

**Case No. D45/09**

**Salaries tax** – present in Hong Kong – transit days – sections 8(1), 8(2)(j) and 68(4) of the Inland Revenue Ordinance ('IRO'), sections 2, 3 and 19 of the Interpretation and General Clauses Ordinance (Cap 1).

Panel: Colin Cohen (chairman), Erik Shum and Mark Richard Charlton Sutherland.

Date of hearing: 4 November 2009.

Date of decision: 12 January 2010.

The Taxpayer, a crew member, argued that his 'transit days' should not have been counted as days on which he was 'present in Hong Kong' for the purposes of section 8(2)(j) for the years of assessment 2006/07 and 2007/08.

The 'transit days' were days in which the Taxpayer flew in to Hong Kong but did not pass through the Hong Kong Border and Passport Control before departing for Macau.

**Held:**

1. Giving the word 'present' its ordinary meaning, once the Taxpayer landed in Hong Kong, he was indeed 'present' as provided for, and set out in, section 8(2)(j) of the IRO.
2. The Taxpayer during such period of transit in Hong Kong was neither present in Macau nor in any 'no man's land' such that he must have been, and was, 'present in Hong Kong'.
3. The precise time at which the Taxpayer becomes 'present in Hong Kong' can be accurately ascertained as being the specific time at which the aeroplane touches down on Hong Kong soil.

**Appeal dismissed.**

Cases referred to:

Owen Thomas Mangin v Inland Revenue Commissioner [1971] AC 739  
Pepper (Inspector of Taxes) v Hart [1993] AC 593  
Commissioner of Inland Revenue v Loganathan [2000] 1 HKLRD 914  
Commissioner of Inland Revenue v Common Empire Limited [2006] 7 HKTC

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D30/07, IRBRD, vol 22, 723  
WT Ramsay v IRD [1982] AC 300

Taxpayer in person.

J G A Grady, Chan Wai Yee and Wong Pui Ki for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. Mr A ('the Taxpayer') has objected to salaries tax assessments for the years of assessment 2006/07 and 2007/08. The Taxpayer is a Company D crew member.
2. The Taxpayer appeals against a Determination by the Deputy Commissioner of Inland Revenue dated 3 April 2009 in respect of salaries tax assessment for the year of assessment 2006/07 showing a net chargeable income of \$612,931 with tax payable thereon in the sum of \$90,956 and in respect of salaries tax assessment for the year of assessment 2007/08 showing a net chargeable income of \$974,730 with tax payable thereon in the sum of \$130,204.
3. The issue in respect of the present case before the Board is a narrow one. In short, it turns on whether the 'transit days' should be regarded as days in which the Taxpayer was 'present in Hong Kong' for the purposes of section 8(2)(j) of the Inland Revenue Ordinance ('IRO'). The 'transit days' were days in which he flew in to Hong Kong but did not pass through the Hong Kong Border and Passport Control ('Passport Control') before departing for Macau. There was no dispute by the parties as to the number of such transit days involved. In respect of the year 2006/07, there were 11 transit days and in respect of the year 2007/08, there were 18 transit days.
4. The facts in this case were not in dispute. The Taxpayer argues for an exemption for salaries tax for the relevant years in question on the basis that his 'transit days' should not have been counted as days on which he was 'present in Hong Kong' for the purposes of section 8(2)(j). If those days were not counted as days on which he was present in Hong Kong, he would have satisfied the 60/120 days rule as provided for, and set out in, section 8(2)(j) of the IRO and hence would have qualified for the relevant exemption. In his communications and correspondence, he drew to the Board's attention that when he arrived at Hong Kong, he did not pass through Passport Control, in turn, he made his way to Macau taking advantage of the transit/transport procedures provided by the Hong Kong International Airport Authority ('the Hong Kong Airport') with regard to passengers transitting into various ports in either Macau or China. When he arrived in Hong Kong, he purchased the relevant ferry tickets and in turn, he boarded a bonded bus that proceeded to a sky pier, at the sky pier, he then boarded a ferry to Macau.

