INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D123/02

Salaries tax – directors' fees – whether sourced outside Hong Kong.

Panel: Andrew J Halkyard (chairman), Joseph Paul Fok SC and Alexander Woo Chung Ho.

Date of hearing: 16 October 2002.
Date of decision: 26 February 2003.

The appellant was a director of a company. He received directors' fees from holding this office. The central issue is whether the directors' fees were subject to salaries tax as all the directors' meetings were held outside Hong Kong.

Held:

1. The source of income is a question of fact and is not determined solely by where directors' meetings were held (CIR v Geopfert (1987) 2 HKTC 210 applied).

2. The location of the appellant's office as director of the company was determined by where the company was resident (McMillian v Guest (1942) 24 TC 190 applied).

3. Having considered all the evidence, the Board found that part of the superior and directing authority of the company was present in Hong Kong. Besides, it also kept house and had substantial business operations in Hong Kong. The Board concluded that the company was resident in Hong Kong (Swedish Central Railway Company, Ltd v Thompson (1925) 9 TC 342 applied).

4. Therefore, the Board found the location of the appellant's office was in Hong Kong and the appellant was liable to salaries tax on his directors' fees.

Appeal dismissed.

Cases referred to:

Great Western Railway Co v Bater (1992) 8 TC 231
McMillan v Guest (1942) 24 TC 190

Koitaki Para Rubber Estates Ltd v FCT (1940) 6 ATD 42
De Beers Consolidated Mines, Ltd v Howe (1906) 5 TC 198
Koitaki Para Rubber Estates Ltd v FCT (1941) 6 ATD 82
Cesena Sulphur Company, Ltd v Nicholson (1876) 1 TC 88
The Egyptian Delta Land and Investment Company, Ltd v Todd (1928) 14 TC 119
The American Thread Company v Joyce (1912) 6 TC 1
Calcutta Jute Mills Company, Ltd v Nicholson (1876) 1 TC 83
Denver Hotel Company, Ltd v Andrews (1895) 3 TC 356
San Paulo (Brazilian) Railway Company, Ltd v Carter (1895) 3 TC 407
Grove v Elliots and Parkinson (1896) 3 TC 481
The Frank Jones Brewing Company, Ltd v Apthorpe (1898) 4 TC 6
St Louis Breweries, Ltd v Apthorpe (1898) 4 TC 111
United States Brewing Company, Ltd v Apthorpe (1898) 4 TC 17
Apthorpe v Peter Schoenhofen Brewing Company, Ltd (1899) 4 TC 41
The New Zealand Shipping Company, Ltd v Thew (1922) 8 TC 208
Goodwin v Brewster (1951) 32 TC 80
Swedish Central Railway Company, Ltd v Thompson (1925) 9 TC 342
BR15/71, IRBRD, vol 1, 72
F & K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139
CIR v Goepfert (1987) 2 HKTC 210
Meridian Global Funds Management v Securities Commission [1995] 2 AC 500
Lennard's Carrying v Asiatic Petroleum [1915] AC 705
Bolton v Graham [1957] 1 QB 159

Ngan Man Kuen for the Commissioner of Inland Revenue.
Carmen Chow King of Messrs Ernst & Young, Certified Public Accountants, for the taxpayer.

Decision:

1. The Appellant has appealed against the salaries tax assessments raised on him for the years of assessment 1995/96 and 1996/97. He claims that the directors' fees received from Company A should not be chargeable to salaries tax.

Facts not in dispute

2. The following facts were not in dispute, and we so find:

(a) (i) Company A was incorporated as a private company in Hong Kong on 27 June 1995.

(ii) The Appellant and his wife, Madam B, were appointed as the first directors of Company A.

(iii) The Appellant and Madam B were the only two shareholders of Company A, holding 80% and 20% of its share capital respectively.

(iv) At all relevant times, the registered address of Company A was at Address C.

(v) In its profits tax returns for the years of assessment 1995/96 and 1996/97, Company A described the nature of its business as 'to act as cargo space agents for airliners'. It offered its profits for assessment and paid profits tax accordingly.

(vi) Company A's financial statements for the period ended 31 March 1996 and for the year ended 31 March 1997 were audited by Messrs Ernst & Young ('the Representatives'), certified public accountants, in Hong Kong.

(vii) Company A also furnished employer's returns in respect of its employees to the Inland Revenue Department.

(b) In its employer's returns for the years ended 31 March 1996 and 1997, Company A reported the particulars and income of the Appellant as follows:

Year of assessment	**1995/96**	**1996/97**
Capacity	Director	Director
Period	1-6-1995 – 31-3-1996	1-4-1996 – 31-3-1997
Income: Director's fee	$2,116,000	$2,600,000

The following remarks appeared on both returns: 'Directors' meetings held outside Hong Kong, therefore not taxable ...'

The Appellant's residential address was stated as: '[an address]' ('the Property').

(c) In his tax returns - individuals for the years of assessment 1995/96 and 1996/97, the Appellant declared the same particulars of income as returned by Company A at subparagraph (b) above. He claimed that the directors' fees received by him in the two years of assessment were not chargeable to tax for the following reason: 'All directors' meetings which managed and controlled the operation of

the company were held outside Hong Kong.'

In both returns, the Appellant declared that the Property was his residential address.

(d) On divers dates, the assessor raised on the Appellant the following salaries tax assessments:

Year of assessment 1995/96	$
Assessable income (subparagraph (b))	2,116,000
Tax payable thereon	317,499

Year of assessment 1996/97	$
Assessable income (subparagraph (b))	2,600,000
Tax payable thereon	390,000

(e) The Representatives objected, on behalf of the Appellant, to the above assessments on the ground that the directors' fees were sourced outside Hong Kong and thus should not be subject to salaries tax. In amplification of the ground of objection, the Representatives stated:

'Our client, being a director of [Company A], received an income from an "office" which is not defined in the IRO. In the English court case of Great Western Railway Co v Bater (1922) 8 TC 231, 235, an "office" was judicially defined as "a subsisting, permanent, substantive position, which has an existence independent from the person who fills it and which goes on and is filled in succession by successive holders."

