INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D128/00

Salaries tax – taxpayer providing services outside Hong Kong – working for Hong Kong company with subsidiary in China – whether salary derived from a source in Hong Kong – whether exempt from salaries tax – sections 8(1), 8(1A)(b) and 8(1B) of the Inland Revenue Ordinance (' IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Dennis Law Shiu Ming and Ronald Tong Wui Tung.

Date of hearing: 3 November 2000.
Date of decision: 26 February 2001.

Between April and August 1994 (' the relevant period') the taxpayer was sent to Company B China. Company A Hong Kong is the holding company of Company B China. For the relevant period the taxpayer paid income tax to the fiscal authority in China. The taxpayer claimed that he was exempt from payment of Hong Kong salaries tax for this period since all the services he provided in this job were rendered in China. He also stated that the fact that he had not commenced his employment in China at the start of the relevant period was on account of the fact that Company A Hong Kong was unable to reserve an airline seat for him for at least three consecutive days.

Held:

1. Where the services were rendered was not a relevant factor. The Board had to determine whether there was ' any income arising in or derived from Hong Kong from any office or employment of profits as to bring the taxpayer within the ambit of section 8(1) of the IRO' : CIR v Goepfert 2 HKTC 210 considered;

2. Regard must first be had to the contract of employment although the source of income and employment were also factors to take into account, even the taxpayer conceded that he did come to Hong Kong for, inter alia, company briefings;

3. On balance, it was more probable that the taxpayer was working in Hong Kong in connection with his new assignment. Hence, there was no hesitation to conclude, under section 8(1A)(b) that the taxpayer did not render outside Hong Kong all the services in connection with his employment in Company A Hong Kong;

4. Further, the taxpayer was unable to rely on section 8(1B) since he had been in Hong Kong for 74 days: D29/89, IRBRD, vol 4, 340 and D12/94, IRBRD, vol 9, 131 applied.

Appeal dismissed.

Cases referred to:

CIR v Georfert 2 HKTC 210
D29/89, IRBRD, vol 4, 340
D12/94, IRBRD, vol 9, 131

Chu Wong Lai Fun for the Commissioner of Inland Revenue.
Shum Sui On Samson of Messrs T K Lam (C P A) Co Limited for the taxpayer.

Decision:

1. Company A Hong Kong is a company incorporated in Hong Kong. It is the holding company of Company A China, a company incorporated in City B in China.

2. By letter dated 7 March 1994 [' the March Letter'] written on note paper with the letter-head of Company A Hong Kong, Mr C wrote to the Taxpayer in the following terms:

> ' Thank you for visiting me in my office last week at such short notice.
>
> As I indicated the assignment will be based in City B and I have arranged a flight to City B on the 14 March 1994.
>
> You had indicated that you will spend 95% of your time on our assignment as you have other matters to attend to ...
>
> Your remuneration for this assignment will be $70,000 per month plus appropriate accommodation in City B.
>
> I have arranged a meeting in our office on Friday 11 March 1994 at 3:00 pm to discuss the action to be taken in City B. I do hope that you are able to attend. Could you also discuss with me on Friday the method of payment for your service ...'

3. The Taxpayer was present in Hong Kong for the following number of days:

Period	By counting the day of arrival and the day of departure as two days	By counting either the day of arrival or the day of departure
1-4-1994 – 31-8-1994	74 days	61 days
1-4-1994 – 31-3-1995	273 days	256 days

4. The Taxpayer spent the following full days in Hong Kong during the period between 1 April 1994 and 31 August 1994:

Date	Day of the week
6-4-1994	Wednesday
7-4-1994	Thursday
8-4-1994	Friday
11-4-1994	Monday
2-5-1994	Monday
13-5-1994	Friday
16-5-1994	Monday
30-5-1994	Monday
10-6-1994	Monday
15-6-1996	Wednesday
27-6-1994	Monday
11-7-1994	Monday
15-7-1994	Friday
25-7-1994	Monday
8-8-1994	Monday
15-8-1994	Monday
22-8-1994	Monday

5. During the five months between 1 April 1994 and 31 August 1994, the Taxpayer paid tax to the fiscal authority in China on income amounting in total to RMB103,888. This is equivalent to HK$92,840 at the then prevailing exchange rates. The Taxpayer asserted that ' Salaries tax was paid to the Chinese government for the five months I worked in City B. In line with the "accepted"

practice at that time, the amount of salary declared to the Chinese government was less than the actual salary paid by my Chinese employers, for obvious reasons ...'

