

Case No. D2/20

Salaries tax – whether income arising in or derived from Hong Kong – exemption – whether income derived from services rendered outside Hong Kong – section 8 of the Inland Revenue Ordinance (‘the Ordinance’)

Panel: Lo Pui Yin (chairman), Leung Wai Lim and Wong Man Kong Raymond.

Date of hearing: 22 January 2020.

Date of decision: 11 May 2020.

The Taxpayer was employed by a Hong Kong company (Company B), which had a principal place of business in Hong Kong, under an employment contract governed by Hong Kong. He was seconded to work in Mainland China commencing 1 August 2014. The secondment agreement was also governed by Hong Kong law, and the Taxpayer’s employer and the secondment employer agreed to submit to the exclusive jurisdiction of Hong Kong courts. Evidence shows that the Taxpayer would return to Hong Kong from time to time. He claimed that he needed to attend meetings, entertain clients, and report to his superiors in Hong Kong.

For the 2014/15 year of assessment, the Taxpayer applied for exemption from charge of salaries tax in respect of the part of his income derived from his services rendered in the Mainland. He produced an Individual Income Tax Payment Certificate of the Mainland tax authority as proof that he paid Mainland tax. The assessor estimated that the income the Taxpayer paid individual income tax was \$461,074.00, and exempted the same from the charge of salaries tax under section 8(1A)(c) of the Ordinance. The Taxpayer objected to the assessment, arguing that his entire income during secondment should be exempted.

The Deputy Commissioner considered exemption should be given to the days the Taxpayer stayed outside Hong Kong, and apportioned his income accordingly. He revised the income under exemption to \$602,551.00. The Taxpayer appealed against the Determination, arguing that his income derived from the Mainland was wholly chargeable to Mainland tax which he had paid, and thus the entire \$1,080,647.24 should be exempted from charge of salaries tax in Hong Kong.

Held:

1. The Taxpayer’s income (including the secondment period) came from a Hong Kong source and was thus chargeable to salaries tax, subject to any of the exclusions under the Ordinance that was applicable. This is because his home employer remained to be Company B throughout, and the

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

secondment agreement was governed by Hong Kong law (Commissioner of Inland Revenue v Goepfert [1987] HKLR 888; Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80 considered).

2. For the exemption under section 8(1A)(c) to apply, the relevant enquiry is whether the Taxpayer rendered his service outside Hong Kong, and if so, whether his income was derived from such service. Accordingly, section 8(1A)(c) does not allow the Taxpayer to exclude the whole of his income during the secondment period. He may only rely on this provision insofar as he is able to show that that part of his income was derived from services in the Mainland. This does not relate to the number of days the Taxpayers may fortuitously happen to be in or out of Hong Kong (D24/17, (2018-19) IRBRD, vol 33, 526 followed).
3. In order to consider the extent of the exemption under section 8(1A)(c), it was wrong to adopt the ‘day in, day out’ formula to apportion income, as it does not address the real issue (D17/04, IRBRD, vol 19, 145; Varnam (Inspector of Taxes) v Deeble [1985] STC 308; Coxon v Williams (Inspector of Taxes) [1988] STC 593 not followed).
4. Based on the evidence submitted, the exemption under section 8(1A)(c) should not cover the days, during the secondment period, in which the Taxpayer worked in Hong Kong. Thus, the income exempted under section 8(1A)(c) should be revised to \$885,183.00.

Appeal allowed.

Cases referred to:

D24/17, (2018-19) IRBRD, vol 33, 526
Commissioner of Inland Revenue v Goepfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D17/04, IRBRD, vol 19, 145
Varnam (Inspector of Taxes) v Deeble [1985] STC 308
Coxon v Williams (Inspector of Taxes) [1988] STC 593

Appellant in person.

Chan Lok Ning Loraine and Ng Sui Ling Louisa, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant/Taxpayer, Mr A, against the Decision of the Deputy Commissioner of Inland Revenue dated 28 August 2018 rejecting his objection to the assessment of Salaries Tax for the year of assessment 2014/15 of chargeable income in the amount of HK\$800,932 with tax payable in the amount of HK\$104,158, and reducing the chargeable income to the amount of HK\$659,455 with tax payable in the amount of HK\$80,107 ('the Decision').

2. Although the Decision of the Deputy Commissioner was made in Chinese, the Taxpayer's statement of grounds of appeal was in English. The Revenue's bundle of documents provided to this Board for this Appeal shows that the correspondence between the Taxpayer and the Revenue in respect of the Taxpayer's objection to the assessment of Salaries Tax for the year of assessment 2014/15 had been in English.

3. This Board held the hearing of this Appeal on 22 January 2020. The Taxpayer attended the hearing in person. The Revenue was represented by two Assessors of the Inland Revenue Department and Ms Chan of the two Assessors conducted the Revenue's case at the hearing.

4. The Taxpayer testified under affirmation before this Board in Puntì and was cross-examined by the Revenue. The Taxpayer did not call any other witness. The Taxpayer submitted a closing submission prepared in English and also made oral submissions in Puntì.

5. The Revenue did not call any oral evidence. The Revenue referred to the documents submitted before this Board. The Revenue submitted a closing submission in Chinese and also made oral submissions in Puntì.

6. In light of the use of the official languages by the parties to this Appeal in documentation and in testimony and oral submissions, and having consulted the parties, this Board opted to use English to produce its decision of this Appeal.

