in Hong Kong were taxable, those visits should have been regarded as business visits. As such, the Appellant should be allowed deduction of the relevant outgoing and expenses. Upon cross examination, the Appellant said he could not produce the breakdown of the nature and amount of expenses he wished to claim for deduction to support his claim.

7. The case of the Respondent

Whether the Appellant had rendered all services outside Hong Kong in connection with the 2013 Employment during the year of assessment 2013/14

7.1 The Appellant admitted that he had attended a meeting on 27 June 2013 ('the Meeting') in Hong Kong. In his supplemental statement of appeal, the Appellant claimed that the Meeting was for discussing his health matters which would affect the project progress. He attended the Meeting voluntarily and therefore should not be regarded as rendering services. He relied on the decision in D27/03 in which the Board accepted that the taxpayer purchased spare part occasionally was helping his colleagues as a matter of convenience. The Respondent contended that, according to Company B, the Meeting was an internal meeting for the purpose of project review and site progress review. As it was the Appellant's responsibility to supervise the site progress of the project in Macau, review of project and site progress should be part and parcel of the duty which he discharged in connection with his employment. His attendance at the Meeting could not be regarded as gratuitous or doing the acts in others' favour. The Respondent argued that D27/03 should be distinguished from the present case.

7.2 In his notice of appeal, the Appellant claimed that the Meeting was for the Macau site matters not relating to Company B's business in Hong Kong. However, In D40/07, the Board had made it clear that to consider whether a taxpayer had rendered all services outside Hong Kong under Section 8(1A)(b)(ii) of the IRO, to show that he had no responsibilities or not required to perform services in Hong Kong is not enough. It must be shown that his visit or stay in Hong Kong was in fact unconnected with his employment or work.

7.3 During the hearing, the Appellant initially claimed that he took sick leave in the morning of 27 June 2013 and then went to the office of Company B to inform them about his health matters. Upon cross examination and after reviewing his leave records provided by Company B, the Appellant admitted that he had mistaken that he was on sick leave in the morning of 27 June 2013. He was in fact on duty on 27 June 2013. The Respondent averred that while the Meeting was held on 27 June 2013, according to Company B's records, the Appellant was on duty for the whole day on that day.

7.4 In view of the above, the Respondent submitted that the Appellant should not be regarded as rendering all services in connection with the 2013 Employment outside Hong Kong during the year 2013/14. The exemption under Section 8(1A)(b)(ii) was not applicable to his

case.

Whether the Appellant had visited Hong Kong for less than 60 days

7.5 The Appellant contended that he was a permanent resident in Hong Kong. His returns to Hong Kong should not be regarded as visits. The Respondent submitted that if the Appellant's stays in Hong Kong did not constitute 'visits', he could not rely on the exemption under Section 8(1B). It followed that if his employment income was arising in or derived from Hong Kong, his entire income would be chargeable to salaries tax under Section 8(1)(a) if he had rendered services in Hong Kong, notwithstanding he had stayed in Hong Kong for less than 60 days.

7.6 The Appellant claimed that his visits in Hong Kong did not exceed 60 days. In his calculation, he had excluded the days he spent in Hong Kong on annual leave, sick leave and rest days on the ground that he was not required to render services during those days. However, the interpretation of Section 8(1B) of the IRO has been clarified by the court in Jack So, which confirmed that the words 'not exceeding a total of 60 days' qualify the word 'visits' and not the words 'services rendered'.

7.7 The Appellant also disputed the adoption of the fraction-equals-whole approach in counting the number of days in Hong Kong. The Appellant relied on D37/01 to support his claim. However, the Respondent referred the Board to D39/04 and D40/07 which had considered D37/01 but declined to follow the decision. Moreover, in calculating the number of days he was present in Hong Kong, the Appellant simply took the balance of the days in the period of 129.5 days by subtracting the 179.5 days accepted by the Respondent as he had performed duties in Macau from the total number of days of 309 during the Period. In fact, the Appellant would usually arrive at Hong Kong on Friday's evening and departed from Hong Kong on Monday's morning. In preparing the Determination, the Respondent had counted those days as days on which the Appellant had performed duties for the whole day in Macau. If the fraction-equals-whole approach was adopted in counting the number of days on which he was present in Hong Kong, out of the total 309 days during the Period, the Appellant should have been present in Hong Kong for 205 days.

