Case No. D5/14

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

Panel: Chow Wai Shun (chairman), Li Ming Kwong and Wong Fung King Amy.

Date of hearing: 28 March 2014.
Date of decision: 9 May 2014.

The Taxpayer appeals against the Determination of the Deputy Commissioner in respect of the Salaries Tax Assessments for the years of assessment 2010/11 and 2011/12 raised on him, arguing that his employment was under Company B, a PRC subsidiary wholly owned by Company C which is a private company incorporated in Hong Kong, and that none of his job duty required him to work in Hong Kong. He attached to his notice a copy of a labour contract dated 25 September 2008 purported to have been signed between him and Company B. He had an employment agreement effective from 1 December 2006 with Company C.

Held:

1. The Taxpayer's income under the 2006 Employment Contract arose in or was derived from Hong Kong even though he worked across the border outside Hong Kong. He had been all along under one continuous employment with Company C, irrespective of any weight the Board might have attached to the 2008 Labour Contract. As such, according to Goepfert and Lee Hung Kwong, his entire employment income is subject to Salaries Tax wherever his services have been rendered unless any of the exemption under the IRO may apply.

2. Even if a taxpayer's income has a source in Hong Kong, he may still rely on the relief under section 8(1A)(b)(ii). Whether a taxpayer renders outside Hong Kong all the services in connection with his employment is a question of fact which the Board shall determine in the light of all the evidence in totality. In a holistic consideration of the circumstance of this case, the Board cast considerable doubt on whether the Taxpayer did render all services in connection with his employment outside Hong Kong. As such, the Taxpayer fails to discharge the onus of proof under section 68(4) of the IRO.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888
Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80
D43/94, IRBRD, vol 9, 278
D54/97, IRBRD, vol 12, 354
D2/04, IRBRD, vol 19, 76
D39/04, IRBRD, vol 19, 319

Appellant in person.
Ng Lai Ying and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

1. The Appellant appeals against a Determination of the Deputy Commissioner of Inland Revenue dated 26 November 2013 in respect of the Salaries Tax Assessments for the years of assessment 2010/11 and 2011/12 raised on him ('the Determination').

2. The Appellant chose not to give any oral evidence at the hearing. Attached to his notice and statement of grounds of appeal is a copy of a labour contract for use in City A, PRC (A 城市勞動合同) dated 25 September 2008, purported to have been signed between the Appellant and Company B, a PRC subsidiary wholly owned by Company C ('the 2008 Labour Contract').

Facts

3. Subject to what needs to be said below with regards to further documentary evidence adduced by the parties, we find the following facts relevant to this appeal:

(1) Company C is a private company incorporated in Hong Kong in 1998 and carrying on business in Hong Kong.

(2) By an employment agreement effective from 1 December 2006 ('2006 Employment Contract'), the Appellant was employed as Position D of Company C. The employment agreement contains, among other things, the following terms:

(a) <u>Place of work</u>
'[The Appellant's] place of work will be from the Company C office in City A, China or from other company, suppliers or customer locations as the need arises.'

(b) Hours of work
'[The Appellant's] average working week will be 40 hours normally Monday to Friday, however [the Appellant] may be expected to work additional hours should the need arise.'

(c) Holidays
'[The Appellant] will have 10 working days annual leave (effective after probation).
[The Appellant] will observe the public holidays in China.'

(3) Company C filed employer's returns in respect of the Appellant for the years of assessment 2010/11 and 2011/12, which show the following particulars:

	2010/11	2011/12
Period of employment:	1-4-2010 – 31-3-2011	1-4-2011 – 31-3-2012
Capacity in which employed:	Position E	
Total income:	$892,998	$865,852
Whether the employee was paid by an overseas company:	No	No
Remarks:	Employee has been fully taxed in Mainland China ('the Mainland')	

(4) In his Tax Returns – Individuals for the years of assessment 2010/11 and 2011/12, the Appellant declared the same amount of income as per paragraph 3(3). However, he made an exemption claim on the basis that he worked full time in the Mainland during the two years of assessment and did not render services in Hong Kong and that he had paid tax in the Mainland in respect of his income. In support of his claim, he submitted copies of the Individual Income Tax ('IIT') Certificates issued by the Mainland Tax Authority for the periods from 1 April 2010 to 31 March 2011 and 1 April 2011 to 31 March 2012 respectively.