The Facts

7. The Taxpayer and Revenue have not reached agreement on a set of Agreed Facts for submission to this Board.

8. The Taxpayer has placed before this Board a set of documents relating to this Appeal. The Taxpayer has confirmed the contents of the documents in the course of his testimony as he went through them at the prompting of this Board in the course of his testimony. The Taxpayer has also been asked in the course of his testimony to confirm or comment on the documents that the Revenue has submitted to this Board for the purpose of this Appeal. By virtue of this process, this Board is able to find the following facts as established:

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (1) The Taxpayer has been in employment with Company B since 1979.
- (2) In the period between 1 April 2014 and 31 July 2014, the Taxpayer was Position C of Company B, with the principal place of work in Hong Kong.
- (3) The Taxpayer was seconded to Company D with effect from 1 August 2014 on same terms and conditions as his employment then with Company B. It was stated in the letter of secondment dated 28 July 2014 that: 'Notwithstanding the secondment, [Company B] will continue to be your home employer throughout the period of the secondment.'
- (4) The Taxpayer was then seconded by Company D to Company E with effect from 1 August 2014. The letter of Company D notifying the Taxpayer of the secondment was dated 28 July 2014.
- (5) The Taxpayer was then seconded by Company E to Company F. By a letter dated 28 July 2014, Company E confirmed to the Taxpayer the terms that would apply during his term of secondment to Company F, and the relevant terms for the purpose of this Appeal are as follows:
 - (a) The Taxpayer would be seconded in the capacity of Position G – Company E.
 - (b) The secondment would commence on 1 August 2014, subject to obtaining a work permit in the People's Republic of China (PRC).
 - (c) The secondment would end on 31 July 2016.
 - (d) The work location would be in City H, the PRC.
 - (e) The working hours would be in accordance with the working hours in force in the work location.
 - (f) Provision is made for tax equalization during the period of secondment.
 - (g) Home passage of weekly transit between Hong Kong and City H would be provided.
 - (h) Company F would provide furnished accommodation to the Taxpayer.

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (i) The Taxpayer would be entitled to statutory public holidays of City H.
- (j) Subject to any directions issued by Company E from time to time, during the continuance of the period of the Taxpayer's secondment, he would be required to work for and in the direction and control of Company F.
- (k) The Taxpayer agreed to comply with Company F's policies and procedures (including, for example, procedures for approval of annual leave and carrying forward of annual leave), and acknowledge that he was obliged to comply with the laws of the PRC where his secondment was based, including, but not limited to, laws relating to discrimination, trade practices, occupational health and safety and privacy.
- (l) The law governing the Taxpayer's secondment was the same as that governing his employment contract; that is, the laws of Hong Kong. The Taxpayer, Company E and Company F each submitted to the exclusive jurisdiction of the Hong Kong courts and tribunals.
- (m) Other than the enumerated terms set out in the letter, there would be no change to any other terms and conditions of employment.

The Taxpayer signed to acknowledge receipt of the letter and his agreement to the terms and arrangements stated therein.

- (6) Company B, Company D and Company E were all companies limited by shares incorporated in Hong Kong with the principal place of business in Hong Kong.
- (7) Company B filed with the Revenue the Employer's Return of Remuneration and Pensions for the Year from 1 April 2014 to 31 March 2015 in respect of the Taxpayer. The return included the following information:
 - (a) Capacity in which employed: Position G – Company E
 - (b) Period of employment: 01-04-2014 to 31-03-2015
 - (c) Income:

	\$
Salary	977,844
Salaries tax paid by employer	141,954

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

	\$
Other allowances	<u>399,708</u>
Total	<u>1,519,506</u>

- (d) Whether the employee was wholly or partly paid either in Hong Kong or overseas by an overseas company: No.
- (8) The Taxpayer submitted the Individual's Tax Return for the year of assessment of 2014/15, stating information identical to that set out in (7) above. The Taxpayer applied for exemption from charge of Salaries Tax in respect of part of the income and provided, for this purpose, an Individual Income Tax Payment Certificate of the Mainland Tax Authority in relation to the individual income tax for the period of August 2014 and March 2015.
- (9) The Assessor of the Revenue estimated on the basis of the Individual Income Tax Payment Certificate provided by the Taxpayer that the income in respect of which he paid Mainland individual income tax in the year of assessment 2014/15 was \$461,074 and such income is exempt from the charge of Salaries Tax under section 8(1A)(c) of the Inland Revenue Ordinance (Chapter 112) (IRO). The Assessor therefore raised the following assessment of Salaries Tax for the year of assessment 2014/15 on the Taxpayer:

	\$
Income	1,519,506
<u>Deduction:</u> Income excluded under section 8(1A)(c), IRO	<u>461,074</u>
	1,058,432
<u>Deduction:</u> Contribution to retirement scheme	<u>17,500</u>
	1,040,932
<u>Deduction:</u> Married person's allowance	<u>240,000</u>
Net chargeable income	<u>800,932</u>
Tax payable	<u>104,158</u>

- (10) The Taxpayer objected to the assessment above on the ground that Mainland individual income tax was paid in respect of his income between 1 August 2014 and 31 March 2015, and so such income should be exempt from the charge of Salaries Tax. The Taxpayer provided a calculation of the income that should be exempt from the charge of Salaries Tax on the basis of the number of days he was in the Mainland in each of the months between August 2014 and March 2015, stating that the income that should be exempt from the charge of Salaries Tax was 938,692.35. The Taxpayer further stated that he worked in the Mainland between August 2014 and March 2015 and that while he carried out certain duties like attending meetings and

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

reporting work progress in Hong Kong where it was necessary, such duties were all to do with his work in Mainland.