In another English case, McMillan v Guest (1942) 24 TC 190, it was held that the office of director is located at the place where the central management and control of the company is located, wherever the director resides. In order to determine the source of the director's fees at issue, it is therefore necessary to determine the location of the central management and control of [Company A].

The location of the central management and control of a company is not defined in the IRO. In an Australian case, Koitaki Para Rubber Estates Ltd v FCT (1940) 6 ATD 42, it was held that the location of the central management and control of a company is usually the place where its directors meet to do the business of the company, provided that the board of directors' resolutions are not subject to the approval or consent of any other body. Since the board of directors of [Company A] has never held directors' meeting in Hong Kong, the central management and control of [Company A] is outside Hong Kong and the

director's fee is therefore sourced outside Hong Kong.'

(f) In support of the claim, the Representatives submitted the following documents:

(i) Minutes of all the directors' meetings held in the two years of assessment in question. The minutes contain the following particulars:

Date	Place held	Matters resolved
27-6-1995	Not stated	Appointment of the first directors, secretaries, auditors and tax representatives
		Adoption of the common seal
		Allotment or transfer of shares
		Confirmation of the location of registered office and the date for close of accounts
1-8-1995	Not stated	Change of registered office
13-9-1995	Not stated	Change of financial year-end date
8-1-1996	Not stated	Change of address for Company A's branch office in Macau
8-3-1996	Taiwan	Approval of directors' fee to be paid to the Appellant for the period from 27 June 1995 to 31 March 1996
2-9-1996	Not stated	Approval of directors' report and financial statements for the period ended 31 March 1996
		Re-appointment of directors and auditors
		Convening Company A's annual general meeting in Hong Kong on 20 December 1996

10-3-1997*	Taiwan	Approval of directors' fee to be paid to the Appellant for the year ended 31 March 1997
22-9-1997**	Macau	Approval of the payment of directors' fees to the Appellant and Madam B for the year ended 31 March 1997 Approval of directors' report and financial statements for the year ended 31 March 1997

* This minute was produced at the hearing by the Commissioner (see bundle R1, page 3). It was subsequently replaced by ** dated 22 September 1997, when Company A's corporate secretarial provider, Company D, noted the omission of a directors' fee paid to Madam B.

(ii) A letter from Company A to the Commissioner dated 24 November 1997 stating that Company A had never held any board of directors meetings in Hong Kong during the two years of assessment in dispute. Madam B signed the letter, in her capacity as managing director of Company A.

(iii) Two organization charts of Company A for the period ended 31 March 1996 and for the year ended 31 March 1997. These showed (1) the Appellant as the chairman, (2) under him Mr E and Mr F as managing directors, (3) under Mr E, Ms G as administration executive and Mr H as general manager – sales and (5) under Mr H, Mr I as operations manager and (for the year of assessment 1996/97 only) Mr J as assistant manager – sales and operations.

(iv) The Appellant's travel itinerary for the period from 1 April 1995 to 31 March 1997 and Madam B's passport (see further, subparagraph (g)(xii)).

(g) In correspondence with the assessor, the Representatives asserted as follows:

(i) 'Our client does not have a minutes book. The board of directors' resolutions for the period ended March 31, 1996 and the year ended March 31, 1997 have already been photocopied and submitted.'

(ii) The board of directors' resolutions as listed in subparagraph (f)(i) above were passed and signed in the following places:

Date	Place
27-6-1995	Taipei
1-8-1995	Taipei
13-9-1995	US
8-1-1996	Germany
2-9-1996*	Taipei

* The draft resolution dated 2 September 1996 was brought by the Appellant from Hong Kong to Taipei for discussion and passing with the other director. It was passed and signed on 3 September 1996.

(iii) The Appellant and Madam B, as shareholders of Company A, appointed proxies on 18 December 1996 to attend the annual general meeting of Company A held in Hong Kong on 20 December 1996.

(iv) '[Company A] is engaged in the business of acting as the cargo space agent for airliners. Cargo spaces of some airliners, mainly [Airline K1], are arranged through [Company A] which receives commission based on the spaces sold. The cargo spaces are sold to [Company A's] customers, such as [Company L1], [Company L2], [Company L3], etc. [Company A's] business operations are based in Hong Kong and [Company A] is chargeable to profits tax.

... we do not think such day-to-day business has any impact on the source of the directors' fee in this case.'

(v) '[The Appellant] carried out all the duties as a director required under the Companies Ordinance of Hong Kong and more precisely, formulated the corporate business policies at strategic level. The day-to-day decision making for [Company A] is discretionary making delegated by the board of directors to its employees. This discretionary making power delegated to the employees of [Company A] by no means shifts the central management and control, which rests with the board of directors in meeting. The control of [Company A] is by means of board of directors' resolutions on business policies as the supreme command of [Company A] which were formed outside Hong Kong.'

(vi) 'While in Hong Kong, [the Appellant] listened to the staff of [Company A]

and collected information to help him contribute to the board of directors' meetings. The activities of [the Appellant] in Hong Kong have no bearing on the issue of the source of his directorship, i.e. his office of directorship is located outside Hong Kong. Please note that the income in dispute are not incomes from employment but from an office. [The Appellant] performed his duties as a director under the Companies Ordinance of Hong Kong. Please note that both [the Appellant] and his wife [Madam B], both were directors of the company during the years, were and still are resident in Taiwan during the years and thereafter.'