7.8 On the authority of Jack So, D39/04 and D40/07, the Respondent submitted that the fraction-equals-whole approach in counting the number of days a taxpayer being present in Hong Kong should be adopted for the purpose of calculating the 60 days under Section 8(1B). Whether or not the taxpayer was required to render services in connection with his employment when he stayed in Hong Kong

should be irrelevant for the purpose of calculating the 60 days under Section 8(1B) as the words 'not exceeding a total of 60 days' does not qualify the words 'services rendered'.

Whether the 2013 Employment was sourced outside Hong Kong

7.9 By the 2013 Employment contract entered into between the Appellant and Company B, the Appellant was employed as Position E for 'Project F, Macau Phase 2 Development'. In the employer's return filed by Company B in respect of the Appellant, Company B declared that the Appellant was employed as its Position E during the Period. In his tax return – individuals filed for the year of assessment 2013/14, the Appellant declared that his employer during the Period was Company B. It is clear that at the time of filing the returns, both Company B and the Appellant recognized that they were employer and employee.

7.10 In his notice of appeal, the Appellant claimed that his true employer should be the property owner of the project, i.e. Company F1. However, there was no evidence to show that the Appellant had entered into any employment contract with Company F1 and that his income was derived from such contract instead of the 2013 Employment contract. There was nothing in the pay slips provided by the Appellant which showed that the payments were made by Company F1. The Appellant had provided a copy of a registration form for professional tax in Macau (M/2 Form) in which Company F1 was named as his employer. However, the Respondent contended that the form was incomplete and not signed by the employer, and no weight should be attached to this document.

7.11 The Appellant averred that in standard building contracts, the word 'Employer' means the property owner. As the word 'Employer' appeared in the last paragraph of clause 3 of the employment contract, his true employer should be the property owner, i.e. Company F1. Company B was only an agent appointed by Company F1. The Respondent argued that the available documents did not support such claims. There was nothing in the employment contract indicating the adoption of the definitions in standard building contracts. Moreover, the employment contracts entered into between Company B and the Appellant in respect of the 2012 Employment and the 2013 Employment are very similar. There was nothing to show that Company B was entering into the employment contracts as an agent for any other party. In the letter terminating the 2012 Employment, Company B clearly stated that it had to terminate the Appellant's employment as Position C.

7.12 At the hearing, the Appellant changed his claim that his true employer

was in fact Company H. He asserted that he had entered into an employment contract with Company H in October 2013 ('the Unavailable Contract'). However, he offered no explanation as to why Company H became his true employer instead of Company F1, or why Company H became the 'property owner'. He also could not produce the Unavailable Contract to support his claim. The Appellant tried to support his claim by producing a copy of the 2019 Contract, which was said to be in similar terms as the Unavailable Contract. However, the capacity of Company H in 2015 and that of Company F1 in 2019 were different. In the Appellant's pay-slip for the month April 2015, Company H was described as 配額僱主 while in the pay-slip for February 2019, Company F1 was described as 聘用實體公司. Given that Company H and Company F1 were in different capacities, there was no reason to assume that the Unavailable Contract with Company H in 2013/14, if any, would be in similar terms as the 2019 Contract with Company F1.

7.13 The Appellant claimed that the employment contract was in fact a three-party contract. Again, there was nothing to show that other entities such as Company F1 or Company H was involved in the 2013 Employment contract, which was signed only by Company B and the Appellant.

7.14 The Respondent submitted that Company B was appointed to supervise site progress and workmanship of the project in Macau and the Appellant was appointed by Company B to carry out the duties on its behalf in Macau. The Appellant's employer should be Company B. If the Appellant had indeed signed any employment contract with Company H, it was likely that such a contract was solely for the purpose of obtaining work permit only.

7.15 The Appellant claimed that the source of the 2013 Employment should be in Macau because Company B's profit was derived from the project in Macau and his salaries were paid in MOP in Macau. The Respondent submitted that the source of employer's profit and the currency in which his salary was paid and the place where the payments were not decisive factors in determining the locality of the employee's employment income. According to Lee Hung Kwong, the place where the contract for payment was located must mean the contract of employment based on which the employee earned his payment and not necessarily be the place where the payments were made.