- (11) The Assessor of the Revenue also obtained information from Company B, including information on the bonus that the Taxpayer earned between 1 January 2014 and 31 December 2014, with Mainland individual income tax having been paid in respect of the portion for the period between 1 August 2014 and 31 December 2014, namely \$131,115.
- (12) The Assessor of the Revenue also sought information from the Immigration Department on the entry and exit dates and times of the Taxpayer. According to the information obtained from the Immigration Department, the Taxpayer stayed in Hong Kong for 293 days (if less than one day was counted as one day) in the year of assessment of 2014/15.
- (13) The Assessor of the Revenue wrote to the Taxpayer on 23 March 2017 suggesting a revision of the assessment. The Taxpayer replied to object to the revision on the grounds that the income derived from 1 August 2014 to 31 March 2015 should not be assessable because he worked in the Mainland only; that he had already paid Mainland tax for his services rendered in the Mainland during that period; and that to avoid double taxation, the assessable income seemed excessive and not in accordance with his tax return.
- (14) The Assessor of the Revenue wrote to the Taxpayer on 1 November 2017 setting out the Revenue's consideration of his application for exemption of income from charge of Salaries Tax and suggesting another revision of the assessment. The Taxpayer replied to object to the revision on the grounds that during the period from 1 August 2014 to 31 March 2015, he was seconded in the capacity of Position G – Company E and worked at City H of the Mainland. He had no work in Hong Kong and only carried out the works of the Mainland during the year of assessment. Although he had to return to Hong Kong sometimes for attending meetings, reporting progress to the management, etc., those activities were part of his works required for working in the Mainland. Therefore the income derived from such period should not be assessable. Also, the amount of income of \$1,080,647.24 was wholly chargeable to Mainland tax which he had already paid during that exact period. To avoid double taxation, the Taxpayer stated that he was entitled to the exemption under section 8(1A)(c) of the IRO and the Revenue's revision was excessive and not in accordance with his return.
- (15) The Assessor of the Revenue wrote to the Taxpayer on 12 April 2018 again setting out the Revenue's consideration of his application for

exemption of income from charge of Salaries Tax and suggesting yet another revision of the assessment. The Taxpayer replied to object to the revision on the grounds that during the period from 1 August 2014 to 31 March 2015, he was seconded in the capacity of Position G – Company E and worked at City H of the Mainland. He had no work in Hong Kong and only carried out the works of the Mainland during the year of assessment. Although he had to return to Hong Kong sometimes for attending meetings, reporting progress to the management, etc., those activities were part of his works required for working in the Mainland. Therefore the income derived from such period should not be assessable. Also, the amount of income of \$1,080,647.24 was wholly chargeable to Mainland tax which he had already paid during that exact period. To avoid double taxation, the Taxpayer stated that he was entitled to the exemption under section 8(1A)(c) of the IRO and the Revenue’s revision was excessive and not in accordance with his return.

The Deputy Commissioner’s Determination

9. The Deputy Commissioner of Inland Revenue determined that the Taxpayer’s employment in the year of assessment 2014/15 was sourced in Hong Kong and the whole of his income should be charged to Salaries Tax in accordance with section 8(1)(a) of the IRO, since during that year of assessment, the Taxpayer was employed with Company B, and then seconded to Company D and Company E, all of which were incorporated in Hong Kong and carried on business in Hong Kong.

10. The Deputy Commissioner of Inland Revenue determined that the Taxpayer may not enjoy the exclusions or exemptions under sections 8(1A)(b)(ii) and 8(1B) of the IRO. This was because during the year of assessment 2014/15 he remained in Hong Kong for more than 60 days, his principal place of work between 1 April 2014 and 31 July 2014 was Hong Kong, and he did return to Hong Kong to carry out his duties or functions in relation to work. All these meant that in the year of assessment 2014/15 he did not render in the Mainland all the services in connection with his employment.

11. The Deputy Commissioner of Inland Revenue then turned to section 8(1A)(c) of the IRO, which provides:

‘(1A) For the purpose of this Part, income arising in or derived from Hong Kong from any employment —

(a) ...

(b) ...

(c) excludes income derived by a person from services rendered by him in any territory outside Hong Kong where —

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (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.'*

12. The Deputy Commissioner of Inland Revenue determined that under section 8(1A)(c), the Taxpayer will have the income derived from his services in the Mainland (in respect of which he had paid Mainland individual income tax) excluded from the charge of Salaries Tax. The Deputy Commissioner considered that during the year of assessment 2014/15, the Taxpayer had carried out his duties and functions in Hong Kong and in the Mainland. Even if certain duties and functions he carried out in Hong Kong were in connection with his work in the Mainland, the income was derived from services rendered in Hong Kong and the Mainland, and was not wholly derived from services rendered in the Mainland.