(vii) (Referring to the two organization charts supplied) '[Mr E] was the general manager of [Company A] and oversaw the day-to-day operations of [Company A]. He was designated as the managing director but held no directorship under the Companies Ordinance. [Mr F] was a consultant who helped [Company A] set up the operations of [Company A] in Hong Kong. He retired last year [1997]. [Mr M] worked in the airport to oversee the boarding of cargoes. ... these three persons' activities in Hong Kong could not move the central management and control of [Company A] and the source of [the Appellant's] director's fee to Hong Kong.'

(viii) '[The Appellant] is the founder of [Company A]. He was born and brought up in Taiwan where he developed successfully his knowledge and experience in the business of flight cargo forwarding agency. He runs his own business in this industry, [Company A-Taiwan] (see further, paragraph 3(b)), in Taiwan and built up a very good relationship with international airliners and cargo forwarding service customers. He has a well-established reputation in the industry which enables him to keep and develop agency business in the industry.

In 1995, because of good relationship with [Airline K1], the latter agreed to appoint a company to be set up by [the Appellant] to be its cargo general sales agent in Hong Kong. [The Appellant] therefore set up [Company A] for this purpose. [Company A] was also subsequently appointed as cargo sales agent of the following airliners mainly due to [the Appellant's] relationship with such airliners, his reputation in the industry and that the airliners knew [the Appellant] was the director and the directing authority of [Company A]: [Airline K2], [Airline K3], [Airline K4]. Please note that none of these airliners and [Airline K1] is resident in Hong Kong or otherwise has their senior management located in Hong Kong.'

(ix) 'The nature of cargo forwarding requires the sales agent (i.e. [Company A] in this case) to keep itself abreast of the airliners' flight schedule plan in order to sell as many cargo spaces available as possible. [The Appellant] therefore frequently flew to meet the senior management bodies of these airliners, none of which was in Hong Kong, to collect information on their flight development plans and other useful information and to upkeep the relationship with them. By doing so, it enabled him to formulate the business strategy of [Company A]. Whilst not flying, [the Appellant] was resident and ordinarily resident in Taiwan to oversee his cargo general sales agency business in Taiwan ... and together with the other director of [Company A], to exercise the power of central control over the business of [Company A] ...'

(x) '[The Property mentioned in subparagraph (b) above] is in fact the residence of [Mr E]. [The Appellant] stayed there when he stopped over Hong Kong in his trips. It was not his residence during all relevant times. ... [The Appellant] and the other director of [Company A], [Madam B] were both resident and ordinarily resident in Taiwan, but not in Hong Kong, during all the relevant times.'

(xi) 'The director's fees were paid on various dates by transferring monies from [Company A's] bank account to [the Appellant's] bank account in Hong Kong.'

(xii) The number of days during which the Appellant and Madam B visited Hong Kong is as follows:

	Number of days in Hong Kong	
	1995/96	**1996/97**
Appellant	107	83
Madam B	3	4

(h) In contending that the source of directors' fees was not in Hong Kong, the Representatives advanced the following arguments:

(i) '... the concept of "central management and control" refers to the ultimate control and direction of a company's affairs. It is not one of where the day to day trading or other profit making activities of the company is being conducted. Rather, it is an issue of the location where that business is being ultimately controlled and directed. In many cases, the place of day to day trading or other profit-making business can be a location quite separate from the location of the control and direction of

the business. The source of the company's directors' fees for salaries tax purpose is at the latter location, not the former. Thus, a multinational corporation e.g. airliner, bank and computer network operator can have business in many locations but it does not necessarily follow it has its central management and control in each of these locations.'

(ii) '... both of the shareholders and directors were resident and ordinarily resident in Taiwan during all relevant times. They formed the highest directing authority of [Company A] and exercised such authority outside of Hong Kong. The staff in Hong Kong, none of which had any shareholding nor held any directorship in [Company A] looked after the day to day activities of [Company A] only, ... could not and did not by any means participate into such directing authority.'

(iii) '... the place of incorporation of a company is irrelevant in determining the location of the central management and control of the company ...'

(i) Having reviewed the facts of the case, the assessor maintained her view that Company A was a company resident, managed and controlled in Hong Kong or alternatively, Company A had two places of residence, one in Taiwan and the other in Hong Kong, and that the directors' fees received by the Appellant from his office of directorship with Company A in Hong Kong should be subject to salaries tax.

(j) In a letter to the assessor dated 20 February 2001 the Representatives put forward further contentions on what they considered to be the applicable principles in determining the source of income from directorship. The Representatives also made the following additional assertions:

(i) '[Company A] is owned and controlled by [the Appellant] and his wife. Like many private companies managed and controlled by its small number of directors who are also the shareholders, formulation of business policies is not usually minutes. The minutes are therefore restricted to the minimum required.'

(ii) 'The central management and control of [Company A] must have been exercised outside Hong Kong when due regard is given to the following:

(1) [Company A] is beneficially owned by [the Appellant] and his wife, who are also the only two directors of the company during the relevant years. There is no reason that they would not keep the central management and control in their hands.

(2) Because they are husband and wife, there is no reason to assume that they do not discuss the business of [Company A]. It is only reasonable that they would discuss with each other the same whenever necessary. Because [Madam B] was seldom in Hong Kong, such discussions must have taken place in Taiwan.

(3) They both ordinarily resided in Taiwan. Their discussions on the business of [Company A] must have taken place in Taiwan.

(4) [The Appellant] also ran similar business in Taiwan during the years. Because he and his wife usually resided in Taiwan and managed the Taiwan business from an office there, there is no reason that they would not usually control the business of [Company A] from such Taiwan office.'

Oral evidence of the Appellant

3. During the hearing before us, the Appellant gave oral evidence and was cross-examined thereon. Some of that evidence related to the agreed facts and we will not necessarily repeat them here. The following salient points emerged:

(a) Both the Appellant and Madam B reside permanently in Taiwan.