(5) The Assessor accepted that part of the Appellant's income had been returned for IIT purposes and that IIT charged thereon had been paid. She raised on the Appellant the following 2010/11 and 2011/12 Salaries Tax Assessments:

	2010/11	2011/12
	$	$
Total Income	892,998	865,852

		2010/11 $	2011/12 $
Less:	Income excluded under section 8(1A)(c) of the Inland Revenue Ordinance ('the IRO')	513,779	527,554
		379,219	338,298
Less:	Retirement scheme contributions	12,000	-
		367,219	338,298
Less:	Basic allowance	108,000	108,000
	Dependent parent allowance	60,000	-
Net Chargeable Income		199,219	230,298
Tax Payable thereon		15,867	15,150

(6) The Appellant objected to the above assessments.

(7) In response to the Assessor's enquiries, Company C provided the following information:

(a) Its office hour was from 9:30 a.m. to 6:30 p.m. generally.

(b) The Appellant's place of work was in City A and his main duties were project management and handling of engineering issues.

(c) The Appellant's average working hours in the City A office were 8 hours per day from Monday to Friday but the working hours were flexible, depending on the job nature. Employees were entitled to extra rest hours if they worked overtime during week days.

(d) The Appellant did not need to and did not render any services related to his job functions based in the Mainland during his stays in Hong Kong.

(e) The Appellant was entitled to 14 days annual leave per annum. He took leave on the following dates:

(i) Year of assessment 2010/11

Date	No. of days	Nature of leave
19-20 April 2010	2	Annual leave
17-25 June 2010	7	Discretionary leave
23-24 September 2010	2	Annual leave
27 September 2010	1	Discretionary leave
29 November 2010	1	Sick leave
28 February 2011	1	Annual leave

Date	No. of days	Nature of leave
25-31 March 2011	5	Annual leave
Total	19	

(ii) Year of assessment 2011/12

Date	No. of days	Nature of leave
15-18 April 2011	2	Annual leave
30 May 2011	1	Sick leave
31 May 2011	0.5	Sick leave
4-5 August 2011	2	Annual leave
30 September 2011	1	Annual leave
24 October 2011	1	Annual leave
26-28 December 2011	3	Annual leave
3 January 2012	1	Annual leave
26-28 March 2012	3	Annual leave
Total	14.5	

(8) Based on the records provided by the Immigration Department, the Assessor ascertained that the number of days attributable to the Appellant's services in the Mainland for the years of assessment 2010/11 and 2011/12 are 224.5 and 232.5 respectively. These are so on the following assumptions:

(a) The Appellant's absence from Hong Kong during the respective periods were wholly attributable to his stay in the Mainland; and

(b) For the purposes of counting the number of days, days in which the Appellant

(i) departed from Hong Kong on or before 10:30 a.m. or arrived at Hong Kong after 5:30 p.m. had been treated to be in the Mainland for the whole day;

(ii) departed from Hong Kong after 5:30 p.m. or arrived at Hong Kong before 10:30 a.m. had been treated to be in Hong Kong for the whole day; and

(iii) departed from or arrived at Hong Kong between 10:30 a.m. and 5:30 p.m. had been treated to be in the Mainland for just half a day.

(9) The Assessor observed that the Appellant had stayed in Hong Kong during office hours on the following working days:

(a) Year of assessment 2010/11

Date	Day of the week	Time of departure from / arrival at Hong Kong
2 April 2010	Friday	Departed at 13:30
12 April 2010	Monday	Whole day in Hong Kong
13 April 2010	Tuesday	Arrived at 16:27
23 April 2010	Friday	Whole day in Hong Kong
29 April 2010	Thursday	Departed at 12:05
14 May 2010	Friday	Departed at 11:07
20 May 2010	Thursday	Arrived at 16:19
26 May 2010	Wednesday	Whole day in Hong Kong
4 June 2010	Friday	Departed at 13:09
8 June 2010	Tuesday	Arrived at 16:19
14 June 2010	Monday	Departed at 12:08
7 July 2010	Wednesday	Departed at 11:09
12 July 2010	Monday	Departed at 11:04
26 August 2010	Thursday	Departed at 11:06, arrived at 16:56
31 August 2010	Tuesday	Arrived at 16:19
15 September 2010	Wednesday	Departed at 12:55
28 September 2010	Tuesday	Arrived at 11:02, departed at 14:34
29 September 2010	Wednesday	Arrived at 13:56
18 October 2010	Monday	Departed at 13:59
11 November 2010	Thursday	Departed at 12:08
3 December 2010	Friday	Departed at 12:34
20 December 2010	Monday	Arrived at 14:32
27 December 2010	Monday	Departed at 12:27
28 December 2010	Tuesday	Departed at 12:29
12 January 2011	Wednesday	Departed at 11:42
18 January 2011	Tuesday	Departed at 11:14
26 January 2011	Wednesday	Departed at 11:32
14 February 2011	Monday	Departed at 13:27
14 March 2011	Monday	Departed at 11:20
16 March 2011	Wednesday	Arrived at 15:56
22 March 2011	Tuesday	Departed at 11:01

(b) Year of assessment 2011/12

Date	Day of the week	Time of departure from/ arrival at Hong Kong
13 April 2011	Wednesday	Departed at 14:00
21 April 2011	Thursday	Departed at 12:08
3 June 2011	Friday	Whole day in Hong Kong
22 June 2011	Wednesday	Whole day in Hong Kong
23 June 2011	Thursday	Whole day in Hong Kong
25 July 2011	Monday	Arrived at 15:51
29 July 2011	Friday	Arrived at 12:49
12 August 2011	Friday	Whole day in Hong Kong
16 August 2011	Tuesday	Departed at 13:09
23 August 201	Tuesday	Whole day in Hong Kong
25 August 2011	Thursday	Departed at 11:34
20 October 2011	Thursday	Arrived at 15:35
21 October 2011	Friday	Departed at 14:30
4 November 2011	Friday	Arrived at 13:49
15 November 2011	Tuesday	Arrived at 15:55
25 November 2011	Friday	Departed at 11:01
6 January 2012	Friday	Departed at 11:12
9 January 2012	Monday	Departed at 11:10
17 January 2012	Tuesday	Departed at 13:26
20 March 2012	Tuesday	Departed at 12:45

(10) In response to the Assessor's enquiries, the Appellant put forward the contentions that:

(a) Company C agreed to apply flexible hours to his duties due to his job nature. Thus, he was permitted to stay in Hong Kong during working hours on working days.

(b) His employment was not sourced in Hong Kong.

(11) The Assessor maintained the view that only part of the Appellant's income which was attributable to his services in the Mainland can be excluded from his Assessable Income pursuant to section 8(1A)(c) of the IRO. Having regard to the Appellant's days of work in the Mainland at paragraph 3(8), the Assessor considered that the 2010/11 and 2011/12

Salaries Tax Assessments should be revised as follows, which the Deputy Commissioner agreed in the Determination:

	2010/11	2011/12
Days in the Mainland (A) [paragraph 3(8)]	224.5 days	232.5 days
Days in the year (B)	365 days	366 days
	$	$
Total Income (C)	892,998	865,852
Less: Income excluded under section 8(1A)(c) (C) x (A)/(B)	549,255	550,029
	343,743	315,823
Less: Retirement scheme contributions	12,000	-
	331,743	315,823
Less: Basic allowance	108,000	108,000
Dependent parent allowance	60,000	-
Net Chargeable Income	163,743	207,823
Tax Payable thereon	9,836	11,329

(12) The Appellant appealed against the revised assessments under the Determination.

4. The Respondent raised doubt on the contemporaneousness and authenticity of the 2008 Labour Contract:

(1) The 2008 Labour Contract was not provided until after transmission of the Determination and the Appellant's response that he did not have a copy of it beforehand was difficult to comprehend.

(2) The monthly salary stated in the 2008 Labour Contract is higher than the amount of wages received during the relevant time but is exactly the same as that in 2011.