13. The Deputy Commissioner of Inland Revenue agreed with the revision submitted by the Revenue's assessor to ascertain the income derived from services rendered by the Taxpayer outside Hong Kong by apportionment by reference to the number of days outside Hong Kong in proportion to a year of 365 days (and not by consideration of only working days). The Deputy Commissioner noted that the Assessor had taken into account the time needed to travel between Hong Kong and the Mainland and used the time of departure from and arrival in Hong Kong in the calculation of the days the Taxpayer remained in the Mainland. The Deputy Commissioner considered this approach in the calculation to be appropriate and reasonable and revised the assessment of Salaries Tax of the Taxpayer for the year of assessment 2014/15 accordingly:

	\$
Income	1,519,506
<u>Deduction: Income excluded under section 8(1A)(c), IRO</u>	<u>602,551¹</u>
	916,955
<u>Deduction: Contribution to retirement scheme</u>	<u>17,500</u>
	899,455
<u>Deduction: Married person allowance</u>	<u>240,000</u>
Net chargeable income	<u>659,455</u>
Tax payable	<u>80,107</u>

Notes:

- (1) Income excluded under section 8(1A)(c), IRO from charge of Salaries Tax:

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

<u>Year</u>	<u>Month.</u>	<u>Income</u>	Number of days in <u>Mainland</u> ²	Number of days <u>in the month</u>	<u>Excluded income</u>
		\$			\$
		[a]	[b]	[c]	[a]x[b]/[c]
2014	4	84,192.00	1.0	30.0	2,806.40
	5	84,192.00	—	31.0	—
	6	84,192.00	—	30.0	—
	7	84,192.00	5.0	31.0	13,579.35
	8	92,340.70	18.5	31.0	55,106.35
	9	92,340.70	15.0	30.0	46,170.35
	10	92,340.70	20.0	31.0	59,574.65
	11	92,340.70	13.5	30.0	41,553.32
	12	92,340.70	12.0	31.0	35,744.79
2014	8-12	131,115.00 ³	79.0 ⁴	153.0	67,699.90
	Bonus				
2015	1	92,340.70	16.0	31.0	47,659.72
	2	92,360.70	13.5	28.0	44,531.05
	3	<u>92,340.70</u>	15.5	31.0	<u>46,170.35</u>
		1,206,628.60			460,596.42
Mainland tax paid for by employer		<u>141,954.89</u>			<u>141,954.89</u>
Total:		<u>1,348,583.49</u>			<u>602,551.31</u>

- (2) Having taken into account the travelling time between Hong Kong and the Mainland, the Assessor counted as remaining in the Mainland for one day where the Taxpayer departed Hong Kong before 10 am and/or arrived in Hong Kong after 4 pm on the day; and counted as remaining in the Mainland for half a day where the Taxpayer departed Hong Kong or arrived in Hong Kong between 10 am and 4 pm on the day. The details of the calculation, from information obtained from the Immigration Department, were in Annex 1 to the Determination.
- (3) See paragraph 8(11) above.
- (4) The number of days in the Mainland between August and December 2014:

$$18.5 + 15 + 20 + 13.5 + 12 = 79 \text{ days.}$$

The Taxpayer's Grounds of Appeal, Testimony, Written Statement and Submissions

14. The Taxpayer's Statement of Grounds of Appeal explained that he was seconded to Position G for Company F at the pumped storage power station at City H in the Mainland. He had no work and no office in Hong Kong. He only had one single job that required him to manage the maintenance works in the Mainland during the period between 1 August 2014 and 31 March 2015. He occasionally needed to stay in Hong Kong for attending meetings, reporting progress to management, supporting works, receiving training and entertaining clients, etc., and those were part of his works for Company F. He provided

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

this Board with his name card while he worked for Company F, and copies of emails as supporting documents that showed his duties during his stay in Hong Kong.

15. The Taxpayer referred to the Assessor of the Revenue's approach of counting 1000 hours departure time and 1600 hours arrival time for determining whether he had stayed in the Mainland or in Hong Kong and indicated that this approach may not be practicable in the case of a management or executive grade employee with frequent travel needs. The Taxpayer pointed to the matter that whilst the days he travelled to other provinces of the Mainland and Country J for business trip could be reasonably excluded, his travels to Hong Kong for a similar purpose of business trip had to be taken into account. The Taxpayer considered that the Revenue had not considered thoroughly his actual intent and the scope of his job.

16. The Taxpayer underlined that the income in the amount of \$1,080,647.24 was wholly chargeable to Mainland individual income tax and he had paid such Mainland tax for the services he rendered in the Mainland during the exact period. He provided the Mainland tax bills for information. He observed that the Mainland tax he paid was far more than the Hong Kong tax payable. The Mainland tax was paid monthly as advised by Mainland tax consultant. Not much consideration was taken on whether he needed to stay one more day in the Mainland or in Hong Kong in the course of work. This all depended on business need and arrangement. The income derived from the period should not be assessable to Salaries Tax.

17. The Taxpayer submitted that he was entitled to the exemption under section 8(1A)(c) of the IRO and he submitted that the assessment was excessive and not in accordance with his tax return for the year of assessment 2014/15. The assessable income should be \$438,860.25.

18. The Taxpayer provided this Board with a Written Statement in English. He expressly adopted the assertions of fact in the Written Statement as part of his evidence. The points he made in this Written Statement can be summarized as follows:

- (a) Company E has the right to use 50% of the capacity of Power Station K, which is owned and operated by Company F, a state-owned company that is owned by Company L, a state-owned company of the PRC.
- (b) In 1990, Company E and Company F signed a contract relating to the operation of the said power station. One of the provisions of this contract was that Company E agreed to second experienced personnel to work in the said power station in order to utilize Company E's experience in the operational management of modern power stations. The salary of the seconded staff would be paid by Company F to Company E. Such seconded staff would not work for other units of the companies to the contract within and outside of the PRC, including their original company, on full time or part time basis during the period of secondment. Such seconded staff would pay

taxes according to the Mainland tax laws and regulations on all income coming from the secondment to work in the power station.