(b) The Appellant's Taiwanese company, Company A-Taiwan had been the sole cargo sale agent of Airline K1 in Taiwan for more than ten years. He established Company A with the encouragement of Airline K1 to be Airline K1's sole cargo general sales agent in Hong Kong and Macau. The sales agency agreement entered into between Company A and Airline K1 required several meetings until it was finalized. Negotiations were conducted in Canada and Taiwan. The agreement was effective from 20 July 1995. The Appellant signed the agreement outside Hong Kong on 24 August 1995.

(c) Details of Company A's 'Managing Directors' (see paragraph 2(f)(iii)) are: Mr E (the Appellant's younger brother) and Mr F (an older man and the Appellant's former boss in Airline K5). They were not statutory directors of Company A and the Appellant intimated that these posts were little more than sinecures (Mr E was inexperienced and Mr F was elderly). Mr E reported to the Appellant and they spoke regularly on the phone, discussing the day-to-day operations of Company A, when the Appellant was in Taiwan. The general sales manager, Mr H, was responsible for the day-to-day work in negotiating with Company A's local cargo forwarders.

(d) The Appellant only occasionally issued instructions to Company A's staff since he had already set down the company policy and administrative procedures in Taiwan and the staff were aware of them. He was involved in any salary review of Company A's staff. The payroll was prepared in the Appellant's office in Taiwan.

(e) Airline K1 accounted for about 80% to 90% of the turnover of Company A for the relevant years of assessment. Developing a close business relationship with Airline K1 was thus crucial for Company A's survival. Company A was also appointed as the cargo sale agent for three other airlines, namely Airlines K2, K3 and K4. None of these airlines, including Airline K1, set up their own offices or employed their own staff in Hong Kong. The Appellant frequently flew to meet the senior management of Airline K1 (about four to five times a year) and other airliners outside Hong Kong to discuss matters such as their flight development plans and their freight rate charges (which was Company A's major cost). On several occasions the Appellant concluded revised terms of Company A's sales agency agreement with Airline K1 in Canada.

(f) The business operation model of Company A was that it acted as sales cargo agent for the airlines it represented in Hong Kong. It sold space to its customers (who were all Hong Kong cargo forwarders) and it received payment from the customers in Hong Kong. After deducting its commission and operating costs, it remitted the balance to the principal (airline) carrier.

(g) The Appellant described Company A's business as helping airlines to promote business in Hong Kong. He confirmed that Company A operated as an enquiry or booking centre, and this involved making reservations on behalf of its customers. Its office premises were around 1200 square feet.

(h) The Appellant formulated the business strategies of Company A and also fixed Company A's selling price of air cargo space (he stated he did this in Taiwan) based upon the information he obtained from discussion with the airliners. He reckoned that the key factors in Company A's success were his track record, his connections, good credibility and expertise.

(i) After negotiating and agreeing freight rates with airliners during meetings and phone discussions outside Hong Kong, the Appellant would then set Company A's selling price of air cargo space. He would send a letter notifying Company A's customers of any change in freight rates and dispatch it from Taiwan to Company A. Company A's sales manager in Hong Kong (Mr H) would then forward the letter to the customers.

(j) The Appellant indicated that he directed, controlled and managed Company A's commercial, financial, treasury and administrative business and decided important questions of business and policy outside Hong Kong. Specifically, from his home and base in Taiwan he set the sales performance budget for Company A and monitored it against actual performance. He then reviewed the sales performance reports, cargo sales reports and tonnage reports that were sent from time to time by Company A to his Taiwan office. He also handled other matters such as setting Company A's credit policy and notifying Company A's customers thereof, and negotiating sales proceeds remittance procedures with Airline K1. Documentation produced to us showed that when Airline K1 raised a problem with the Appellant concerning the need to adjust certain air freight charges payable by Company A's Hong Kong customers, the Appellant immediately referred the matter to Company A's Hong Kong staff to deal with (bundle A1, page 97). Furthermore, although the Appellant denied that he issued correspondence for Company A whilst he was in Hong Kong, on certain occasions letters signed by him were dated at times he was physically present in Hong Kong (bundle A1, page 73).

(k) The Appellant agreed that he was involved in leasing Company A's office in Hong Kong, but he considered this a fairly trivial matter. He agreed that he interviewed Company A's staff in Hong Kong prior to their being hired.

(l) Company A's bank accounts were with Bank N in Hong Kong. Essentially, the Appellant controlled Company A's finances. Almost all Company A's expenses (such as salaries and courier fees) were paid by cheque. The Appellant dispatched these cheques from Taiwan. Payments to the airliners were made about twice a month and authorization letters to Bank N to pay these amounts were prepared and sent from Taiwan. Bank N sent Company A's monthly bank statements to the Appellant's office in Taiwan.

(m) The Appellant also pledged his own money to help Company A provide bank guarantees to airliners. On the other hand, Company A required its customers to provide bank guarantees to it. The Appellant carried out these activities in Taiwan.

(n) All documents required for the purpose of auditing Company A's books of account were kept in Taiwan. The accounts on which the audits were based were prepared in Taiwan and copies were not kept in Hong Kong for reasons of confidentiality. Company A had no accountant in Hong Kong.

(o) Madam B was not involved in the solicitation of business for Company A. She stayed in Taiwan at all material times and helped the Appellant review Company

A's accounts and bank statements and monitor its cash flow and payment of normal business expenses. The Appellant also stated that he and his wife discussed Company A's business and made its business decisions (including confidential matters such as staff salary and promotion). The Appellant could not, however, point to any document in any of the various bundles before us that evidenced Madam B's involvement in Company A's business, except the board minutes and resolutions she signed.

(p) All Company A's corporate secretarial work, including drafting board minutes and resolutions, were prepared by a corporate secretarial firm in Hong Kong, Company D, and then sent to the Appellant's office in Taiwan. The Appellant reiterated that he and Madam B signed the minutes and resolutions outside Hong Kong, mainly in Taiwan. The Appellant agreed that none of these documents evidenced any policy decision.