(3) It is provided in the 2008 Labour Contract that wages would be paid on the 25th day of each month which does not match with all the pay slips provided by the Appellant.

We do not see it necessary to rule on this issue. As will be seen below, it does not affect our analysis.

5. The Respondent also referred us to the conduct of the Appellant's objection to the Salaries Tax Assessment for the year of assessment 2009/10. Particularly, the Respondent highlighted that:

(1) The Appellant objected on the same grounds that the assessment was excessive because he had not rendered any services in Hong Kong and that his income had been taxed in the Mainland.

(2) When being asked for the reasons of his presence in Hong Kong during the working days in 2009/10, the Appellant admitted that he had picked up foreign clients at train station, arranged factory visit with clients in City A, accompanied foreign clients to airport and accompanied foreign clients for visa renewal.

(3) The Appellant did not lodge any appeal against the determination issued to him with the same results, that is to say, to reject his claim under section 8(1A)(b)(ii) but with section 8(1A)(c) allowed.

In our view, how the Appellant dealt with the assessment in the previous year of assessment does not, and should not, have any direct bearing on this appeal. Each year of assessment is to be looked at and considered separately.

6. The Appellant did not challenge other further documentary evidence adduced by the Respondent and on such basis we find the following additional facts:

(1) As provided by Company C in response to the Assessor's enquiry:

(a) A breakdown of income reported in the Employer's returns of remuneration and pension for the years of assessment 2010/11 and 2011/12 as follows:

Year of assessment 2010/11

Period	Salary	Bonus	Total
	$	$	$
Apr 2010	54,112.69		
May 2010	54,112.69		
Jun 2010	54,112.69		
Jul 2010	54,112.69		
Aug 2010	54,112.69		
Sep 2010	54,112.69		
Oct 2010	55,448.33		
Nov 2010	55,448.33		
Dec 2010	55,448.33		
Jan 2011	59,114.27	69,169.18	
Feb 2011	59,114.27	155,465.06	
Mar 2011	59,114.27		
	668,363.94	224,634.24	892,998.18

Year of assessment 2011/12

Period	Salary	Bonus	Total
	$	$	$
Apr 2011	59,114.27		
May 2011	59,114.27		
Jun 2011	59,114.27		
Jul 2011	60,025.46		
Aug 2011	60,025.46		
Sep 2011	60,873.03		
Oct 2011	60,873.03		
Nov 2011	60,873.03		
Dec 2011	60,873.03		
Jan 2012	63,950.53	133,115.26	
Feb 2012	63,950.53		
Mar 2012	63,950.53		
	732,737.44	133,115.26	865,852.70

(b) The above remuneration was paid on standing instruction into the Appellant's joint saving account with his spouse in Hong Kong.

(c) The main reason for signing the 2008 Labour Contract is for the Individual Income Tax submission in Mainland China.

(d) The length of the Appellant's service with Company C would not be broken by the 2008 Labour Contract as there is no termination of contract.

(e) During the period from 25 September 2008 to 24 September 2013, there is no change in the fringe benefits provided to the Appellant, including those in respect of Mandatory Provident Fund and medical and accident insurance.

(f) A constitution document of Company B, i.e. Certificate of Approval issued in 2007, showing the name of its investor is Company C which is registered in Hong Kong with 100% capital contribution.

(2) As shown in the relevant appendices to the Determination and records prepared by the Appellant, the following days were days in which the Appellant was absent from Hong Kong during the relevant years of assessment:

Year of assessment: 2010/11

Departure from HK			Arrival at HK			No. of days not in HK
16/06/2010	09:42	Wed	26/06/2010	23:45	Sat	9
15/09/2010	12:55	Wed	22/09/2010	05:32	Wed	6
22/09/2010	21:46	Wed	28/09/2010	11:02	Tue	5
26/02/2011	08:25	Sat	28/02/2011	21:45	Mon	1
						21[1]

Year of assessment: 2011/12

Departure from HK			Arrival at HK			No. of days not in HK
15/04/2011	09:13	Fri	18/04/2011	23:22	Mon	2
14/05/2011	08:50	Sat	18/05/2011	23:24	Wed	3
24/06/2011	08:54	Fri	02/07/2011	22:51	Sat	7
04/08/2011	07:06	Thu	07/08/2011	20:10	Sun	2
21/10/2011	14:30	Fri	24/10/2011	21:59	Mon	2
07/02/2012	09:52	Tue	09/02/2012	22:11	Thu	1
						17[2]

The number of days that the Appellant was present in Hong Kong, for any duration of a day, for 2010/11 and 2011/12 are therefore 344 (i.e. 365-21) days and 349 (i.e. 366-17) days respectively.