7.16 According to Geopfert, to determine the source of income from an employment, the place where the services were rendered was not relevant and should be completely ignored. Instead, regard must first

be had to the contract of employment. Under the 2013 Employment contract, the contracting parties were Company B and the Appellant. As the employer, Company B was a company incorporated and carried on business in Hong Kong, the 2013 Employment should be located in Hong Kong. It follows that the Appellant's entire income should be subject to salaries tax under Section 8(1) of the IRO without apportionment, irrespective of the place where his services might have been rendered.

7.17 The Appellant had alleged that the Respondent had purposely withheld the production to the Board his pay-slips related to the 2013 Employment, which showed that Company H was his 配額僱主. The Respondent pointed out that the Appellant only put forth such claims during the hearing that his employer should be Company H. Moreover, the pay-slips available to the Respondent were for the period from April to September 2014 and from December 2014 to April 2015 which was unrelated to the Period.

The correct amount of the Appellant's chargeable income for the year of assessment 2013/14

The amount of income to be exempted under Section 8(1A)(c)

7.18 Section 8(1A)(c) of the IRO is a Section which provides exemption to exclude income from services rendered in other territory outside Hong Kong, of which tax of a similar nature to salaries tax had been paid in that territory (i.e. the three requirements as stated in D17/04). In other words, only the income attributable to the Appellant's services rendered in Macau could be excluded from Section 8(1A)(c).

7.19 The Appellant contended that only the income attributable to his actual services in Hong Kong should be chargeable to salaries tax. As such, he suggested adopting a working day basis to calculate his income attributable to services rendered in Macau. However, the Respondent contended that according to the 2013 Employment contract, the Appellant was entitled to a monthly salary and allowance of $87,500 and $20,000 respectively, which were accrued on a day-to-day basis. Even the Appellant was on leave, the income would still accrue to him. Following the principle in Varnam v Deeble, the income attributable to the Appellant's services rendered in Macau should be computed based on his number of days spent in Macau during the period from 27 May 2013 to 31 March 2014. If the Appellant was present in Hong Kong for the whole day on a particular day, he could hardly be regarded as rendering services outside Hong Kong on that day. The Respondent therefore submitted that this basis was fair and was reasonable and was consistent with Sections 2 and 3 of the Apportionment Ordinance.

Deduction of outgoings and expenses

7.20 The Appellant claimed that the monthly allowance of $20,000 was paid to cover his cross-territories travelling, housing and catering expenses. The Respondent submitted that there was nothing in the 2013 Employment contract showing the allowance was paid for such specified purpose. On the other hand, expenses on accommodation, food and travelling from home to work places were not expenses incurred by the Appellant in the performance of his duties under the 2013 Employment. Those expenses were therefore not deductible under Section 12(1)(a).

7.21 At the hearing, the Appellant claimed that if the Respondent sought to tax his income attributable to his 44 visits to Hong Kong as business visits, he should be allowed deductions of outgoings and expenses for those days. In order to qualify for deduction under Section 12(1)(a), a taxpayer has to prove that the expenses are wholly, exclusively and necessarily incurred in the performance of his duties. The Respondent submitted that the Appellant could not produce the actual amount of expenses incurred that he wished to claim for deduction. In the circumstances, his claim must fail.

Whether the sums paid upon termination of the 2012 Employment was taxable

7.22 In his notice of appeal, the Appellant raised a new ground of appeal. He claimed that the leave pay of $15,000, the gratuity and payment in lieu of notice of $112,500 totaling $127,500 paid to him by Company B upon termination of the 2012 Employment were compensation for loss of employment and should not be taxable.

7.23 By a letter dated 10 April 2013, there was an early termination of the 2012 Employment with the Appellant by Company B. According to that letter, the Appellant would be paid one month's salary in lieu of notice, 9 days' annual leave and a portion of the gratuity equal to 15% of the salary actually earned up to 10 April 2013. Company B confirmed that the following payments made upon termination of employment were made in accordance with the contract of the 2012 Employment and had been reported in the employer's return:

	$
One month's salary in lieu of notice	50,000
9 days' annual leave	15,000
Gratuity	62,500
Total	127,500

7.24 The Respondent submitted that on the authority of Fuchs, the above sums were clearly income from employment and should be chargeable to salaries tax. As the Appellant was entitled to those sums upon termination of his employment on 11 April 2013, they were accrued to him during the year of assessment 2013/14. They were the Appellant's entitlements under his employment contract and were correctly assessed as his employment income for the year of assessment 2013/14 pursuant to Sections 11B and 11D(b) of the IRO.