**The evidence**

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5. The Taxpayer very helpfully confirmed that the facts upon which the Determination arrived at were agreed. These are now set out below and we find them as facts:

- (1) [Mr A] [“the Taxpayer”] has objected to the Salaries Tax assessments for the years of assessment 2006/07 and 2007/08 raised on him. The Taxpayer claims that his income should be excluded from the charge to Salaries Tax.
- (2) [Company B] and [Company C] are companies incorporated in Hong Kong. Their holding company is [Company D]. At all relevant times, [Company B] and [Company C] carried on a business of provision of [crew] services in Hong Kong.
- (3) For the year of assessment 2005/06, the Taxpayer was a [crew member] of [Company B] and his employment income from [Company B] was fully assessed to tax. The Taxpayer was present in Hong Kong for 74 days in that year.
- (4) [Company B] filed employer’s returns in respect of the Taxpayer showing, inter alia, the following particulars:

	<u>2006/07</u>	<u>2007/08</u>
(a) Capacity in which employed :	XXXXXX	XXXXXX
(b) Period of employment :	1.4.2006-31.3.2007	1.4.2007-31.12.2007
(c) Particulars of income :		
Salary	\$848,031	\$649,519
Bonus	20,189	-
Other rewards, allowances or perquisites	<u>24,711</u>	<u>96,833</u>
Total	<u>\$892,931</u>	<u>\$746,352</u>

- (5) [Company C] filed employer’s return in respect of the Taxpayer showing, inter alia, the following particulars:
- (a) Capacity in which employed : XXXXXX
- (b) Period of employment : 1.1.2008-31.3.2008
- (c) Particulars of income :
- |        |                  |
|--------|------------------|
| Salary | <u>\$328,378</u> |
|--------|------------------|

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- (6) In his Tax Returns – Individuals for the years of assessment 2006/07 and 2007/08, the Taxpayer declared the same income particulars as per Facts (4) and (5). The Taxpayer also claimed full tax exemption for these two years by reason that his respective number of days in Hong Kong was 43 days and 59 days. Hence, he should be exempt from tax under section 8(2)(j) of the Inland Revenue Ordinance [“the Ordinance”].
- (7) To support his exemption claim, the Taxpayer furnished copies of the following documents:

- (a) 3 reports headed “Crew Days in HKG Report” [“the Days Report”] prepared by [Company B] and [Company C]. The reports showed the number of days that the Taxpayer was in Hong Kong during the relevant periods were as follows:

<u>Period</u>	<u>Number of days in Hong Kong</u>
1.4.2005 – 31.3.2006	74
1.4.2006 – 31.3.2007	57
1.4.2007 – 31.3.2008	85

- (b) The Taxpayer’s duty rosters for the periods from April 2006 to March 2007 and from April 2007 to March 2008.
- (c) Lists of days in Hong Kong for the periods from April 2006 to March 2007 and from April 2007 to March 2008 prepared by the Taxpayer.
- (d) Fare receipts, boarding cards and passport records showing the Taxpayer’s arrivals and departures of Hong Kong and Macau.
- (8) In computing the number of days in Hong Kong, the Taxpayer excluded the following days from the Days Reports:

- (a) For the year of assessment 2006/07

	<u>No. of days</u>	<u>No. of days</u>
Number of days in Hong Kong per the Days Report		57
<u>Less:</u>		
<u>Date</u>	<u>Reasons</u>	
01.08.2006 <sup>[1]</sup>	Transit to Macau	1
16.08.2006 <sup>[1]</sup>	Transit to Macau	1
01.09.2006 <sup>[1]</sup>	Transit to Macau	1
05.09.2006 <sup>[1]</sup>	Transit to Macau	1

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18.09.2006 <sup>[1]</sup>	Transit to Macau	1	11
30.09.2006 <sup>[1]</sup>	Transit to Macau	1	
04.10.2006 <sup>[1]</sup>	Transit to Macau	1	
04.11.2006 <sup>[1]</sup>	Transit to Macau	1	
25.12.2006 <sup>[1]</sup>	Transit to Macau	1	
12.02.2007 <sup>[1]</sup>	Transit to Macau	1	
17.02.2007 <sup>[1]</sup>	Transit to Macau	<u>1</u>	
02.09.2006 <sup>[2]</sup>	Remained in Macau	1	
13.02.2007 <sup>[2]</sup>	Remained in Macau	<u>1</u>	
30.10.2006 <sup>[3]</sup>	Scheduled arrival was delayed	<u>1</u>	
Total			43

