Case No. D10/92

Salaries Tax – lorry driver of cross-border vehicle – whether income subject to Hong Kong salaries tax.

Panel: T J Gregory (chairman), Glen C Docherty and John Lo Siew Kiong.

Date of hearing: 28 April 1992.
Date of decision: 29 May 1992.

The taxpayer was a lorry driver who was employed by a company carrying on business in Hong Kong to drive a heavy goods vehicle between Hong Kong and the People's Republic of China. The taxpayer submitted that he was not subject to salaries tax in Hong Kong because he earned all of his income in the People's Republic of China.

Held:

The taxpayer did not render his services exclusively outside of Hong Kong. His contract of employment was in Hong Kong. Accordingly the income of the taxpayer was subject to salaries tax in Hong Kong.

Appeal dismissed.

Cases referred to:

CIR v Goepfert 2 HKTC 210
D29/89, IRBRD, vol 4, 340

May Chan Wai Mi for the Commissioner of Inland Revenue.
Lawrence Tse of Messrs Lawrence Tse & Co for the taxpayer.

Decision:

1. THE NATURE OF THE APPEAL

The Taxpayer appealed against an assessment to salaries tax for the year of assessment 1989/90 as revised by paragraph 9 of the determination of the Commissioner dated 10 January 1992.

2. THE FACTS

The following facts were not in dispute:

2.1 The Taxpayer was a heavy goods vehicle driver by profession and the holder of a Hong Kong identity card.

2.2 On 1 April 1989 the Taxpayer entered into an employment contract with a transportation company, Company A, which carried on its business form premises in the New Territories.

2.3 The employment contract, which was in writing, was addressed to the Taxpayer at an address in the New Territories. Under the employment contract, the Taxpayer was required to drive a heavy goods vehicle, with a consignment of goods, from Hong Kong to a consignee in the People's Republic of China ('PRC'), to safeguard the lorry and the goods and to prevent any possibility of damage or loss to both thereof during transportation. His salary was based on a fixed percentage of the charges levied by Company A on its customers for delivering their merchandise from Hong Kong into the PRC.

2.4 The employment contract was concluded in Hong Kong and was enforceable in Hong Kong. The salary paid to the Taxpayer was always paid by way of cheques drawn on an account maintained by Company A in Hong Kong with The Hang Seng Bank Limited.

2.5 The Taxpayer's duties did not require him to collect goods from customers for delivery to Company A in Hong Kong; his duties were to drive the heavy goods vehicle with the goods from a depot of Company A in Hong Kong into the PRC and thereafter deliver the goods either to the consignee or, if more than one, the consignees.

2.6 The Taxpayer was not an employee of any corporation in the PRC and he did not pay any tax on his earnings from the employment contract in the PRC.

2.7 The Taxpayer was solely responsible for his expenses in the PRC, namely accommodation, if he stayed overnight, and his subsistence.

2.8 During the year ended 31 March 1990, the Taxpayer had spent a total of 169 days in the PRC.

3. THE CASE FOR THE TAXPAYER

3.1 The case for the Taxpayer, who did not attend the hearing, was put by his tax representative.

3.2 Having summarised the facts, the representative emphasised the fact that it was a condition of the Taxpayer's employment that he drove from Hong Kong into the PRC and delivered the goods to customers in the PRC. There was no collection of merchandise from Company A's customers in Hong Kong or delivery of any consignments brought from the PRC to Hong Kong to the consignees in Hong Kong. Such consignments were delivered to Company A.

3.3 The Board was shown a copy of the Custom's Log Book issued to the Taxpayer which showed his trips into the PRC starting with one on 15 November 1990 and concluding with one on 30 December 1990. The Board was also shown copies of records maintained by the Taxpayer which showed the nature and quantity of the goods carried and the location to which the consignment was delivered and another schedule repeating that information but adding how the goods were packed, invariably in containers, the identity of Company A's client and the transportation charge from which the Taxpayer's salary was calculated.

3.4 The case for the Taxpayer was that the services he rendered were rendered exclusively outside Hong Kong and that although there was no specific provision in the Inland Revenue Ordinance ('the Ordinance') for income derived by heavy or other goods vehicle drivers whose duties require them to drive from Hong Kong into the PRC and back, this was now a very common practice. The Board was told that there were over thirty thousand lorry drivers in exactly the same position as the Taxpayer.

3.5 The Board was advised, but without citation of the authority, that the tax legislation in both the United Kingdom and Singapore afforded relief to drivers whose duties require them to drive from the United Kingdom or Singapore, as the case may be, to another country.

3.6 The Board's attention was also drawn to the fact that it was now very common for Hong Kong residents, acting on the instructions of a Hong Kong employer, to discharge the entirety of their employment duties in the PRC whilst continuing to reside in Hong Kong. The Board was advised that these employees were not liable to any tax in the PRC as they were not employed by an entity in the PRC.

3.7 The representative concluded by stating that the Taxpayer was of the view that either he was not liable to Hong Kong salaries tax as he rendered all of his services outside Hong Kong, even though he held a Hong Kong employment or he was entitled to a time apportionment under section 8(1A)(b) of the Ordinance.

At the conclusion of the Taxpayer's case the Board enquired as to whether any evidence was to be called to prove the documents before it. The answer was that no evidence would be called. The Board then asked whether the Revenue

accepted the various documents which had been submitted to the Board as true or whether they required evidence to prove those documents. After a brief adjournment the Board was advised by the Revenue that they do not challenge the authenticity of the documents and did not require them to be proved.