Grounds of appeal, the Appellant's submissions and responses to questions from this Board

7. The Appellant argued that:

(1) his employment is under Company B. The 2006 Employment Agreement came to an end on 24 September 2008 and was replaced by the 2008 Labour Contract. Since then he reported all his individual income to the Mainland tax authority.

(2) he was allowed by Company B and was entitled to flexible hours. All his meetings with venders / clients, daily operations were carried outside Hong Kong. None of his job duty requires him to work in Hong Kong. His family is based in Hong Kong and he resided in Hong Kong when he was not working.

[1] Out of 21 days, 7 days are Saturdays or Sundays, 1 day is a public holiday and 9 days are leave days.
[2] Out of 17 days, 8 days are Saturdays or Sundays, 1 day is a public holiday and 1 day is a leave day.

8. The Appellant also relied on the written support purportedly issued by Company B dated 24 December 2013, the content of which will be considered and dealt with in our analysis below.

The law

9. We agree with the Respondent's submissions, which the Appellant did not challenge, that the following provisions of the IRO apply.

(1) Section 8(1) provides:

'*(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; and

(b) any pension.'

(2) It is further extended by section 8(1A)(a) which reads:

'*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;…'

(3) Section 8(1A)(b) and (c) go on to exclude certain income from the charge to Salaries Tax as follows:

'*(b) excludes income derived from services 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 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.'

(4) Section 8(1B) further provides that:

' *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.*'

(5) Section 68(4) provides:

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

10. We also accept the Respondent's submission which, again, the Appellant did not dispute that the following cases apply.

(1) Commissioner of Inland Revenue v George Andrew Goepfert [1987] HKLR 888;

(2) Lee Hung Kwong v Commissioner of Inland Revenue [2005] 4 HKLRD 80;

(3) D43/94, IRBRD, vol 9, 278;

(4) D54/97, IRBRD, vol 12, 354;

(5) D2/04, IRBRD, vol 19, 76; and

(6) D39/04, IRBRD, vol 19, 319.

Our analysis

11. It is common ground that the Appellant has income from an employment. The issues for the Board to decide are:

(1) whether the income received by the Appellant arose in or was derived from Hong Kong; and

(2) if so, whether the Appellant's income should be excluded from the charge to Salaries Tax pursuant to section 8(1A)(b)(ii) of the IRO.

Whether the income was derived from Hong Kong

12. In Goepfert, Macdougall J, after referring to a number of UK cases and decisions of the Board, made the following comments on the approach to resolve the issue of whether income 'arises in or is derived from Hong Kong':

(1) ' *It follows that 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.*' (page 901E)

(2) ' *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.*' (page 901I-J)

(3) ' *There can be no doubt therefore that in deciding the crucial issue, the Commissioner may need to look further than the external or superficial features of the employment. Appearance may be deceptive. He may need to examine other factors that point to the real locus of the sources of income, the employment.*

It occurs to me that sometimes when reference is made to the so called "totality of facts" test it may be that what is meant is this very process. If that is what it means then it is not an enquiry of a nature different from that to which the English cases refer, but is descriptive of the process adopted to ascertain the true answer to the question that arises under s. 8(1).' (page 902D-E)

(4) ' *Having stated what I consider to be the proper test to be applied in determining for the purpose of s.8 (1) whether income arises in or is derived from Hong Kong from employment, the position may, in my view, be summarised as follows.*

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.' (page 902H-J)