(b) For the year of assessment 2007/08

		<u>No. of days</u>	<u>No. of days</u>
Number of days in Hong Kong per the Days Report			85
<u>Less:</u>			
<u>Date</u>	<u>Reasons</u>		
13.05.2007 <sup>[1]</sup>	Transit to Macau	1	18
30.05.2007 <sup>[1]</sup>	Transit to Macau	1	
08.07.2007 <sup>[1]</sup>	Transit to Macau	1	
28.07.2007 <sup>[1]</sup>	Transit to Macau	1	
08.08.2007 <sup>[1]</sup>	Transit to Macau	1	
18.08.2007 <sup>[1]</sup>	Transit to Macau	1	
30.08.2007 <sup>[1]</sup>	Transit to Macau	1	
03.09.2007 <sup>[1]</sup>	Transit to Macau	1	
18.09.2007 <sup>[1]</sup>	Transit to Macau	1	
27.09.2007 <sup>[1]</sup>	Transit to Macau	1	
07.10.2007 <sup>[1]</sup>	Transit to Macau	1	
26.10.2007 <sup>[1]</sup>	Transit to Macau	1	
08.11.2007 <sup>[1]</sup>	Transit to Macau	1	
20.11.2007 <sup>[1]</sup>	Transit to Macau	1	
11.12.2007 <sup>[1]</sup>	Transit to Macau	1	
26.02.2008 <sup>[1]</sup>	Transit to Macau	1	
29.02.2008 <sup>[1]</sup>	Transit to Macau	1	
25.03.2008 <sup>[1]</sup>	Transit to Macau	<u>1</u>	
09.08.2007 <sup>[2]</sup>	Remained in Macau	1	
04.09.2007 <sup>[2]</sup>	Remained in Macau	1	
09.11.2007 <sup>[2]</sup>	Remained in Macau	1	
21.11.2007 <sup>[2]</sup>	Remained in Macau	1	

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22.11.2007 <sup>[2]</sup>	Remained in Macau	1	6
26.03.2008 <sup>[2]</sup>	Remained in Macau	<u>1</u>	
16.10.2007 <sup>[3]</sup>	Scheduled arrival was delayed	1	2
01.12.2007 <sup>[3]</sup>	Scheduled arrival was delayed	<u>1</u>	
Total			<u>26</u>
			<u>59</u>

Note:

1. The days that the Taxpayer was scheduled to arrive in HongKong ["the Transit Days"] according to the Days Reports.
  2. The Taxpayer remained in Macau for the whole day.
  3. The Taxpayer arrived in Hong Kong on the following day.
- (9) The Assessor agreed to exclude the days that the Taxpayer remained in Macau for the whole day and the arrivals were delayed to the next day in counting the number of days he was in Hong Kong. However, the Assessor maintained the view that the Taxpayer was present in Hong Kong for the Transit Days. As such, the number of days the Taxpayer was present in Hong Kong should be as follows:

	<u>2005/06</u>	<u>2006/07</u>	<u>2007/08</u>
Number of days in Hong Kong per the Days Reports	74	57	85
<u>Less: Remained in Macau [Fact (8)]</u>	-	2	6
Scheduled arrival was delayed [Fact (8)]	<u>-</u>	<u>1</u>	<u>2</u>
Total	<u>74</u>	<u>54</u>	<u>77</u>

- (10) The Assessor considered that the Taxpayer did not qualify for the exemption under section 8(2)(j) of the Ordinance. Accordingly, the Assessor raised on the Taxpayer the following Salaries Tax assessments:

	<u>2006/07</u>	<u>2007/08</u>
	\$	\$
Income:		
[Company B] [Facts (4)(c) and (6)]	892,931	746,352
[Company C] [Facts (5)(c) and (6)]	<u>-</u>	<u>328,378</u>
	892,931	1,074,730
<u>Less: Basic allowance</u>	100,000	100,000
Child allowance	80,000	-
Single parent allowance	<u>100,000</u>	<u>-</u>
Net Chargeable Income	<u>612,931</u>	<u>974,730</u>

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Tax Payable thereon	<u>90,956</u>	<u>130,204</u>
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- (11) The Taxpayer objected against the assessments in Fact (10) on the grounds that he should be entitled to the tax exemption provided in section 8(2)(j) of the Ordinance since he remained in Hong Kong for less than 60 days in each year of assessment 2006/07 and 2007/08, and less than 120 days during the consecutive two years one of which was the relevant year of assessment.
- (12) In amplification of the ground of objection, the Taxpayer stated the following:
- (a) “Each of my TRANSIT days at the HKG Airport I did not enter HKG via passport control, remaining in the transit area of the airport, proceeding directly to Macau from the restricted airport transit area.”
- (b) “[Section 8(2)(j) of the Ordinance] refers clearly to time ‘Spent’ in Hong Kong.

In order to ‘Spend’ time in Hong Kong, one must ‘Land’ and then be ‘Admitted’ to ‘Enter’ Hong Kong.

According to Hong Kong Immigration Laws and procedures, a passenger or crew arriving by air at the HKG International Airport, is considered to have ‘Landed’ in Hong Kong.

However, according to the same Laws, the passenger or crew must go [through] Passport Control to be ‘Admitted’ and ‘Enter’ Hong Kong.

It is also an International custom to consider Passport Control as the official entry point.”

- (c) “[S]ince they must be ‘Admitted’ to ‘Enter’ [Hong Kong] via Passport Control ..., the official time of ‘Enter’ is the time of ‘Admittance’.

When ‘Admitted’ The Immigration Officer stamps the passport ‘Admitted[’]. The ‘Entry’ is recorded in the computerized system and the record used by all Government Departments including the Legal System in Hong Kong.

... in a Hong Kong Court of Law, the Immigration Records and Procedures will support that a passenger or crew remaining in ‘Transit’ at the airport, awaiting and proceeding as a passenger to

another city as a final destination, such Court would deem the ‘Transit’ days as days not ‘Spent’ in [Hong Kong].”

- (d) “The record of day of arrival and departure [of Company D] is purely incidental. Only the Immigration record is capable of accurately recording the day of arrival and departure.

Counting the total days in Hong Kong by simply using the employers scheduled days of arrival and departure and ignoring the Immigration records is not correct. Also counting days in transit, days that I did not enter in HKG via Passport Control as days spent in HKG is not correct, not only using Hong Kong Immigration Laws and Procedures as well as commonly used International Immigration Rules and Procedures.

Although Landed in HKG, any person not admitted in Hong Kong via Passport Control, has not entered HKG.

A day not physically entered in HKG does not constitute a day spent in HKG and therefore should not count in the total days spent in HKG.”

- (e) “[T]he days that I remained in transit at the Hong Kong International Airport, never entering or being admitted into Hong Kong Territory via Passport Control, are according to your Immigration Laws, days not spent in HKG.

...

My transit time at HKG International Airport was minimal in time, remaining only the required time in order to connect to Macau ferry. Only a few ferry scheduled connections are available during the day.”

- (f) “During many years the IRD has accepted hours (not days) in transit in HKG as days not spent in HKG and therefore did not consider or counted Transit days towards the 60/120 days rule.”
- (g) “[Company D] list of days in HKG is simply the list of the log recording landing and departing times in HKG. It does not include the personal movements of every crew once the crew duty is complete on arrival.

...



In order to be accurate in counting days spent in HKG, the employer's records as well as Immigration records should be used in order to maintain accuracy. Ignoring Immigration records is not only unfair but also contravenes HKG Immigration Laws and Rules controlling the entrance and admittance of every individual in HKG."