7.25 At the hearing, the Appellant changed his claim that only the portion of the leave pay and gratuity attributable to the period from 1 April to 10 April 2013 should be assessed in the year of assessment 2013/14. Proviso (i) to Section 11D(b) provides that gratuity could be related back to the service period. However, there was no such application made by the Appellant in writing for relating back the gratuity within 2 years after the end of the year of assessment 2013/14. The Respondent therefore submitted that no part of the gratuity should be related back to the year of assessment 2012/13.

8. Finding

8.1 As mentioned above, the Appellant did not call any witness. He represented himself at the hearing.

8.2 The Board finds that the Appellant was an unreliable witness. He chose to remember facts only when they best suited him. At the hearing, he kept admitting that he had made mistakes whenever his allegations were contradicted by documentary evidence.

8.3 Did the Appellant render all services outside Hong Kong

(a) At the hearing, the Appellant first argued that he took sick leave on 27 June 2013 and went to the office of Company B to inform Company B about his health related matters. Only upon cross-examination by the Respondent and confronted with the leave records of Company B that the Appellant said he had made a mistake. He was actually on duty that day and he attended the Meeting at the office.

(b) It was somewhat disingenuous of the Appellant that in the same breath he admitted making a mistake of taking sick leave on 27 June 2013, he immediately argued about the nature of the Meeting on that day.

(c) In his statement of appeal, the Appellant alleged that the Meeting was 'an ad hoc meeting and not concerned with Company B's Hong Kong business, only Macau site matters'.

(d) In his supplemental statement of appeal, the Appellant claimed tht the Meeting was to discuss 'only a serious illness during an emergency medical incident happened in Macau' and to discuss (*inter alia*) 'my health matter and the serious sickness effect project progress'. The Appellant claimed that he went to the office voluntarily. The Meeting took place in the afternoon on 27 June 2013 for an hour.

(e) At the hearing, the Appellant continued to contend that he only discussed his sickness with the project team that might affect the site progress.

(f) During cross-examination, the Appellant was questioned why in Company B's reply to the Respondent, it was mentioned that the Meeting 'was an internal meeting amongst the team members for purposes of project review and site progress review'. Company B also confirmed that the Appellant was required to attend that meeting in Hong Kong even though that was the only meeting taken place during the Period. The reply did not mention anything about the Appellant's sickness nor did it suggest that the Appellant went to the office voluntarily.

(g) The Appellant did not provide any satisfactory explanation of the discrepancies between the content of the letter and his allegations. He argued that he did not know what was on Mr J's mind when he wrote the reply to the Respondent and that there was a conflict between Mr J's reply and his recollection.

(h) Judging from the facts presented, the Board finds that the Appellant did not render all his services to Company B outside Hong Kong during the Period. He had at least worked in Hong Kong on the 27 June 2013. There is no precedent to support any contention that attending an irregular or so-called ad hoc meeting should not be considered as service. There is no reason not to follow the decision in D39/04 in this appeal i.e. a day of service for the benefit of one's employer within Hong Kong would disentitle the employee to claim exemption from salaries tax. With respect, the Board also agrees to the refusal by the Board in D39/04 to follow the decision in D37/01. It should be noted that not being a court of record, the Board is not bound to follow its previous decisions.

(i) As stated in paragraphs 1(11) and (12) above, one of the Appellant's grounds of objection to the Respondent's assessment was that he had worked less than 60 days in Hong Kong during the Period. Whereas the Respondent's assessment

was based on the fact that the Appellant had stayed in Hong Kong for more than 60 days. The important point to note is that it is not relevant to decide whether an employee has rendered services in Hong Kong for more or less than 60 days. It is the number of his visits to Hong Kong that is crucial to the entitlement of exemption to salaries tax.

(j) The considerations in deciding whether a taxpayer is entitled to the exemption of salaries tax under Section 8(1A)(b)(ii) and 8(1B) of the IRO has been extensively discussed in numerous authorities. At the risk of stating the obvious, the Board will set out once again a list of questions to be asked whenever an employee who has rendered his/her services outside Hong Kong wishes to know if he/she is chargeable to salaries tax in Hong Kong:

(i) Did an employee render all his/her services outside Hong Kong in any year of assessment?