- (c) The Taxpayer made the point that before his secondment from 1 August 2014, he had worked in Hong Kong with Company B continuously and he had not discontinued to pay Hong Kong Salaries Tax before.
- (d) During the period of secondment, the Taxpayer's working arrangements at the said power station were from Monday to Friday, with Saturday and Sunday being rest days. The working hours started from 2:30 pm on Monday and ended at 12 noon on Friday. All employees of Company F stayed in the accommodation in the power station during the weekdays. While there might be longer working hours from time to time depending on need of work, the official working hours each weekday was from 8 am to 5:30 pm with a lunch break from 12 noon to 2:30 pm (Tuesday to Friday). The Taxpayer expanded on his travelling time to work from Hong Kong on Monday and his travelling time after coming off work to Hong Kong on Friday in his testimony. He gave the example of coming off duty at 12 noon on Friday and explained that he usually could cross the border after 4 pm or 5 pm on Friday because it took about 4 to 5 hours by train and by car to go from City H to Hong Kong. If the Taxpayer had to attend a meeting in City M on Friday morning and the meeting finished after 1 pm, then while he arrived in Hong Kong at 2 pm, he in fact worked late on that Friday but the Revenue would have wrongly considered him as having arrived early.
- (e) The Taxpayer reported to Position N of Company F and Position P of Company F (who was a secondee from Company E), both of whom were based in City H.
- (f) The Taxpayer was issued with a work permit by the Mainland authorities. The Taxpayer asserted that this demonstrated that his employment was permanent and totally related to his services in the Mainland.
- (g) Since the Taxpayer's superiors were all stationed in City H, there was no need for him to report to the Hong Kong office in relation to his works in the Mainland. Operational decisions and direction of works were made in the said power station.
- (h) During the period of work in the Mainland, the Taxpayer would normally visit Hong Kong for holidays during the weekend on Saturday and Sunday, the PRC statutory holidays and annual leave. His stays in Hong Kong were for holiday purposes wholly unconnected with his employment. There were 70 Saturdays and

Sundays in total during the period between August 2014 and March 2015.

- (i) As for the business of Company F or relating to the said power station, the Taxpayer needed to visit Hong Kong for the following purposes generally: (i) attending management committee and sub-committee meetings of the joint grid between Province Q and Hong Kong normally held in City M or Hong Kong; (ii) attending the joint management committee and dinner/entertainment with joint management committee members normally held at the said power station or Hong Kong; (iii) communications and liaison with different functions of Company B to achieve success business of Company F, including providing support to Company B public affairs in the renovation of the exhibition gallery at the said power station, providing support to Company B insurance to lodge claim for loss of property in the said power station damaged by Typhoon Utor, and logistic support of Company B IT for repairs of the electronic communications device used in the said power station; and (iv) attending and representing Company F in the presentation of a paper in the 2014 Asia-Pacific Power and Energy Engineering Conference, and attending Company B trainings workshops and seminars that would be shared to Company F. The Taxpayer underlined that all of these works initiated from the business needs of Company F and he was assigned to follow up those works in Company F. The Taxpayer supported these assertions with quotations from the letter of Company B dated 6 January 2016 to the Revenue. The Taxpayer thus asserted that he did not render any service to his employer in Hong Kong during the period between August 2014 and March 2015.
- (j) The Taxpayer referred to the contract between Company E and Company F, which included the provision that the secondees' salaries would be settled by Company F. The Taxpayer asserted that this impliedly that his income was derived from the Mainland.
- (k) The Taxpayer referred to the tax equalization provision in the Company E's letter of 28 July 2014, which required him to pay the hypothetical Hong Kong Salaries Tax as if he was still working in Hong Kong to Company B and this was done by Company B withholding the relevant amount from his monthly payroll during the secondment period. In the year of assessment of 2014/15, a total amount of \$142,618 was deducted from his payroll for this purpose. Since the amount of Mainland tax liability was larger than that of Hong Kong, Company B was responsible to bear the difference, which was called the equalization costs.

- (l) The Taxpayer stated that he was not involved in the submission or reporting of income to the local Mainland tax bureau and that that was done by a tax consultant engaged by Company B.

19. The Taxpayer summed up that the difference between him and the Revenue was over the definition of the ‘exemption’ under section 8(1A)(c) of the IRO. The Revenue stated that the ‘exemption’ should only be granted on the basis of the days the Taxpayer spent in the Mainland. The Taxpayer’s understanding was that the income derived from the period during his full employment in the Mainland should not be assessable because that amount of income of \$1,080,647 had been wholly chargeable to Mainland tax. He considered that the income during his whole employment period in the Mainland should be exempt from Salaries Tax to avoid double taxation, which was the original intent of section 8(1A)(c). In this relation, he submitted that in his case, the income during the secondment in the Mainland was sourced outside Hong Kong, namely from working at the power station in the Mainland and having the full salary during the secondment period paid by Company F and therefore derived from the Mainland. The Taxpayer also submitted that the income during the secondment period was chargeable to tax of a similar nature to Salaries Tax, and that Revenue had no objection to his case that he had paid Mainland individual income tax in respect of his income. The Taxpayer therefore submitted that all three requirements under section 8(1A)(c) were satisfied and his case qualified for the ‘exemption’ under it.