- (h) "The Employer's Roster Report only states the scheduled days of arrival and does not record the crews traveling movements following the arrival at the terminal."
- (i) "My employer does not record my days of absentia in HKG. When a crew arrives in HKG and his duties are complete, the crew is free to travel to another destination, including crews who are based in HKG but do not reside in HKG. The crew will then return to HKG on the scheduled departure duty day."

(13) The Taxpayer put forth the following contentions:

- (a) "The only legal and logical definition of 'Presence in Hong Kong' can be passage through Border and Immigration Controls. It is impossible to include either a flight over or a sailing through Hong Kong airspace or territorial waters if it does not include subsequent passage through Border and Immigration Controls.

The logic and legality behind this is that even the ship's master or aircraft Captain, cannot determine with any accuracy the precise time of such events.

My aircraft or vessel will enter and depart Hong Kong at a different time to that recorded by the Immigration Department at the Border Control. My passport may well be stamped when I pass through Immigration and both I and the Immigration Department will regard this as the time I either arrived or departed Hong Kong. Quite clearly, it is impossible to use any other definition of what constitutes 'a presence in Hong Kong'."

- (b) "Prior to the 6th of April 2008 [the date that the Finance Act 2008 in UK was enacted], days of arrival and departure in the UK, did not count as days of presence in the UK. After 6 April 2008, any day where the individual is present in the UK at midnight will be counted as a day of presence in the UK.

Additional exemptions such as involving days spent in transit, which could involve being in the UK at midnight, will not be counted as days of presence in the UK, so long as during transit the

individual does not engage in activities that are to substantial extent unrelated to their passage through the UK. So, for example, if they take time out to attend a business meeting then the transit exemption will not have effect.

With due respect to the IRD, I humbly suggest that more precise day counting rules as published by the UK – HM Revenue & Customs would clarify and facilitate the assessment of many a case of individuals who do not reside in Hong Kong.”

- (c) Similar claims lodged by his [crew] colleagues were accepted by the Inland Revenue Department.

(14) The Taxpayer furnished the following further documents:

- (a) 3 documents downloaded from the website of HM Revenue & Customs of the UK headed:
  - (i) Residence and Domicile: The Residence Test and Day Counting Rules dated 12<sup>th</sup> March 2008
  - (ii) FAQ: Residence and domicile – day counting
  - (iii) Residence and domicile: amendments to the residence and domicile tax rules – December 2008 – Day counting.
- (b) A letter dated 13<sup>th</sup> February 2009 from [Company D] relating to the Duty printout.
- (c) A revised assessment dated 24<sup>th</sup> October 2007 issued by the Inland Revenue Department to his colleague informing him that his 2005/06 Salaries Tax assessment was revised to nil.
- (d) A letter dated 12<sup>th</sup> December 2008 issued by the Inland Revenue Department to his colleague informing him that his 2007/08 Salaries Tax assessment was cancelled.’

6. Therefore, having regard to the issues that were before us, the Taxpayer did not need to give the evidence but in turn, drew our attention to various documents for our consideration and review.

### **The law**

7. Section 8(1) of the IRO is the basis charge for salaries tax, which provides as follows:

- ‘(1) *Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources-*
  - (a) *any office or employment of profit; .....*’

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8. Section 8(2)(j) of the IRO provides as follows:

‘(2) *In computing the income of any person for the purposes of subsection (1) there shall be excluded the following-*

.....

(j) *income derived from services rendered as master or member of the crew of a ship or as commander or member of the crew of an aircraft by a person who was present in Hong Kong on not more than-*

(i) *a total of 60 days in the basis period for that year of assessment; and*

(ii) *a total of 120 days falling partly within each of the basis periods for 2 consecutive years of assessment, one of which is that year of assessment,’*

9. Section 68(4) of the IRO provides the burden of proof in respect of the hearing before the Board and states as follows:

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

10. The Interpretation and General Clauses Ordinance (‘Chapter 1’) insofar as it is relevant to the various issues that need to be considered has the following pre-amble:

‘*To consolidate and amend the law relating to the construction, application and interpretation of laws, to make general provisions with regard thereto, to define terms and expressions used in laws and public documents, to make general provision with regard to public officers, public contracts and civil and criminal proceedings and for purposes and for matters incidental thereto or connected therewith.’*