13. Deputy Judge To (as he then was) in Lee Hung Kwong fully concurred with the view of Macdougall J and said:

(1) ' *It is plainly obvious that the charge or the liability to salaries tax is created by s.8(1). The crucial words of the charge are income arising or derived from Hong Kong from one of the two sources, namely (a) any office or employment of profit and (b) any pension. Section 8(1A)(a) expressly brings into the charge income derived from services rendered in Hong Kong and s.8(1A)(b) expressly excludes income from certain categories of persons who render outside Hong Kong all the services in connection with their employment. Both subsections are silent as to the source of the income thus included or excluded. If the income included under s.8(1A)(a) is an income from a Hong Kong source, the subsection clearly serves no useful purpose. The purpose of the subsection must be to bring into the charge income from a source outside Hong Kong if the services are rendered in Hong Kong. Likewise, the purpose of s.8(1A)(b) must be to exclude from the charge an income from a Hong Kong source if the person renders outside Hong Kong all services in connection with his employment. Thus, the question which falls to be decided in any particular case is whether the income which is sought to be charged is income from a Hong Kong source and the place where the services are rendered is irrelevant. If the income is from a Hong Kong source, it is subject to the charge whether the services are rendered in or outside Hong Kong, unless it falls within the exception under s.8(1A)(b).'* (pages 89F-90A)

(2) ' *Thus, the test as to the source of income is to look for the place where the income really comes to the employee. As Sir Wilfrid Greene MR said, regard must first be had to the contract of employment. This must include consideration as to the place where the employee is to be paid, where the contract of employment was negotiated and entered into and whether the employer is resident in the jurisdiction. But none of these factors are determinative. ... Consideration of these factors shows the very process adopted in ascertaining the locality of the contract. This is perhaps what have been referred to as the totality test.*' (page 91A-D)

14. In D43/94, the taxpayer employed by a Hong Kong company claimed that his income during the period when he worked in Country A should be exempted from Salaries Tax. In dismissing the appeal, the Board said, at page 280, paragraph 5:

(1) ' *... one must bear in mind the difference between the employment and the services rendered under the employment contract. An employment is a state in which an employee is employed by an employer; it is the source of the employee's income, but it is not necessarily located where the employee renders his services under the employment contract.*'

(2) ' *... the same employment may continue notwithstanding the variation of the terms and conditions of the employment contract or even the replacement of the entire contract by a new employment contract ... and notwithstanding that the employee is seconded or transferred to work outside Hong Kong.*'

15. Although the Appellant said that as an employee he did not pay much attention to and care about any difference between Company C and Company B, the 2006 Employment Agreement was signed between the Appellant and Company C. As employer, Company C reported the Appellant's income annually and contributed to an MPF scheme in accordance with the statutory requirements in Hong Kong.

16. Furthermore:

(1) Company C is a private company in Hong Kong. At all relevant times it carried on business in Hong Kong. It is a Hong Kong resident corporation.

(2) Remuneration was paid into the Appellant's bank account in Hong Kong.

(3) The Appellant did not adduce any evidence to show that the 2006 Employment Agreement was negotiated and entered into outside Hong Kong.

17. Applying Goepfert and Lee Hung Kwong, the Appellant's income under the 2006 Employment Contract arose in or was derived from Hong Kong even though he worked across the border outside Hong Kong.

18. Had the signing of the 2008 Labour Contract changed the position?

19. Following D43/94, the same employment may continue even if the entire contract was replaced by a new one.

20. The Appellant relied on the written support purportedly issued by Company B dated 24 December 2013 (paragraph 10 above), which suggested that the 2008 Labour Contract has replaced the 2006 Employment Agreement. The letter was, however, issued under the letterhead of Company C. The signatory was in the Human Resources Department of Company C although the rubber chop of Company B was affixed to the letter. With regard to the Appellant's employment, it was ambiguously referred to Position E in both Company C and Company B with a slash '/' in between.

21. In contrast:

(1) In response to the Assessor's various enquiries, it had been consistently confirmed that the Appellant was employed by Company C since 1 December 2006 and that the 2006 Employment Agreement remained in force, the latest reply of such a kind was in January 2014, after the said written support.

(2) For the relevant years of assessment, the Appellant declared in his tax returns Company C as his employer; whereas Company C filed Employer's Returns in the capacity of the Appellant's employer. In those Employer's Returns, Company C reported that the Appellant was not paid by any overseas company either in or outside Hong Kong.