The Revenue’s Submissions

20. Ms Chan for the Revenue maintained the reasons of the Deputy Commissioner of Inland Revenue in his Determination dated 28 August 2019. The Taxpayer’s income in the year of assessment 2014/15 (including during the secondment period) was sourced from Hong Kong and all his income in that year of assessment was chargeable to Salaries Tax under section 8(1)(a) of the IRO. The Taxpayer could not rely on section 8(1A)(b)(ii) or section 8(1B) of the IRO to exclude his income from the charge of Salaries Tax since none of those two exclusions applied to his case. To rely on the exclusion under section 8(1A)(c), the Taxpayer must satisfy these three criteria: (1) the income was derived from services rendered by him in a territory outside Hong Kong; (2) the income was chargeable to tax of substantially the same nature as Salaries Tax under the IRO by the laws of the territory where the services were rendered; and (3) the Commissioner was satisfied that that person had, by deduction or otherwise, paid tax of that nature in that territory in respect of that income. Ms Chan accepted on behalf of the Revenue that in this Appeal, only criterion (1) is in contention, and her submission was that on analysis, the income of the Taxpayer during the secondment period from Company B was derived from services he rendered both in Hong Kong and in the Mainland, so that the exclusion under section 8(1A)(c) could only apply to the part of the income derived from services he rendered in the Mainland. Given that there was no provision in the letter dated 28 July 2014 of Company E distributing the Taxpayer’s income into a part relating to the services rendered in the Mainland and a part relating to the services rendered in Hong Kong, an apportionment by reference to the number of days he stayed in the Mainland during the secondment period in the year assessment should be adopted. Ms Chan also submitted that the approach the Assessor of the Revenue used in the recommendation to the Deputy Commissioner had taken into account the Taxpayer’s needs to travel between Hong Kong

and the Mainland and under this approach, the Taxpayer was not in fact prejudiced if he in fact travelled in the hours and for the travelling times he testified.

D24/17 and Further Submissions

21. After the hearing of this Appeal, this Board came across the recent decision of the Board of Review in D24/17, (2018-19) IRBRD, vol 33, 526 (7 February 2018). Having read this decision, it was considered that this decision may be relevant to the issues raised in this Appeal. This Board therefore directed that the parties to this Appeal should, if any of them considers appropriate, furnish this Board with further written submissions on the relevance and application of this decision. This Board received the further written submission of the Revenue dated 27 March 2020. This Board received no further written submission from the Taxpayer. This Board shall discuss D24/17 (above) and the further written submissions received in the next section of this Decision.

Discussion

22. This Board is satisfied that, having considered the submissions of the Taxpayer and the Revenue, the principal issue for determination in this Appeal is whether the Taxpayer has established that his income during the secondment period in the year of assessment 2014/15 should be excluded under section 8(1A)(c) of the IRO.

23. This Board is satisfied that the Taxpayer's employment in the year of assessment 2014/15 (including the secondment period) was with Company B, a company incorporated in Hong Kong and carried on its business in Hong Kong. The Taxpayer's first secondment to Company D was on the express term that his home employer remained Company B. Although the Taxpayer's second secondment from Company D to Company E did not specify any terms and conditions, there was no reason not to conclude that, by reason of the common understanding of 'secondment', his home employer remained Company B. The Taxpayer's third secondment from Company E to Company F was on terms stated in the letter of Company E dated 28 July 2014 and this Board considers that the essential terms that were relevant to this, the third, secondment were that his secondment would be governed by the law that governed his employment contract and that the terms and conditions of employment would not be changed other than in respect of those terms set out in the letter. In other words, the employment of the Taxpayer continued to be that with Company B under the employment contract he had with Company B. As the Revenue had observed, this was the position that Company B expressed in the employer's return for the year of assessment 2014/15 in relation to the Taxpayer, which reported the Taxpayer's income for the whole year of assessment, including the secondment period in that year. On the authorities of Commissioner of Inland Revenue v Goepfert [1987] HKLR 888 (HC) and Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80 (CFI), this Board is satisfied that the whole of the Taxpayer's income in the year of assessment of 2014/15 came from Company B, a Hong Kong source, and that the place that the whole of the income came to him was Hong Kong. Section 8(1)(a) of the IRO therefore applied to the whole of the Taxpayer's income in the year of assessment of 2014/15, subject to any of the exclusions under the IRO that was applicable. This Board notes that the Taxpayer appeared to have recognized the substance of this matter in his individual tax return for the

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

year of assessment of 2014/15, since he provided details of his income in similar details as those that Company B provided in the employer's return and applied for exclusion/exemption of the part of the income that he submitted that he had already paid Mainland tax.

24. This Board is satisfied that the exclusions under section 8(1A)(ii) and section 8(1B), of the IRO were not applicable. This was because in the relevant basis period of 1 April 2014 to 31 March 2015 for the year of assessment of 2014/15, the Taxpayer did render services in connection with his employment in Hong Kong and also the services he rendered in Hong Kong exceeded a total of 60 days.