(q) The Appellant was specifically cross-examined upon the board minute dated 10 March 1997 (paragraph 2(f)(i) refers). Although signed by both directors, the Appellant admitted that the meeting was not actually held (his secretary simply followed the prior year's precedent), and that he was not in Taiwan when it was purportedly held on 10 March 1997. In relation to the replacement minute for a meeting claimed to be held on 22 September 1997, the Appellant could not remember how he traveled to Macau (perhaps by plane) and what time the meeting was held (perhaps in the morning, since he was in Hong Kong in the evening). He confirmed, however, that Madam B was probably not physically present at the meeting (noting that they could conduct a meeting by telephone). He could not remember whether he had signed the minute on that day (22 September 1997) or where he signed it, but nonetheless claimed that it was not in Hong Kong.

(r) The Appellant was also cross-examined upon the execution of various other board minutes and resolutions noted at paragraph 2(f)(i). Although he claimed to have signed these outside Hong Kong, his evidence on where and when he signed was vague (for example, he could not recall how he received the documents allegedly signed in the US and Germany, and when shown that he was in Hong Kong on the date when the 2 September meeting was purportedly signed, he stated that this was a document prepared by Company D and he actually signed it in Taiwan on 3 September 1996).

(s) The Appellant's trips to Hong Kong during the relevant period (paragraph 2(g)(xii) refers) were mainly concerned with establishing Company A's Hong Kong and Macau offices and interviewing local staff, as well as meeting with Company A's local customers in order to build up good relations. Since 1997,

he has visited Hong Kong less frequently. In cross-examination regarding his presence of 107 days in Hong Kong during the year of assessment 1995/96, the Appellant replied that: there were many regional offices of airlines in Hong Kong (that he should meet), he needed to meet with Bank N and that he had to pass through Hong Kong to go to Macau. He admitted that he went to Company A's offices but stated that most of his time did not involve this. He agreed that he stopped by to say 'hello' to Company A's staff, but did not discuss important issues with them since he had already laid down these in Taiwan. He reiterated that the key business decisions relating to the charge to customers, credit policy and freight charges by the airlines were all set down in Taiwan. He stated that if any questions arose whilst he was in Hong Kong, he would call his wife and discuss the matter with her before making any decision.

The Appellant's contentions

4. The Appellant's representative, Ms Carmen Chow of the Representatives, contended that the Commissioner was wrong in concluding that Company A was resident, managed and controlled in Hong Kong. Rather, the office of his directorship was located outside Hong Kong, where the Appellant exercised Company A's central management and control and this is the place where the directors meet to do the business of the company and where the direction, control and management of a company is exercised. All board of directors meetings were held outside Hong Kong. This is a separate and distinct matter from where Company A carried on its profit making activities and there is no issue of Company A having more than one residence. Thus, the directors' fees in dispute were sourced outside Hong Kong and not chargeable to salaries tax.

5. Ms Chow referred us to the following authorities, which we have summarized as follows:

(a) De Beers Consolidated Mines, Ltd v Howe (1906) 5 TC 198. A South African company, working diamond mines in South Africa, had a majority of its directors residing in the UK. Held that the real business of the company is carried on where the central management and control actually abides – and the directors' meetings in London was where the real control was exercised in all the important business of the company. The company was therefore resident in the UK and liable to tax on all its profits under the first case of schedule D.

(b) Koitaki Para Rubber Estates Ltd v FCT (1941) 6 ATD 82 (full court of the High Court of Australia). An Australian company owned rubber plantations in New Guinea. An officer of the company living in New Guinea managed the plantations. The company did not deny that it was resident in Australia, but it did claim that it was also resident in New Guinea. Held that there was no divided control. The head seat and dominant power of the company was in Australia.

All matters of policy and finance were determined in Australia and all the direction, control and management took place there. As a resident of Australia, the company was liable to income tax on income sourced overseas.

(c) Koitaki Para Rubber Estates Ltd v FCT (1940) 6 ATD 42. Sitting as a single judge of the High Court of Australia, Dixon J held that residence is always a matter of degree and may be constituted by a combination of a variety of factors. However, one factor to be looked for is the existence in the place claimed as residence of some part of the superior or directing authority by means of which the affairs of the company are controlled. Dixon J also held that although a company may have more than one residence, such a finding should not be made unless the control of the general affairs of the company is divided or distributed amongst two or more countries.

(d) Cesena Sulphur Company, Ltd v Nicholson (1876) 1 TC 88. An English company carried on business by manufacturing and selling in India and Italy. Directors meetings were all held in England. Held that the company was resident in England and thus liable to tax on all its profits.

(e) The Egyptian Delta Land and Investment Company, Ltd v Todd (1928) 14 TC 119. An English company removed its control and management to Egypt. Thereafter, all directors resided in Egypt and board meetings were conducted there. Held that the company was not resident in England. The organic nature of the company (place of incorporation, and compliance with the Companies Acts) did not alone render it to be resident in England. Rather, this is a factual question as to the mode and place in which a company's affairs are controlled and directed.

(f) The American Thread Company v Joyce (1912) 6 TC 1. A US company, with both American and UK directors, manufactured and sold cotton in the US. The control of the management of the affairs of the company rested with and was constantly exercised by the UK resident directors. Held that the finding on control was a matter of fact that could not be impugned. The court would not overturn the finding that the company was a resident of the UK and liable to assessment under the first case of schedule D.

(g) Calcutta Jute Mills Company, Ltd v Nicholson (1876) 1 TC 83.

(h) Denver Hotel Company, Ltd v Andrews (1895) 3 TC 356.

(i) San Paulo (Brazilian) Railway Company, Ltd v Carter (1895) 3 TC 407.

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(j) Grove v Elliots and Parkinson (1896) 3 TC 481.

(k) The Frank Jones Brewing Company, Ltd v Apthorpe (1898) 4 TC 6.