11. Section 2 provides for the application of Chapter 1:

‘(1) *Save where the contrary intention appears either from this Ordinance or from the context of any other Ordinance or instrument, the provisions of this Ordinance shall apply to this Ordinance and to any other Ordinance in force, whether such other Ordinance came or comes into operation before or after the commencement of this Ordinance, and to any instrument made or issued under or by virtue of any such Ordinance.*

(1A) *The inclusion of the substance of a provision of this Ordinance in another Ordinance does not imply the exclusion of the application of any other*

*provision of this Ordinance to the other Ordinance. (Added 89 of 1993 s. 2)*

(2) *This Ordinance shall be binding on the State.'*

12. Section 3 provides, in relation to the interpretation of the relevant words and expressions, as follows:

*“Hong Kong”(香港)means the Hong Kong Special Administrative Region;*

.....

*“Hong Kong Special Administrative Region”(香港特別行政區) means the Hong Kong Special Administrative Region of the People’s Republic of China, the geographical extent of which is the land and sea specified or referred to in Schedule 2;’*

13. Schedule 2 of Chapter 1 referred to in the definition of ‘Hong Kong’ has the heading ‘**THE LAND AND SEA COMPRISING THE HONG KONG SPECIAL ADMINISTRATIVE REGION**’ and this reads as follows:

*‘The land and sea comprised within the boundary of the administrative division of the Hong Kong Special Administrative Region of the People’s Republic of China promulgated by the Order of the State Council of the People’s Republic of China No. 221 dated 1 July 1997 and published as S.S. No. 5 to Gazette No. 6/1997 of the Gazette\*. Note: \* Reproduced in BLIS Cap 2207’*

14. Finally, Section 19 of Chapter 1 under the heading ‘**General principles of interpretation**’ provides as follows:

*‘An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.’*

15. As can be seen from the relevant provisions as set out in section 8(2)(j), the Taxpayer is able to satisfy the relevant exemption if he was ‘present in Hong Kong’ for not more than the relevant total of days, that is, 60 days in the relevant basis period and 120 days in respect of two consecutive years of assessment, one of which is that year of assessment. This is commonly known as the 60/120 days rule.

16. Therefore, this is the question of interpretation that we need to embark upon is to consider whether or not the Taxpayer, when he landed in Hong Kong and completed the relevant transit procedures without passing through Passport Control and, in turn, departed for Macau, was he ‘present in Hong Kong’ during the relevant period of time?

### **The case law**

17. Our attention was drawn to the following cases:
- (a) Owen Thomas Mangin v Inland Revenue Commissioner [1971] AC 739;
  - (b) Pepper (Inspector of Taxes) v Hart [1993] AC 593;
  - (c) Commissioner of Inland Revenue v Loganathan [2000] 1 HKLRD 914;
  - (d) Commissioner of Inland Revenue v Common Empire Limited [2006] 7 HKTC; and
  - (e) D30/07, IRBRD, vol 22, 723.

18. Mr Grady, in his submissions, took us through the relevant cases and submitted to us that we should be giving the words ‘their ordinary meaning’, we should look at what is clearly said and, in turn, we should look at the object of the construction of a tax statute in order to ascertain the will of the legislature to ensure that neither injustice nor absurdity was intended. He relied heavily on WT Ramsay v IRD [1982] AC 300 at page 323 in which Lord Wilberforce said as follows:

*‘A subject is only to be taxed on clear words, not on “intendment” or on the “equity” of an Act ... What are “clear words” is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should be regarded ...’*

19. Mr Grady submitted to us that the word ‘present’ must be given its ordinary meaning. He asserted that the Taxpayer was indeed present in Hong Kong on the relevant days in question. He relies heavily on a definition set out in the Oxford Dictionary of English which states that ‘present’ means ‘in a particular place’. Therefore, his submission was that, once the Taxpayer landed in Hong Kong in respect of those specific days, he was present in Hong Kong when the aeroplane landed. The Taxpayer, however, asserted that he was not present in Hong Kong on those days because he did not pass through Passport Control.