If the answer is yes, then the employee is not subject to paying salaries tax in Hong Kong. It should be borne in mind that all means not even 'a single jot of service for the benefit of his/her employer' as stated in D39/04.

(ii) If the answer to the previous question is in the negative i.e. an employee has rendered some services in Hong Kong in any year of assessment, the second question to ask is:

'*Did the employee visit Hong Kong more than 60 days in that year?*'.

(iii) If the answer to the second question is in the negative, again, the employee is not chargeable to salaries tax in Hong Kong. It is because the law does not take into account any services rendered in Hong Kong for less than 60 days in a year of assessment.

(iv) However, if the answer to the second question is in the positive, i.e. an employee has visited Hong Kong for more than 60 days and that employee has rendered services in Hong Kong, even for one day or one 'single jot of service for the benefit of the employer' in any year of assessment, he/she will be chargeable to salaries tax. It is an irrelevant question to ask whether an employee has worked in Hong Kong for 60 days in any year.

(k) In this appeal, the Board has found that the Appellant had rendered services in Hong Kong during the Period, unless he could prove that his visits to Hong Kong did not exceed 60 days, he should be chargeable to salaries tax in Hong Kong.

8.4 Number of days the Appellant visited Hong Kong

(a) The Board accepts the Respondent's computation of the Appellant's visits to Hong Kong being 205 days during the Period. The Board also accepts the Respondent's adoption of the fraction-equals-whole approach in counting the number of days of the Appellant's presence in Hong Kong following the decisions in Jack So, D39/04 and D40/07.

(b) The Board finds that there is no legal basis to exclude any days of annual leave, 'non-working days', Macau public holidays, sick leave and rest days. The Board certainly finds no merit in the argument that given the Appellant's health condition, any refusal to discount his sick leave and rest days would be an infringement of the Disability Discrimination Ordinance. Invoking anti-discrimination law in the context of deciding exemption of salaries tax is simply too far-fetched and unsustainable. In any event, the computation of visits to Hong Kong prepared by the Appellant as stated in paragraph 6.2 above was totally groundless and unacceptable to the Board.

8.5 Whether the 2013 Employment was sourced outside Hong Kong

(a) The Board finds that the 2013 Employment contract was clearly entered into between Company B and the Appellant. This fact was supported by Company B's filing the employer's return for the Period confirming the employment of the Appellant.

(b) The Board finds there is no legal basis for the Appellant to argue that his employer was in fact Company F1. The copy of a pay slip and registration form for professional tax in Macau was insufficient to prove that he was employed by Company F1. The argument that the money used by Company B to pay the Appellant was money earned by Company B in Macau and hence not subject to Hong Kong tax is simply absurd.

(c) The Appellant made a reference to the word 'Employer' as appeared in the 2013 Employment contract. He then relied on the definition of 'Employer' in the Hong Kong Institution of Architect Building Contract to mean the property owner. He contended that since the property owner was Company F1, it should also be his employer.

(d) The Board finds this contention totally irrational and was calculated to confuse the matters. Being a member of the Royal Institute of Chartered Surveyors, the Appellant should be fully aware of the meaning of 'Employer' in the context of construction contracts. The 'Employer' in that context normally refers to the land-owner or the developer in a building project. It is the client to an architect or a contractor. It has nothing to do with an employer in general employment situation.

(e) The 2013 Employment contract made no reference to the adoption of the definition of 'Employer' as used in the Standard Form Building Contract whatsoever. Even the word 'Employer' in uppercase appeared once in the contract, it would not be sufficient to prove that it referred to Company F1. Linking the two documents to ascertain the true employer was convoluted and nonsensical.

(f) The Appellant then mounted another argument that there was in fact another employment contract signed between Company H and himself. It could also have been a tri-party agreement although the Appellant failed to establish the identity of that third party. The Appellant alleged that this Company H contract superseded the 2013 Employment contract. The Board was completely baffled by the Appellant's incoherent arguments over 'yin and yan contracts', common law in Hong Kong vis-à-vis continental law in Macau, and the legitimacy of his employment in Macau. The Appellant could not articulate nor was he qualified to speak on the relevant law in Macau in relation with the legitimacy of employment contracts.