6. By another letter dated 17 August 1994 [' the August Letter'] written again on note paper with the letter-head of Company A Hong Kong, Mr C as ' managing director' wrote to the Taxpayer as follows:

> ' I refer to our recent discussion and am pleased to confirm our offer to you to become Finance Director of Company A Hong Kong and each of its subsidiary companies effective 1 September 1994 ...
>
> ... You will report to myself as Managing Director.
>
> ... Your annual remuneration will be $1,080,000 per annum payable in 12 monthly instalments in arrears ...
>
> ... By signing this letter you confirm that you are eligible to take up employment in Hong Kong ...'

7. By letter dated 5 May 1995, Company A Hong Kong sent to the Revenue their return as employer of the Taxpayer for the year ended 31 March 1995. According to that return, the Taxpayer was employed as ' Finance Director' and his salary for the period between 1 April 1994 and 31 March 1995 was $930,452. Company A Hong Kong further informed the Revenue that ' During 1 April 94 to 30 August 94, [the Taxpayer] was the General Manager in our subsidiary, based in City B. He performed his duties outside of Hong Kong and his emoluments during this period is $225,000. On 1 September 94 until now, [the Taxpayer] is the Group Finance Director of this company and performing his duties in Hong Kong.'

8. By his return dated 25 June 1995, the Taxpayer reported to the Revenue his salary from Company A Hong Kong at $705,452. He did not include in this return the sum of $225,000 which was his salary for the period between April and August 1994.

9. The Taxpayer left the employment of Company A Hong Kong on 26 August 1995. According to a computation dated 10 August 1995, the Taxpayer was first employed by that company on 1 March 1994 and the duration of his service was one year and 179 days. He received a payment in lieu of leave amounting to $79,890.41 which included 10.08 days of annual leave accrued during the period from 1 March 1994 to 31 August 1994.

10. By letter dated 6 November 1997, Company A Hong Kong informed the Revenue that:

(a) ' The position held by [the Taxpayer] during March 1994 to August 1994 was consultant and acting General Manager of our City B operation. He was to be based in City B ...' .

(b) ' The salary paid in Hong Kong for [the Taxpayer] was as follow:

April 1994	$25,000
May 1994 to August 1994	$50,000 each month
Total	$225,000.'

(c) ' [The Taxpayer] received $70,000 from April 1994 to August 1994 with $50,000 paid in Hong Kong and $20,000 paid in City B.'

11. Company A Hong Kong furnished the Revenue additional information by letter dated 28 February 2000. This letter was signed by Mr D. Mr D assumed the position of Group Managing Director as from 1 December 1994. Mr E informed the Revenue that:

(a) The name of the company in City B with Company A China.

(b) ' ... [the Taxpayer] returned to Hong Kong every weekend that includes Saturday and Sunday. He had periodic meetings with my Predecessor, Mr C and the Group Financial Director, Mr E. Meeting topic would be to discuss the City B operation and to give an update on the situation.'

12. By letter dated 29 February 2000, the Taxpayer made the following representations to the Revenue:

(a) ' from 14 March 1994 to 31 August 1994 – I was employed by Company A China ... The immediate holding company of Company A China is Company A Hong Kong ...'

(b) ' the Managing Director of Company A Hong Kong was also the Managing Director of Company A China at the same time.'

(c) ' the choice of a letterhead is of little significance to the employment.'

(d) ' I rendered all my services during March 1994 to August 1994 in City B.'

(e) ' I was not required to report to Company A Hong Kong.'

(f) ' ... I was in Company A' s Hong Kong office for not more than six (6) hours totally ... the major part of this six hours was for a personal interview with the Chairman of Company F, the ultimate holding company ... that meeting resulted my employment as the group Financial Director of Company A Hong Kong ...'

(g) ' The "briefings" that I had with the Managing Director when I went to Company A Hong Kong to pick up my airplane tickets, can best be considered as casual, non-periodical, and bears little significance to my overall services rendered in China.'

(h) ' ... for those weekdays that I was in Hong Kong was : (a) waiting for the airplane tickets, and/or available plane seat back to City B, and (b) I was on holidays.'

13. The issue before us is whether the Taxpayer is assessable to salaries tax in respect of his income earned during the period between April and August 1994.

Sworn testimony of the Taxpayer

14. He was first interviewed by Mr E in September 1993. No engagement resulted from that interview.

15. Six months later he was asked to see Mr C. Mr C told him that the General Manager in City B was leaving the group and a replacement had to be found immediately. Mr C wrote him the March Letter after the interview. It was not a contract of employment. He did not counter-sign it. There was no concluded agreement in relation to the method of payment.

16. He went to City B to assess the situation. His contract of employment was concluded on 14 March 1994 in a hotel in City B. Mr C was the Managing Director not only of Company A Hong Kong but also of Company A China. He was not aware of such status on the part of Mr C when his employment was discussed but he became aware of it when his employment was finalised.