20. Yet, Mr Grady in his submission then puts forward, if he was not ‘..... present in Hong Kong whilst in the transit area at Hong Kong International Airport, where was he present? .....’ Mr Grady submitted that we should be concerned with the issue of whether, in fact, the Taxpayer was present in Hong Kong on those relevant days when he transitted through Hong Kong Airport. He asserted that giving the definition of ‘Hong Kong’ in Chapter 1 and the location of the airport within the boundaries of Hong Kong as particularly defined above, it must therefore follow that he was present in Hong Kong on the days in question. However, the Taxpayer in his correspondence and communications and in his submissions before us asserted that he only becomes present in Hong Kong once he passes through Passport Control and presents his passport to enter Hong Kong.

21. He indicated to us that he accepted without hesitation the fact that once he left Macau to return to Hong Kong via the Macau ferry into Central or Kowloon, once he landed in Hong Kong and passed through Passport Control, then he was present in Hong Kong during the course of that day.

22. Mr Grady in his submission also drew our attention to D30/07, IRBRD, vol 22, 723 (Horace Wong Yuk Lun SC (Chairman), Fred Kan and Kwok Siu Man). In that decision, the board there outlined the circumstances under which different approaches and principles with regard to interpretation may be applied. There, the board recognised that where the object of the relevant provisions is simply fiscal (the collection of funds to swell the general revenues of the State) a provision such as section 19 of Chapter 1 would be of little assistance in the construction of such provisions. However, the board did express a view where the primary purpose is not fiscal, the provision is deemed to be remedial and the approach mandated by section 19 of Chapter 1 must be followed. The headnote, stated as follows:

- ‘1. *Where an object (other than a purely fiscal one) can be discerned of the relevant tax provision, the provision is deemed to be remedial and a fair, large and liberal construction should be adopted in order to ensure the attainment of the object in accordance with the true intent, meaning and spirit of the statute (Owen Thomas Mangin v Inland Revenue Commissioner [1971] AC 739 and Commissioner of Inland Revenue v International Importing Limited [1972] NZLR 1095 considered).*
2. *In the present case, the Board is concerned with an allowance provided in a tax statute, as opposed to a mere fiscal provision designed to collect tax for the benefit of the general revenue. Clearly there is a purpose or object behind the granting of such a statutory allowance. The question is to ascertain the object behind the granting of ADPA, and the relevant statutory provisions should be construed following the approach mandated by section 19 of IGCO.*
3. *In applying section 19 of IGCO, the Board is required not merely to give the relevant statutory provision a fair, large and liberal construction but “one which combines all elements in such a way as will best ensure the object of the statute as a whole and the provision under consideration in particular according to its true intent, meaning and spirit”: see judgment of Wilson J in Union Motors Ltd and another v Motor Spirits Licensing Authority and another [1964] NZLR 146 at 150, where the learned judge considered the effect of section 5(j) of the Acts Interpretation Act 1924 which, as pointed out above, was in terms similar to section 19 of IGCO.*
4. *Following the approach of section 19 of IGCO and adopting a fair, large and liberal construction is not the same as giving the statute an “equitable construction”, nor does it mean that the rules of equity should*

*be applied to the task of statutory construction. As is often said, there is no equity about a tax. The word “fair” in section 19 of IGCO refers to the construction of the relevant provision itself and not to the result of that construction: see the Union Motors Ltd Case, supra, at page 150 (Wong Tai Wai, David and another v Commissioner of Inland Revenue 6 HKTC 460 followed).*

23. The decision also referred to Pepper (Inspector of Taxes) v Hart [1993] AC 593 whereby it was felt that it was not permissible to refer to the budget debate which introduced the relevant legislation. At page 745 of the decision, the board said as follows:

*‘This Board has no hesitation in dismissing this appeal which has no merit whatsoever. As stated in D24/87 the Board of Review has no power to extend the scope of any extra-statutory concession. Indeed the Board of Review cannot even apply let alone extend any extra-statutory concession. The Board is strictly bound by the provisions of the Inland Revenue Ordinance and has no discretionary powers other than those laid down in the Inland Revenue Ordinance.’*