(3) By the terms of the 2006 Employment Agreement, the Appellant was required to work in Company C's office in City A. He continued to be required to work in City A under the 2008 Labour Contract.

22. Also taking into account facts found in paragraphs 6(1)(b), (c), (d) and (e), we find that the Appellant has been all along under one continuous employment with Company C, irrespective of any weight we might have attached to the 2008 Labour Contract. As such, according to Goepfert and Lee Hung Kwong, his entire employment income is subject to Salaries Tax wherever his services have been rendered unless any of the exemption under the IRO may apply.

Whether the Appellant's income should be excluded from the charge pursuant to section 8(1A)(b)(ii) of the IRO

23. Even if a taxpayer's income has a source in Hong Kong, he may still rely on the relief under section 8(1A)(b)(ii) if he '*renders outside Hong Kong all the services in connection with his employment*'. In addition, for the purpose of such relief, section 8(1B) provides that '*no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment*'.

24. Whether a taxpayer renders outside Hong Kong all the services in connection with his employment is a question of fact which the Board shall determine in the light of all the evidence in totality.

25. The IRO does not define what constitutes services in the context of section 8(1A)(b)(ii). In D54/97, the taxpayer admitted that she '*made calls to factory to check production progress and other matters relating to manufacturing while she was waiting in Hong Kong for a new return permit*'. She also stated that she '*sometimes received calls from the Company's factory in Country B either by telephone or pager in respect of urgent matters and she gave instructions to deal with them while she was in Hong Kong*'. The Board held that all these activities amounted to '*rendering services in Hong Kong*

irrespective whether she was in Hong Kong for holidays or otherwise' (page 359). As such, '*services*' is a term of wide import.

26. In D39/04, IRBRD, vol 19, 319, the taxpayer asserted that his return and stay in Hong Kong was only for the purpose of his staying at home with his family. Whatever work he did in relation to his employer, such as to bring customers from China to Hong Kong, to have meeting in Hong Kong etc, was merely incidental. In dismissing his appeal, the Board held that:

> ' *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.*' (page 329)

27. In D54/97, where the taxpayer lodged a claim for no service in Hong Kong notwithstanding her exceptionally long stay in the territory, the Board had called for an explanation as to why she did not have to work during the long period of stay and did not accept bare assertion without looking into other evidence.

> (1) ' *This is an appeal case and according to section 68(4) the burden of proof is on the Taxpayer to show that the Commissioner is wrong. In this case the Commissioner was not satisfied that "the Taxpayer rendered outside Hong Kong all the services in connection with her employment and section 8(1A)(b) is, thus, not applicable". Therefore, the Taxpayer has to prove to us that during her stays in Hong Kong she did not render any service in connection with her employment. The aggregate period of her stays in Hong Kong is exceptionally long: according to the Revenue's calculation it has a total of 251. She has to explain to us why during this long period she did not have to work at all. To prove the negative is not at all easy. We cannot accept bare assertion by the Taxpayer without looking into other evidence. We have to take into consideration all the evidence in its totality.*' (page 358)
>
> (2) ' *Her presence there was absolutely necessary; otherwise, the Company would not have employed her. There were 251 days, either in whole or in part that she was absent from the factory in Country B. Unless she had other duties to perform, no factory would employ a person who was away from the place of work nearly 70% of the year.*' (page 359)

28. On the facts, the Appellant was present in Hong Kong for 344 days and 349 days in the two years of assessment 2010/11 and 2011/12 respectively (paragraph 6(2) above). After excluding Saturdays, Sundays, Hong Kong public holidays, sick leave and annual leave shown in Company C's leave record, the Appellant spent 228 days[3] and

[3] 2010/11: 344 (paragraph 7.4 above) – [(104 – 7) (Sat and Sun, note 1)] – [(10 – 1) (Public holidays other than Sat/ Sun and leave days)] – [(19 – 9 (leave days, note 1)] = 228 days

226.5 days[4] in Hong Kong during the relevant years of assessment respectively. He denied, in response to a question from a member of the Board, that he rendered any such or similar services as he had done in the year of assessment 2009/10.