(l) St Louis Breweries, Ltd v Apthorpe (1898) 4 TC 111.

(m) United States Brewing Company, Ltd v Apthorpe (1898) 4 TC 17.

(n) Apthorpe v Peter Schoenhofen Brewing Company, Ltd (1899) 4 TC 41.

(o) The New Zealand Shipping Company, Ltd v Thew (1922) 8 TC 208.

Cases (g) to (o) all concern companies whose business affairs and key policy questions were managed and controlled and determined by a board of directors in the UK, even though the companies' profit making activities were located outside the UK. Held in each case that the company was resident in the UK and liable to assessment under the first case of schedule D.

(p) McMillan v Guest (1942) 24 TC 190. A director of an English company, with its seat of government in England, resided outside England and did not take part in the management of the company. Held that the director held a 'public office' within the UK and was thus assessable to income tax under schedule E.

(q) Goodwin v Brewster (1951) 32 TC 80. A case concerning a managing director of a company, resident and controlled in the UK. The managing director resided in Trinidad, supervising the business of the company there. Held that, although the offices of director and managing director were separate, the taxpayer still held an office in the UK, which was where the head seat and directing power of the company were.

(r) Swedish Central Railway Company, Ltd v Thompson (1925) 9 TC 342. Held that a company may be resident in more than one place. In other words, the central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; if so, it may have more than one residence.

(s) Departmental Interpretation and Practice Notes No 32 (June 1998). Paragraph 65 states that a company is resident in Hong Kong if its central management and control is in Hong Kong. Paragraph 70 elaborates that the place of incorporation or registration is not conclusive of where central management and control is exercised.

(t) Departmental Interpretation and Practice Notes No 10 (December 1987). Paragraph 15 states that where a company's management and control is exercised in Hong Kong, then the source of a directors' fee is Hong Kong, irrespective of where the person resides.

The Commissioner's contentions

6. In addition to relying upon several of the authorities cited by the Appellant, the Commissioner's representative, Ms Ngan Man-kuen, referred us to the following additional authorities:

(a) BR15/71, IRBRD, vol 1, 72. A managing director of a Hong Kong company spent the majority of his time in Hong Kong managing the company's business. Held, following McMillan v Guest, that the office of a company director is located where the company was located. As the company was located in Hong Kong, the director's emoluments were liable to salaries tax.

(b) F & K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139. A private international law case on the situs of a simple contract debt. Held, for the purpose of determining the situs, which in this case depended upon where the debt was properly recoverable, a company may be resident in more than one place including the place where it has a fixed place of business.

(c) CIR v Goepfert (1987) 2 HKTC 210. The only superior court decision in Hong Kong dealing with the location of employment for the purposes of the general charging provision to salaries tax, section 8(1)(a). Held that a totality of facts test determined this question, except that the place where the employee rendered services was irrelevant.

7. Ms Ngan contended that we should uphold the Commissioner's determination that the directors' fees in dispute were sourced in Hong Kong, and thus subject to salaries tax, because Company A was resident, managed and controlled in Hong Kong.

Analysis

8. One matter that appears to have been overlooked by both sides is that source of income is always a hard, practical matter of fact. In Goepfert's case, cited above, Macdougall J at page 237 stated that:

> '*in deciding the crucial issue [of source of employment income], the Commissioner may need to look further than the external or superficial features of the employment. Appearances may be deceptive. He may need to*

examine other factors that point to the real locus of the source of the income, ...'

9. We appreciate that Goepfert's case was decided in the context of determining the source of employment income and not, as in the current appeal, income from an office. However, in our view, the approach commended by Macdougall J is equally applicable to determining the source of income from an office. The judgment reminds us forcefully that source of income is always fact dependent and should not be determined simply by formulae, such as by sole reference to the place the board of directors meets in cases involving the location of the office of a company director. We will return to this matter later in our decision.

10. Both parties agree that we must determine the location of the Appellant's office as director of Company A in deciding this appeal. This approach is entirely consistent with that adopted by Macdougall J in Goepfert's case, and we agree with it. Of all the cases cited to us, the one having greatest relevance is McMillan v Guest (1942) 24 TC 190, since this was a House of Lords decision dealing specifically with the location of the office of a company director for the purpose of liability to assessment under schedule E of the Income Tax Act 1918 (the UK equivalent of Hong Kong's salaries tax), rather than determining whether a company was resident in the UK for the purpose of liability to assessment under the first case of schedule D (the UK equivalent to Hong Kong's profits tax).

11. In McMillan v Guest, Lord Atkin held at page 202:

'The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. It is in fact part of the organic structure of the corporation. ... I consider it to be clear that the director of an English company which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds an office in the United Kingdom.'

12. At pages 203 to 204 Lord Wright stated:

'The office of a director is something notional; its locality is one degree, if that is possible, even more notional. In my opinion, the place where it is exercised, if it is exercised anywhere at all, is not necessarily the test. ... I agree with the Master of the Rolls that it is in the office of director that the crucial test is to be found, because "every right which a director has and every duty which under the law, general or special, imposes on the director is to be exercised in this country and nowhere else."'

13. Lord Porter, who delivered the final judgment, decided at pages 205 to 206:

> '*For the present purpose it is enough to say that a person in the position of the Appellant holds an office in this Kingdom despite the fact that he has not in fact attended any meetings in this country since 1931. He is a director of a company resident and managed in this country, entitled to attend any board meetings which may be held here, giving advice as to matters concerning its management, and supplied at least with its formal literature. In such a case it is, I think, immaterial that most, if not all, of [the appellant's] activities are carried out in America; he still holds an office in the United Kingdom.'*

14. We note also that in Goodwin v Brewster (1951) 32 TC 80 (Court of Appeal), Jenkins LJ held at page 95 that:

> '*[McMillan v Guest] clearly shows that the office of a director – the ordinary office of a director – of a company incorporated here and resident here is an office in the United Kingdom within the meaning of Schedule E. It shows, further, that the place of exercise of the office is not a decisive consideration in such a case.'*

15. Ms Chow sought to explain McMillan v Guest on the ground that there was no dispute in that case that the company was centrally managed and controlled, and thus resident in the United Kingdom. By way of contrast, since the head seat and directing power of Company A were outside Hong Kong as evidenced by the board meetings outside Hong Kong, she argued that McMillan v Guest and Goodwin v Brewster supported the Appellant's claim that the source of his directors' fees was outside Hong Kong.