25. Turning to section 8(1A)(c) of the IRO, this Board notes and agrees with the Revenue's indication in paragraph 20 above that the issue in contention in this Appeal is whether the Taxpayer's income during the secondment period from 1 August 2014 to 31 March 2015 was derived from services rendered by him in a territory outside Hong Kong, namely the Mainland. The Taxpayer's submission was that the income derived from the secondment period during his full employment in the Mainland should not be chargeable because that amount of income had been wholly chargeable to Mainland tax, and doing the otherwise would be contrary to the intention of the statutory provision of avoiding double taxation. This Board is unable to accept the Taxpayer's submission. This is because the language of section 8(1A)(c) indicates that the provision operates to exclude 'income derived by a person from services rendered by him *in* any territory outside Hong Kong' (emphasis supplied), where that person did pay tax of substantially the same nature as Salaries Tax under the IRO in that territory in respect of the income. This requires, in the Taxpayer's case, differentiation between income derived by him from services rendered by him in the Mainland (or a territory outside Hong Kong) and income derived by him from services rendered by him in Hong Kong. Although this Board appreciates the Taxpayer's submission to the effect that it might be an anomaly not consistent with the purpose of section 8(1A)(c) as a provision for avoidance of double taxation for services rendered by him in Hong Kong in discharge of the duties he had under the direction (as he must as a secondee) of Company F, this Board is unable to give section 8(1A)(c) an interpretation that would strain its language or change the substance of its object.

26. This Board finds support for the consideration above in the decision of the Board of Review in D24/17 (above). The Board of Review in that case determined on how section 8(1A)(c) of the IRO applied and, on the basis of three previous cases of the Board of Review (including D17/04, IRBRD, vol 19, 145, which the Revenue cited in this Appeal), held in paragraphs 70 to 79 that in connection with section 8(1A)(c), three requirements, which the Board of Review noted to be derived from the plain language of section 8(1A)(c), must be satisfied: (i) that the income was derived from services overseas; (ii) that the income was chargeable to tax of a similar nature to salaries tax; and (iii) that the Commissioner is satisfied that the person has paid tax of that nature in that territory in respect of the income. The Board of Review added that '[none] of these three requirements has any correlation with the number of days the Appellant may fortuitously happen to be in or out of Hong Kong. The relevant enquiry is whether she rendered her services inside or outside Hong Kong, and if so, whether her income or any portion thereof was derived from services inside

or outside Hong Kong (i.e. requirement (i)). This is a very different enquiry from an arbitrary “day in, day out” formula.’

27. Accordingly, this Board holds that the Taxpayer may not rely on section 8(1A)(c) of the IRO to exclude the whole of his income during the secondment period from 1 August 2014 to 31 March 2015; and that the Taxpayer may only rely on this provision to exclude the part of his income during the said period in so far as he is able to show that that part was derived from services in the Mainland.

28. As a result, it is necessary to conduct an exercise of apportionment. In this regard, the Board of Review in D24/17 (above) indicated in paragraph 80 that where the entirety of the income does not satisfy the three requirements under section 8(1A)(c) of the IRO, it is then a question of fact and evidence what part of the income satisfies the three requirements. The relevant question to ask is whether the taxpayer in question rendered any services in Hong Kong and derived income from such service.

29. However, both the Revenue and the Taxpayer had, in their respective submissions, approached the matter of apportionment on a ‘day in, day out’ basis based on the entry and exit records from the Immigration Department. The Revenue, in its further written submissions, maintained that the ‘day in, day out’ formula was an appropriate and reasonable basis, citing D17/04 (above), Varnam (Inspector of Taxes) v Deeble [1985] STC 308, and Coxon v Williams (Inspector of Taxes) [1988] STC 593 in support. Particularly, the Revenue made the point that the Board of Review in D17/04 (above) accepted the Revenue’s computation in apportioning the income on a ‘day in, day out’ formula.

30. Having considered all the submissions, this Board respectfully agree with the Board of Review in D24/17 (above) that the approach in apportioning income by a ‘day in, day out’ formula did not address the real issue. Although the Board of Review in D17/04 (above) accepted the Revenue’s apportionment on a ‘day in, day out’ basis, this Board respectfully does not find that decision to be of decisive assistance, since the Board of Review in D17/04 (above) did not explain why it accepted the ‘day in, day out’ basis of apportionment, whereas the Board of Review in D24/17 (above) had considered D17/04 (above) and after discussion, pointed out what the relevant question should be asked in an exercise of apportionment. And this Board, having examined the evidence relevant to apportionment in this Appeal, considers that in the circumstances of this Appeal, adopting a ‘day in, day out’ basis of apportionment would have been arbitrary and led to injustice. This Board shall explain in the paragraphs that follow.

31. Regarding the relevant evidence in this Appeal, the Taxpayer has provided this Board with a table entitled ‘Duties of Mr A performed in Hong Kong (Period from 1 August 2014 to 31 March 2015)’ and printouts of email correspondence regarding the meetings and other activities he did in Hong Kong in his bundle of documents. This Board has heard the Taxpayer’s testimony explaining the provenance of these printouts and admits them as evidence in this Appeal.

32. However, in the light of the approach adopted by the parties in this Appeal on the issue of apportionment, little attention was given by the parties on the finding of facts

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

on the days within the period of 1 August 2014 and 31 March 2015 on which the Taxpayer rendered services in Hong Kong and derived income from such service.

33. This Board finds that the relevant question to ask is the one stated in paragraph 28 above. This necessarily means that the Saturdays, Sundays and the PRC statutory holidays that the Taxpayer spent in Hong Kong should not be counted against his claim under section 8(1A)(c) of the IRO. These holidays would have been counted on a ‘day in, day out’ basis. This Board is of the view that this could not possibly be right and just.