(g) The Appellant referred the Board to certain documents alleged to be a Company H contract together with certain pay slips stating that the Company H was the 'Quota Employer'. When the Board pointed that the alleged contract was signed in 2019 with a certain Company F1 and the pay slips were all dated beyond the Period, the Appellant argued that the Board should accept his words that there was such a contract in existence in 2013 and the pay slips were to prove that Company H was his 'Employer'. The Appellant could not explain in what way the Company H contract, if at all existed, would have superseded the Company B contract and what legal effects entailed.

(h) The Appellant referred the Board to a document of 'Statement of Defendant/Defendant Company' in a Labour Tribunal Claim No. LBTCXXXX/XXXX. Only upon the request of the Board, did the Appellant produce a copy of the 'Statement of

Claimant'. The Board questioned the Appellant why he would commence proceedings against Company B as his employer if his contract had been superseded by a Company H contract. The Appellant simply claimed that it was his right to do as he only understood common law in Hong Kong not continental law in Macau.

(i) The Board finds these Labour Tribunal proceedings to have no relevance to this appeal. In fact, the documents produced showed that the claim was in relation with an employment contract for the period between 28 January 2019 and 27 July 2020.

(j) As to the Appellant's belated post-hearing reference to the 'control test' or 'multifactor test', the Appellant's invocation of such tests rests upon fresh assertions of factual matters made for the first time in the Appellant's Submissions. As mentioned above, the Board would not accept any new evidence at this late stage, and it is therefore inappropriate to entertain the Appellant's argument in this regard.

(k) In any event and for sake of completeness only, the Board notes that it is well-established as a matter of Hong Kong law that the question of the existence of an employer-employee relationship is a matter of qualitative examination of the circumstances as a whole, of which the 'control test' or 'multifactor test' form only one part of the examination. Based on the overall circumstances set out and analyzed at Paragraphs 8.5(a) to 8.5(i) hereinabove, the Board has no hesitation in finding conclusively as a matter of fact that the 2013 Employment contract was entered into between Company B and the Appellant.

8.6 The amount of the Appellant's chargeable income for the year of assessment 2013/14

<u>The amount of income to be exempted under Section 8(1A)(C)</u>

(a) The Board accepts the Respondent's submission that only the income attributable to the Appellant's services rendered in Macau could be excluded from Section 8(1A)(C). The Board rejected the Appellant's argument that only the income attributable to his actual services rendered in Hong Kong should be chargeable to Hong Kong salaries tax.

Deduction of outgoings and expenses

(b) The Board finds that there was no basis for the Appellant to deduct all outgoings and expenses for his 44 business visits to Hong Kong. Firstly, as already dealt with above, the Appellant was not being taxed for having made 44 'business visits' to Hong Kong. His tax liability stemmed from his having visited Hong Kong for more than 60 days and he had rendered services during the Period. Besides, the Appellant failed to produce any breakdown of such expenses, if at all incurred, and any evidence to prove that they were incurred wholly, exclusively and necessarily for the performance of his duties.

Whether the sums paid upon termination of the 2012 Employment was taxable

(c) Company B has confirmed that the payments made upon termination of the Appellant's 2012 Employment i.e. leave pay, gratuity and payment in lieu of notice were made in accordance with the 2012 Employment contract. Following the authority of Fuchs, they were clearly income from employment and should be chargeable to salaries tax.

(d) Regarding whether only the portion of leave pay and gratuity attributable to the period from 1 April to 10 April 2013 should be taxable, the Board accepts the Respondent's submission that since the Appellant had not made any application in writing for relating back the gratuity within two years after the end of the year of assessment 2013/14, he was not entitled to do so at this stage.

9. Conclusion

(a) In view of the above, the Board finds that the Appellant did not render all his services in connection with the 2013 Employment outside Hong Kong during the year of assessment 2013/14. The Appellant's visits to Hong Kong during the Period exceeded 60 days. The 2013 Employment was not sourced outside Hong Kong. The Appellant was therefore chargeable to salaries tax in Hong Kong. The amount of the Appellant's chargeable income for the year of assessment 2013/14 was that as stated in paragraph 1(13) above.

(b) The Appellant has failed to discharge the burden of proving that the assessment appealed against is excessive or incorrect. The appeal is dismissed.

(c) Pursuant to Section 68(9) of the IRO, the Appellant is ordered to pay

costs of the Board in the sum of HK$20,000.