16. As Ms Chow acknowledges, a company may have more than one residence for the purpose of establishing liability to income tax (Swedish Central Railway Company, Ltd v Thompson (1925) 9 TC 342). In this regard, however, she drew our attention to Koitaki Para Rubber Estates Ltd v FCT (1940) 6 ATD 42 where Dixon J at pages 45 and 48, referring to the Swedish Central Railway case, stated:

> '*The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled.*

> *... [Citing many of the cases on company residence relied upon by Ms Chow, Dixon J continued] From these passages it would seem to be proper to conclude that residence of a company depends upon the existence within the country for which it is claimed of some part at least of the superior administration or control of the company's general affairs.'*

17. It is common ground between the parties that, in accordance with McMillan v Guest, we must determine the location of the Appellant's office and, in this regard, it is necessary to find that Company A is resident in Hong Kong in order to conclude that the Appellant's office is located in Hong Kong. Ms Chow urges us to determine residence solely by reference to central management and control (as evidenced by the fact that all of Company A's board meetings were convened outside Hong Kong), whereas Ms Ngan for the Commissioner submits that residence can be constituted by a combination of factors, including 'a scrutiny of the course of business and trading' (De Beers Consolidated Mines, Ltd v Howe (1906) 5 TC 198, 213), and even though central management and control of Company A may be outside Hong Kong (Swedish Central Railway case). Although we do not reject Ms Ngan's arguments in their entirety, we note that certain of her submissions were framed very widely indeed, and if Jabbour's case applied in this matter, a local source could arguably be attributed to directors' fees received from any company having a fixed place of business in Hong Kong. This cannot be correct and we reject the suggestion emphatically. We also reject the argument that central management and control, or some part thereof, need not be present in Hong Kong for the Appellant's office to be located in Hong Kong.

18. At this juncture, it is appropriate to return to the Appellant's evidence and record our findings thereon. In her submissions, Ms Chow asked us to find that:

(a) The Appellant and his wife, Madam B, beneficially owned Company A. They were the only two directors of Company A during the relevant time. We so find.

(b) The Appellant and Madam B were at all relevant times resident in Taiwan. We so find.

(c) The Appellant and Madam B formed the highest directing authority of Company A and exercised such authority substantially outside Hong Kong. We refuse to make this finding in these terms.

(i) First, we reject the oral evidence of the Appellant that he consulted his wife on all financial and other important matters. In all the documentation presented to us, her name never appeared except on formal documents necessary for purposes of the Companies Ordinance ('CO'). On the evidence before us, she signed no correspondence (except the self-serving letter sent to the assessor at paragraph 2(f)(ii)), and there is nothing to suggest that she communicated with the airliners, Company A's customers

or Company A's staff in any way. We find that the real controlling and directing mind of Company A was the Appellant – and the Appellant alone.

(ii) Second, we find that little, if any, real business was conducted at the directors' meetings described at paragraph 2(f)(i) (apart from complying with various requirements of the CO), with the exception of setting the level of directors' fees. In our view, the Appellant was made well aware that for tax purposes he should not hold directors' meetings in Hong Kong. And his evidence indicated that he obviously did everything possible to avoid this, to the point where board minutes were prepared and signed for a meeting in Macau that did not take place. An additional problem, which can be seen with the benefit of hindsight, was that the directors decided virtually nothing of real substance at these meetings. They were certainly not the medium through which central management and control of Company A was exercised. The explanations given by the Appellant of the circumstances relating to where the meetings were held and where the minutes were signed did not enhance his credibility in any degree.

(iii) Third, on the question as to where the Appellant exercised his directing authority, we find that he exercised it both in Taiwan (to a major degree), and also in Hong Kong (to a lesser degree). We reject as incredulous his claims that during his lengthy period of stay in Hong Kong his dealings with Company A's office staff amounted to him dropping in to say 'hello' without discussing any important business matters. What then did he do during his 190 days in Hong Kong? We find that he would have done exactly what he would have done outside Hong Kong, namely manage and control the business of Company A. Given the Appellant's evidence on matters such as (1) the fact that determination of freight rates was not a simple, straightforward exercise, (2) the fact that all of Company A's customers were Hong Kong-based freight forwarders, and (3) the fact that he was involved in leasing the office premises, recruiting staff and opening bank accounts for Company A in Hong Kong, we cannot see how key business decisions (or as Ms Chow put it 'the strategic or fundamental questions of policy relating to the direction of the business') stopped at the border every time the Appellant arrived in Hong Kong and were somehow quarantined in Taiwan and overseas. In this regard, we note also that the Appellant's trips to Hong Kong were not invariably short-term: on 14 occasions he stayed in Hong Kong for between five to ten days at a time (see bundle R1, pages 1 to 2).

(iv) We should state generally that when giving evidence-in-chief we found the Appellant to be an impressive and capable witness. However, in cross-examination on various matters (such as those referred at paragraph 3(q) to (s) above in the 'Oral evidence of the Appellant'), he was measurably less impressive. For instance, his explanations as to what he did in Hong Kong, where the board meetings were held and why none of the board minutes were signed in Hong Kong (given his travel schedule) appeared forced and bordered on the evasive.