24. The Taxpayer also in his submissions drew to the Board’s attention that there was a series of other cases whereby his colleagues had been able to persuade the IRD to accept that their days in transit would not be counted as days present in Hong Kong. He produced to us a series of letters and correspondence which supported such a contention. In short, he put forward a submission that by the IRD accepting those cases in question, the IRD had created a precedent and, as such, he should be treated in the same way as his colleagues. However, Mr Grady submitted that the IRD does not have any policy or general practice of applying a ‘special’ approach to transit days. Whether or not there were other cases whereby an assessor took the view that the transit days should not be taken into account is neither here nor there. These cases are not before the board in the present appeal and, in any event, would undoubtedly have their own factual matrix. In the event that a mistake was made, it is the duty of the board to apply the law and to correctly interpret the provisions set out in the IRO as to the meaning of ‘present in Hong Kong’. He took the view that the Taxpayer cannot rely on such cases to show that the treatment of his colleagues in other cases was material to the present appeal before the Board.

### **Our analysis**

25. Having very carefully considered the submissions put forward both by the Taxpayer and Mr Grady on behalf of the IRD, we have no hesitation in coming to the conclusion that the submissions put forward to us by Mr Grady are indeed correct and find favour with us.

26. We give the word ‘present’ its ordinary meaning and have no hesitation in concluding that once the Taxpayer landed in Hong Kong, he was indeed ‘present’ as provided for, and set out in, section 8(2)(j) of the IRO. Therefore, despite the fact that he was transitting to Macau, he was still ‘present in Hong Kong’ in accordance with the

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relevant section. By way of further amplification, in order to arrive and land in Macau, the Taxpayer first had to transit through Hong Kong even though he did not pass through Passport Control. Giving the word 'present' its ordinary meaning, and by a necessary process of elimination, the Taxpayer during such period of transit in Hong Kong was neither present in Macau nor indeed was he in any disputed or unoccupied territory commonly referred to as 'no man's land' leaving us with the only interpretation that he must have been, and was, 'present in Hong Kong'.

27. We again accept that in the absence of any legislation or provisions to the contrary, we are only concerned with the issues as to whether in fact the Taxpayer was present in Hong Kong on the relevant days, when he transited through Hong Kong International Airport. We accept that given the definition of 'Hong Kong' in Chapter 1 and the location of the airport within the boundaries of Hong Kong as defined, it therefore follows that he was 'present in Hong Kong' on the days in question. We accept that we cannot see how any injustice or absurdity would result by giving the word 'present' its ordinary meaning when used in section 8(2)(j) of the IRO.

28. We were asked to consider whether it would be appropriate for us to look at the legislative history leading to the enactment of section 8(2)(j) of the IRO. In our view, the answer must be a 'no'. We take the view that there is no ambiguity or that a literal meaning would lead to absurdity. Hence, we come to the conclusion that the words 'present in Hong Kong' must be given its literal meaning. Once the Taxpayer's aeroplane had landed (in this case more specifically when it touched down on Hong Kong soil at Hong Kong Airport), he was 'present in Hong Kong' in accordance with the provisions of section 8(2)(j) of the IRO. The precise moment in time at which the Taxpayer becomes 'present in Hong Kong' can thus be ascertained with accuracy as being the specific time at which the aeroplane so touches down.

29. However, we do wish to set out our concerns over the fact that the Taxpayer may very well have been treated differently compared to the way in which other assessors dealt with some of his colleagues. We would have thought that this should not have happened and it is incumbent upon the IRD to ensure that in future all taxpayers in a similar position should be treated in the same way unless, of course, the factual matrix of each case distinguishes one taxpayer from another and this has an inevitable bearing and impact on the outcome of their treatment. We would have thought that having regard to this decision, the IRD should ensure that each and every taxpayer who falls within the ambit of section 8(2)(j) of the IRO should be treated in a similar way.

30. Hence, having reviewed the evidence carefully and having considered all submissions put before us, we dismiss the Taxpayer's appeal and uphold the relevant assessments for the years in question.