17. He was stuck in Hong Kong in early April 1994 as there was no available seat in flights back to City B.

18. Whilst working in City B, he made application to become the legal representative of Company A China. In order to confirm this position, he paid tax in China.

19. He was asked by Mr C not to take any holiday in City B but to do so in Hong Kong. He agreed to this proposal as his pay in Hong Kong was better than his pay in City B.

20. Mr D came to Hong Kong from Country G. He knew little about separate corporate personality and the difference between Company A Hong Kong and Company A China.

21. He had to return to the office of Company A Hong Kong in order to obtain his air tickets. He did meet Mr C and Mr E and had casual conversations with them on those occasions but these were not formal meetings nor formal reporting.

22. He disagreed with the Revenue' s computation as to the number of days that he spent in Hong Kong between April and August 1994. He contended that the days of arrival and the days of departure should not be counted as two days. The Revenue had double-counted 23 August 1994 in arriving at their figure of 61 days.

The relevant provisions in the IRO (Chapter 112)

23. Section 8(1) of the IRO 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.'*

24. Section 8(1A) of the IRO provides:

> '*(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment –*
>
> *(a) ...*
>
> *(b) excludes income derived from service 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.'*

25. Section 8(1B) of the IRO provides:

> ' *(1B) 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.'*

Our decision

26. Was there any income arising in or derived from Hong Kong from any office or employment of profit as to bring the Taxpayer within the ambit of section 8(1) of the IRO? In CIR v Goepfert 2 HKTC 210, MacDougall J pointed out at pages 236 and 237 that:

> ' *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.*
>
> *That being so, what is the correct approach to the enquiry? ...*
>
> *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 Wilfred Greene said, regard must first be had to the contract of employment.'*

27. The Taxpayer asserted before us that his employment with Company A China was concluded in City B on 14 March 1994. There was little trace of this contention in the extensive correspondence between the Taxpayer and the Revenue prior to the hearing before us. We attach no weight to this assertion. The Taxpayer knew fully well the obstacles presented to his case by the March Letter. He said it was merely an invitiation for employment. He did not signify acceptance of its terms. Furthermore there was no concluded agreement on the method of payment. We reject these arguments. The test of an agreement is an objective one. The March Letter evidences a subsisting agreement. It referred to a meeting between the Taxpayer and Mr C ' last week' . Mr C pointed out that ' the assignment will be based in City B' . The Taxpayer' s remuneration for

' this assignment' was then set out. The relevant principles are to be found in paragraph 2-026 of ' Chitty on Contracts' :

> ' ***Negotiation after apparent agreement***. *Businessmen do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may sometimes continue to negotiate after they appear to have agreed to the same terms. The court will then look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement. If it did, the fact that the parties continued negotiations after this point does not affect the existence of the contract between them, unless the continued correspondence can be construed as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that after its conclusion, one party sends to the other a document containing terms significantly different from those which had been orally agreed.'*

We take the view that the March Letter sets out the terms of a concluded agreement. The subsistence of such agreement was not made dependent upon agreement on the method of payment. The agreement was between the Taxpayer and Company A Hong Kong. The letter-head in the March Letter and the complete absence of any reference to Company A China point to no other conclusion.

28. We have no hesitation to conclude that the Taxpayer did not render outside Hong Kong all the services in connection with his employment with Company A Hong Kong. We find it hard to accept his explanation for his stays in Hong Kong between 6 and 11 April 1994. We find it incredible that Company A Hong Kong took no prior step to secure seat for the Taxpayer on board flights to City B given his responsibility for the operations in City B. We are not persuaded that there was difficulty in securing a seat for three consecutive days. We find it more probable that the Taxpayer was working in Hong Kong in connection with his new assignment. In any event, the Taxpayer conceded that he had briefings in Hong Kong although the same were not done on a formal basis.

29. The Taxpayer invited us to consider the duration of his stay in Hong Kong between April and August 1994. Assuming but without deciding that the Taxpayer approach is a permissible one to adopt, we agree with the Revenue that the proper basis for computation is set out in various Board of Review Decisions (for example, D29/89, IRBRD, vol 4, 340 and D12/94, IRBRD, vol 9, 131). The Revenue' s computation is in line with those decisions and the Taxpayer stayed in Hong Kong for a total of 74 days. That is outside the exemption as provided by section 8(1B) of the IRO.

30. The Revenue has given due allowance for the tax paid by the Taxpayer to the fiscal authority in China and no further issue turns on the exemption under section 8(1A)(c) of the IRO.

31. For these reasons, we dismiss the Taxpayer' s appeal and confirm the assessment.