4. THE CASE FOR THE REVENUE

4.1 The Board's attention was drawn to section 8(1) of the Ordinance and the decision of Macdougall J in CIR v Goepfert 2 HKTC 210 at page 237 in which he stated:

> '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.'

It was submitted that one of the first considerations must be the contract of employment which the Board was reminded was agreed as having been concluded and as being enforceable in Hong Kong. Further, the Taxpayer's salary was paid by a Hong Kong employer in Hong Kong.

4.2 The Board was then referred to the passage in the Goepfert case on page 236 reading:

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

It was submitted that the only factor which the Taxpayer could rely on to rebut the indications that his employment was a Hong Kong employment was to say that his services were performed overseas. However, that was irrelevant.

4.3 The Board's attention was then drawn to the passage at page 238 of the Goepfert case reading:

> 'If during a year of assessment a person's income falls within the basic charge to salaries tax under section 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 section 8(1A)(b) as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment.'

4.4 The Board's attention was then drawn to sections 8(1A)(b)(ii), 8(1A)(c) and 8(1B) of the Ordinance. It was submitted that the sections do not allow for

apportionment of income but do no more than provide exceptions to the charge to tax under section 8(1). So far as visits are concerned the Board's attention was drawn to its decision in D29/89, IRBRD, vol 4, 340 and the passage in paragraphs 5.1 and 5.2 of that decision.

4.5 It was emphasised that for section 8(1A)(a)(ii), as qualified by section 8(1B), to apply the Taxpayer must establish three things:

4.5.1 That all the services of his employment were carried on outside Hong Kong.

4.5.2 If he visited Hong Kong his visits did not amount to more than 60 days.

4.5.3 If his visits did amount to more than 60 days that he carried out no services in Hong Kong whatsoever.

4.6 It was submitted that the admitted facts did not support this.

5. QUESTIONS TO THE TAXPAYER'S TAX REPRESENTATIVE

5.1 At the conclusion of the Revenue's submission the Taxpayer's representative was asked whether or not he accepted that some part of the Taxpayer's services were necessarily performed in Hong Kong, namely picking up the heavy goods vehicle with the goods from Company A's depot and driving to the border or by driving either the vehicle alone or the vehicle with another container or other goods from the PRC from the border to Company A's depot. The representative answered this question by stating that the Taxpayer did not have to report for duty and that he could himself telephone, or get somebody to do so on his behalf, to find out if there was work for him to do.

5.2 When asked to whom the reports of the trips were made the representative replied that they were made to Company A in Hong Kong but that the fact that Company A's business was a Hong Kong business was not relevant.

5.3 When asked whether it was accepted that the Taxpayer has spent 196 days in the year in question in Hong Kong, the first answer was that he rendered his services for the balance of the time outside of Hong Kong. When the question was repeated his reply was that the Taxpayer only returned to Hong Kong for relaxation. When the question was repeated for the third time the representative accepted that the Taxpayer was in Hong Kong on those days.

6. REASONS FOR THE DECISION

6.1 It is common ground that the Taxpayer was employed by a Hong Kong firm and that his duties were to drive a laden heavy goods vehicle, invariably goods packed in a container, from Company A's depot in Hong Kong over the border

to a destination in the PRC and occasionally, to more than one destination in the PRC.

6.2 While there were occasions upon which the Taxpayer spent one or even two or three nights in the PRC, his own documents disclosed that on 25 of the 47 trips into the PRC disclosed in the Custom's Log Book referred to in paragraph 3.3, he went from Hong Kong into the PRC and returned on the same day. On the Taxpayer's case, all of the salary subjected to salaries tax related to journeys commencing in Hong Kong. On these facts, the Taxpayer's services were not rendered exclusively outside of Hong Kong: the assignments allocated to the Taxpayer could not have been performed unless he went to Company A's depot either to collect the container or to pick up both the rig and container or other heavy goods vehicle. Accordingly, it is not possible for the Taxpayer to claim that his services were exclusively rendered outside of Hong Kong. Unlike the provision for seamen and air crews there is no provision for any other category of individual to be totally or partially exempted from salaries tax on the basis that the fulfilment of all or some part of his services requires departure from Hong Kong and working whilst overseas.

6.3 There is no dispute that the contract of employment was made in Hong Kong and that it was enforceable in Hong Kong. Similarly, it was not in dispute that his salary for all of the services evidenced by the copy documents produced on behalf of the Taxpayer was always paid in Hong Kong. Factually, there can be no dispute that he had to be in Hong Kong and drive in Hong Kong to fulfill each assignment given to him.

6.4 The decision of Macdougall J in the Goepfert case, which is binding on the Board, states that the place where the services are rendered is not relevant to the enquiry under section 8(1) as to whether income arises in or is derived from Hong Kong from any employment and that that should be completely ignored. If a person's income during a period of assessment 'falls within the basic charge to salaries tax under section 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 in section 8(1A)(b), as read with section 8(1B). Thus, once income is caught by section 8(1) there is no provision for apportionment'. The Board is satisfied that the facts in this appeal fall within this statement of the law.

6.5 Since the Goepfert case the Ordinance has been amended by the introduction of section 8(1A)(c) which excludes income derived by a person from services rendered outside Hong Kong if the person has paid foreign tax of substantially the same nature in respect of such income. It was the Taxpayer's case that he had not paid any tax of whatever nature within the PRC.

6.6 On the tests set out by Macdougall J in the Goepfert, case refer paragraph 4.1 above, the Taxpayer's employment was within Hong Kong. Further, section

8(1A)(b) has no application to the Taxpayer. Accordingly, his entire salary as returned to the Revenue is subject to salaries tax.

7. DECISION

For the reasons given this appeal is dismissed.