34. This Board therefore revises the assessment by first examining the table entitled ‘Duties of Mr A performed in Hong Kong (Period from 1 August 2014 to 31 March 2015)’ and the email correspondence printouts the Taxpayer had provided in his bundle of documents and making findings on the dates within the period of 1 August 2014 and 31 March 2015 on which the Taxpayer rendered services in Hong Kong and derived income from such service, and from those dates, the number of days in each of the months of the period of 1 August 2014 and 31 March 2015 that the Taxpayer had rendered services in the Mainland. This Board then applies the relevant number for each of those months in the calculation set out under Note 1 to paragraph 13 above to arrive at the excluded income under section 8(1A)(c) for each of the months in the period of 1 August 2014 and 31 March 2015. A similar calculation is to be taken in respect of the portion of the Taxpayer’s bonus representing the period between 1 August 2014 and 31 December 2014.

35. Having conducted the examination and making findings in accordance with the approach stated in paragraph 34 above, this Board makes the revision of the assessment of the Taxpayer’s Salaries Tax for the year of assessment 2014/15 as follows:

	\$
Income	1,519,506
<u>Deduction:</u> Income excluded under section 8(1A)(c), IRO	<u>885,183</u>
	634,323
<u>Deduction:</u> Contribution to retirement scheme	<u>17,500</u>
	616,823
<u>Deduction:</u> Married person’s allowance	<u>240,000</u>
Net chargeable income	<u>376,823</u>

Notes:

(1) Income excluded under section 8(1A)(c), IRO from charge of Salaries Tax:

<u>Year</u>	<u>Month.</u>	<u>Income</u>	<u>Number of days rendering service in the Mainland</u>	<u>Number of days in the month</u>	<u>Excluded income</u>
		\$			\$
		[a]	[b]	[c]	[a]x[b]/[c]
2014	4	84,192.00	— ²	30.0	—
	5	84,192.00	—	31.0	—

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

<u>Year</u>	<u>Month.</u>	<u>Income</u>	<u>Number of days rendering service in the Mainland</u>	<u>Number of days in the month</u>	<u>Excluded income</u>
		\$			\$
		[a]	[b]	[c]	[a]x[b]/[c]
	6	84,192.00	—	30.0	—
	7	84,192.00	— ³	31.0	—
	8	92,340.70	28.0 ⁴	31.0	83,404.50
	9	92,340.70	21.5 ⁵	30.0	66,177.50
	10	92,340.70	31.0 ⁶	31.0	92,340.70
	11	92,340.70	23.5 ⁷	30.0	72,333.54
	12	92,340.70	25.0 ⁸	31.0	74,468.30
2014	8-12	131,115.00	129.0 ⁹	153.0	110,547.94
	Bonus				
2015	1	92,340.70	28.5 ¹⁰	31.0	84,893.86
	2	92,360.70	27.0 ¹¹	28.0	89,062.10
	3	<u>92,340.70</u>	23.5 ¹²	31.0	<u>70,000.20</u>
		1,206,628.60			743,228.64
	Mainland tax paid for by employer	<u>141,954.89</u>			<u>141,954.89</u>
	Total:	<u>1,348,583.49</u>			<u>885,183.53</u>

- (2) The secondment period had not begun.
- (3) The secondment period had not begun.
- (4) Three days counted as having rendered services in Hong Kong in August 2014, namely, 8 August 2014 (whole day), 15 August 2014 (whole day), and 22 August 2014 (whole day). Days that the Taxpayer left the Mainland early for meeting, training, support, etc. in Hong Kong are counted as a whole day having rendered services in Hong Kong. Days that the Taxpayer returned to the Mainland in the afternoon of the day after meeting, training, support, etc. in Hong Kong are counted as a half day having rendered services in Hong Kong.
- (5) Eight and a half days counted as having rendered services in Hong Kong in September 2014, namely, 12 September 2014 (whole day), 15 September 2014 (whole day), 16 September 2014 (half day), 18 September 2014 (whole day), 19 September 2014 (whole day), 25 September 2014 (whole day), 26 September 2014 (whole day), 29 September 2014 (whole day) and 30 September 2014 (whole day).
- (6) Zero day counted as having rendered services in Hong Kong.
- (7) Six and a half days counted as having rendered services in Hong Kong, namely, 3 November 2014 (whole day), 4 November 2014 (half a day), 10 November 2014 (whole day), 11 November 2014

(2020-21) VOLUME 35 INLAND REVENUE BOARD OF REVIEW DECISIONS

(whole day), 21 November 2014 (whole day), 27 November 2014 (whole day) and 28 November 2014 (whole day).

- (8) Six days counted as having rendered services in Hong Kong, namely, 8 December 2014 (whole day), 9 December 2014 (whole day), 10 December 2014 (whole day), 12 December 2014 (whole day), 30 December 2014 (whole day) and 31 December 2014 (whole day).
- (9) $28 + 21.5 + 31 + 23.5 + 25 = 129$ days.
- (10) Two and a half days counted as having rendered services in Hong Kong, namely, 14 January 2015 (whole day), 26 January 2015 (half day) and 29 January 2015 (whole day).
- (11) One day counted as having rendered services in Hong Kong, namely, 2 February 2015 (whole day).
- (12) Seven and a half days counted as having rendered services in Hong Kong, namely, 2 March 2015 (whole day), 6 March 2015 (whole day), 12 March 2015 (whole day), 13 March 2015 (half day), 20 March 2015 (whole day), 26 March 2015 (whole day), 27 March 2015 (whole day) and 30 March 2015 (whole day).

Decision

36. This Board allows the Taxpayer's appeal. This Board reduces the assessment appealed against to one based on net chargeable income of \$376,823.