(d) Company A's staff in Hong Kong looked after Company A's day-to-day business only. They had no role in exercising any directing authority. We agree there is no direct evidence before us to rebut this statement, but note that the Hong Kong staff obviously executed the Appellant's commands in carrying out their duties to the company and, in particular, Mr E (having the designation of 'Managing Director') may well have represented the Appellant's mind and will in Hong Kong, given that he reported to the Appellant on a regular basis. In this regard, we note Meridian Global Funds Management v Securities Commission [1995] 2 AC 500 (Privy Council). This case concerned the issue of attribution of an officer of a company's knowledge to the company itself and, in that sense, is not directly relevant to the issue before us. However, in the course of examining the attribution rule, Lord Hoffmann at page 509 discussed the 'anthropomorphism' used by Viscount Haldane in Lennard's Carrying v Asiatic Petroleum [1915] AC 705 (and commented on by Denning LJ in Bolton v Graham [1957] 1 QB 159). Denning LJ said:

'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

The relevance of this metaphor in our case is that, on the facts, we find that Company A's controlling mind and will is found in the person of the Appellant. He was not merely the hands but the brain and nerve centre of the company. It should follow that, to the extent that it is conceded that Company A is carrying on business in Hong Kong, there cannot be any doubt that the Appellant's control and direction is effected at least in part in Hong Kong when he was present here for appreciable periods of time.

(e) The management and control of Company A, which included performing financial and treasury functions, monitoring the funds of Company A, formulating and deciding important business and policy, controlling sale performance all took place in Taiwan. We refuse to make this finding.

As stated above, we find that the Appellant exercised his directing authority both in Taiwan and Hong Kong (albeit to a lesser, but certainly not de minimis, degree). We thus find that, during the relevant years of assessment, some part of the superior administration or control of Company A's general affairs took place in Hong Kong. Company A can therefore be resident in Hong Kong, regardless of whether it was also resident in Taiwan (see Swedish Central Railway case; Koitaki Para Rubber Estates Ltd v FCT (1940) 6 ATD 42, per Dixon J). To paraphrase Dixon J in the Koitaki case at page 47: it is evident that control and management was concentrated in the hands of the Appellant whose operations during the relevant time were not confined within the political boundaries of one jurisdiction.

19. Given our finding that some part of the superior and directing authority of Company A was present in Hong Kong, we return to Goepfert's case quoted above. As previously stated, Goepfert's case indicates that source of income for salaries tax purposes is fact dependent and should generally be determined by adopting a broad totality of facts approach. This approach highlights a lingering difficulty we perceived with Ms Chow's very detailed and well-argued submission. Specifically, we were not convinced that the source of income from the office of a company director should only and solely be determined by reference to where the company is centrally managed and controlled. To modify the words of Macdougall J in Goepfert's case, quoted above: appearances may be deceptive; at the very least, when some part of the superior and directing authority is found in Hong Kong, surely the Commissioner is entitled to examine other factors that point to where the company is resident (apart from simply weighing the Hong Kong part against the whole) to determine the real locus of the source of income from the office in question.

20. Ms Ngan argued that, even assuming central management and control of Company A was exercised outside Hong Kong, it still resided in Hong Kong. She referred to the following facts to support this contention:

(a) Company A was incorporated in Hong Kong.

(b) Company A had its registered office in Hong Kong.

(c) Company A carried on its business of air cargo agency in Hong Kong. Its customers were all local cargo forwarders carrying on their businesses in Hong Kong.

(d) Company A carried on business at a fixed place of business in Hong Kong.

(e) Company A recruited and employed its staff in Hong Kong.

(f) Company A maintained a bank account in Hong Kong from which it paid the Appellant's emoluments, it deposited its trade receipts and settled its business expenses.

(g) Company A was required by law to keep its register of members, directors and secretary in its registered office in Hong Kong.

(h) Company A's accounts were audited in Hong Kong.

(i) Company A's directors had to comply with the CO of Hong Kong.

21. These facts remind us of the decision of the House of Lords in the Swedish Central Railway case, where at page 373 Cave, LC stated that: '*The central management and control of a company may be divided, and it may "keep house and do business" in more than one place; and if so, it may have more than one residence.*' On the facts of that case, very little was needed to be performed in the UK to justify the conclusion that the company was also resident there (as well as in Sweden).

22. By way of contrast, the facts highlighted in this appeal by Ms Ngan are much stronger than those of the Swedish Central Railway case to support a conclusion that Company A was resident in Hong Kong, notwithstanding that by virtue of its central management and control Company A may also be resident in Taiwan. Accordingly, we find that not only was part of Company A's superior and controlling authority present in Hong Kong, it also kept house (at the very least it performed some of the vital organic operations incidental to its existence as a company in Hong Kong) and had substantial business operations in Hong Kong. On this basis, applying the Swedish Central Railway case, as explained by Dixon J in Koitaki Para Rubber Estates, we conclude that Company A was resident in Hong Kong and, in accordance with McMillan v Guest, that the Appellant's office of director of Company A was located in Hong Kong.

Conclusion

23. Our analysis and findings of fact show that we have proceeded in the following way. In accordance with McMillan v Guest, we determined the location of the Appellant's office by reference to where Company A was resident. This, in turn, initially depended upon where the company was centrally managed and controlled. (We note that this analysis essentially accords with the Departmental Interpretation and Practice Notes referred to above.) We have found that the Appellant was the sole embodiment of such central management and control and that he

exercised this partly in Hong Kong. We then proceeded to consider the totality of facts and concluded that Company A conducted substantial business operations and kept house in Hong Kong. On the facts found, we therefore conclude that Company A was resident in Hong Kong. This is sufficient for us to decide that the Appellant was liable to salaries tax on his directors' fees and to dismiss this appeal. Unlike the case of income from employment, no statutory provision for apportioning the fees is contained in the Inland Revenue Ordinance.

24. It is left for us to thank both Ms Chow and Ms Ngan for their very helpful and comprehensive arguments and submissions before us.