29. According to the evidence adduced by the Respondent, even after taken into account of his office hours of 9:30 a.m. to 6:30 p.m. and assuming the travelling time of 1 hour, the Appellant stayed in Hong Kong during the working hours in the working day for 61 days in the year of assessment 2010/11 and 27 days in the year of assessment 2011/12. With regard to some of those days, the Appellant provided the reasons for his stay in Hong Kong, which, however, were not free from challenge.

30. Even if we were to give all benefits of doubt to the Appellant, he departed from or arrived at Hong Kong at odd hours, departure after 11:00 a.m. (and in some occasions only in the afternoon) or arrival before 4:30 p.m. (and in some occasions as early as early afternoon) on 20 occasions in the year of assessment 2010/11 and 16 occasions in the year of assessment 2011/12 with no specific explanation given.

31. Although no submission has been made by either side on the point of 'visit', it does not affect our analysis and conclusion as will be seen below. Even if it were necessary, we would be prepared to hold that the Appellant did not 'visit' Hong Kong since he maintained his family here.

32. The Appellant worked in a team with all other members residing across the border outside Hong Kong. He was allowed to work flexible hours. He also said, in response to a question from a member of the Board that during those years of assessment, he mainly served a client from the US. In light of all these and given telecommunication and Internet services are so convenient nowadays, we find it difficult to conceive that the Appellant had never made any contact, nor responded to any contact, while he was in Hong Kong.

33. The Appellant has placed due reliance on a confirmation issued by the Financial Controller who confirmed that '[the Appellant] does not need to and did not render any services related to his job functions based in China during his stay in Hong Kong'. However, the evidence given has not simply been accepted on its face value but has been read with caution as, for example, in D2/04 where the Board said:

> (1) '*Having considered the evidence and the manner in which the taxpayer responded to questions, we have come to the conclusion that he has not discharged the burden on him to show that he performed all his services outside Hong Kong during the period in question. The taxpayer was a senior executive. Part of his duty was to report to the chief executive officer, and another part of his duty was to supervise his staff. In this*

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[4] 2011/12: 349 (paragraph 7.4 above) – [(105 – 8) (Sat and Sun, note 2)] – [(13 – 1) (Public holidays other than Sat / Sun and leave days)] – [(14.5 – 1) (leave days, note 2)] = 226.5 days

> *day and age, with the advent of telecommunication, such duties can be performed practically anywhere, and certainly when the taxpayer was in Hong Kong. We would need a great deal more than what has been adduced in evidence to be satisfied that a senior executive such as the taxpayer who spent up to 90 days including 14 whole working days in Hong Kong did not perform any of his services in Hong Kong. We need only say that we are unpersuaded that this is the case.*' (pages 82-83).

(2) '*We do not overlook the fact that the financial controller of his employer responded negatively to the following query from the senior assessor:*

> *"Confirm whether [Mr A] had rendered any services relating to the PRC Office as its national channel sales director during his stays in Hong Kong from 1 April 2001 to 31 March 2002. If yes, describe the nature and frequence of the services rendered."*

We do not feel we should attach much weight to that statement when the maker is not available to be cross-examined to test the state of his knowledge and his understanding of the purport of the question.' (page 83)

34. Similarly in this case, we accept the Respondent's submission that there is no information showing the financial controller's state of his knowledge and understanding of the purport of the question, on which the negative statement was made. This is further inferred from and supported by the fact that the same financial controller has made the same statement for the year of assessment 2009/10 but the Appellant had admitted that he had to pick up foreign clients at train station, arrange factory visits with clients at City A, pick up foreign clients at airport, attend lunch meetings with clients and escort foreign clients to airport.

35. In a holistic consideration of the circumstances of this case, we cast considerable doubt on whether the Appellant did render all services in connection with his employment outside Hong Kong. As such, the Appellant fails to discharge the onus of proof under section 68(4) of the IRO.

36. The exclusion under section 8(1A)(c) of the IRO has been allowed and given in the Determination and the Appellant has raised no issue on this in his notice of appeal.

37. For the reasons and analysis set out above, we dismiss the Appellant's appeal and confirm the revised assessments as set out in paragraph 3(11) above.